

Guarantees unenforceable as deeds due to improper execution may take effect as simple contracts (Signature Living Hotel Ltd v Sulyok)

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Banking & Finance analysis: Guarantees executed, but unenforceable, as deeds may take effect as simple contracts where supported by sufficient consideration. Written by Ben Archer, barrister, at 4 New Square Chambers.

Signature Living Hotel Ltd v Sulyok & Another [\[2020\] EWHC 257 \(Ch\)](#)

What are the practical implications of this case?

This is a case providing useful analysis of a general point of principle as to the execution of deeds and it should accordingly be of interest to all civil practitioners. For those advising on or assisting in the execution of deeds of guarantee, it serves as a specific reminder that care must be taken to ensure proper compliance with basic requirements as to formality. Where a company is to be a party, practitioners should be sure to refamiliarise themselves with the provisions of [Part 4](#) of the Companies Act 2006 ([CA 2006](#)) and in particular the strictures of [CA 2006, ss 43](#) and [44](#).

But *Sulyok* is also a tale of redemption. In event of failure, all may not be lost. HHJ Hodge QC (sitting as a judge of the High Court) held that there is no reason in principle why, in such circumstances, a deed 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.

It is submitted that while this was a case concerning deeds of guarantee, there is no principled reason as to why the ratio could not be applied to other types of transaction effected by deed, save of course where strict adherence to the relevant formalities is required by statute, or perhaps where it is clear from the document that the manifest intention of the parties was that it was to be enforceable as a deed or not enforceable at all. Undoubtedly each case will turn on its own facts.

What was the background?

Loans had been given by the respondents to a company within the applicant's group. The applicant itself had entered into deeds of guarantee with each of the respondents in support of those loan agreements. The deeds of guarantee had not been witnessed. They were in writing and had been signed by the applicant company's sole director.

The loans were not repaid. Statutory demands were issued against the applicant in reliance upon the loan agreements and guarantees. The applicant sought to challenge the enforceability of the deeds of guarantee and, in doing so, to enjoin the respondents from presenting it with a winding-up petition.

It was argued by the applicant that as the guarantees had not been witnessed, that was in and of itself sufficient to render them unenforceable. Beyond that, it was said that in any event [CA 2006, s 44\(2\)](#) required, where there was only one director of a company, for any valid execution of a deed on behalf of it to be witnessed. It had not been. While it was accepted that [CA 2006, s 43\(1\)\(b\)](#) enabled a simple contract to be made on behalf of a company 'by a person acting under its authority, express or implied', that section had no application. The parties did not enter into any contract at all for the purposes of [CA 2006, s 43](#). The parties had entered into deeds and the deeds were defective. That was the end of the matter. The defective deeds, it was argued, could not survive as a simple contracts.

The respondents contended that if an otherwise complete contract of guarantee was intended to be embodied in a deed but the formalities had not been complied with, it could nevertheless be enforceable as a simple contract so long as it was supported by consideration. On the facts of this particular case, it was asserted that there was sufficient consideration as the giving of the guarantees had been tied up with a series of other interlinked transactions including the loans. Although it was accepted that [CA 2006, s 44\(2\)](#) had not been complied with, [CA 2006, s 43\(1\)\(b\)](#) would have application. The contracts had been made on behalf of the applicant company by its director, within

the scope of their express or implied authority. Accordingly, it was argued, the guarantees were enforceable as simple contracts.

The essential question for the court was therefore whether defective deeds of guarantee could, as a matter of principle, take effect as simple contracts where supported by sufficient consideration, notwithstanding that they had been embodied in deeds and purported to be deeds on their face.

What did the court decide?

Perhaps surprisingly, the issue had hitherto been more or less untraversed in the authorities. The parties had through their researches each found one authority canvassing the point.

The applicant relied heavily upon the decision of Underhill J in *R (on the application of Mercury Tax Group) & another v HMRC* [2008] EWHC 2721 (Admin). In that case, at para [40], the learned judge said:

[Counsel] observed that, although these documents were expressed to be deeds, it was not necessary that they should be. I am not sure that that is correct, at least in the case of the Option Agreement, for which no consideration is given; but, *even if it were, the fact remains that the parties intended them to be deeds and their validity must be judged on that basis.*'

(emphasis added)

The respondents relied upon *Lloyds TSB Bank plc v The Dye House Limited* [2005] EWHC 1998 (Comm), a decision of Mr Simon Brown QC (sitting as a Deputy High Court Judge). In that case, the judge had found the existence of a simple contract (at para [4]) in circumstances where a deed of guarantee had not complied with the relevant formalities.

Counsel for the applicant asserted that the decision of Mr Brown was an older authority, and that the decision of Underhill J represented a 'sea change' in the law (at para [27]). But HHJ Hodge QC was not taken by that submission, pithily observing that '[t]he single paragraph observation of Underhill J in the Mercury Tax Group case is no more impressive than Mr Brown's judgment' (at para [30]).

The central plank of the applicant's case was hinged upon one sentence of a judgment. The case was not one involving a guarantee, but a judicial review challenge to the validity of search warrants. No authority appeared to have been cited to Underhill J on the point, let alone the earlier decision in *The Dye House*. On the other hand, the authority relied upon by the respondents extended to only five paragraphs. The point had not been properly argued. The defendants did not even appear before the court. No authority had been cited in the judgment.

Nonetheless, the court held that *The Dye House* must be correct in principle. HHJ Hodge QC gave short shrift to the position advanced by the applicant, holding that the true legal position was in fact that set out by the editors of *Andrews and Millett: The Law of Guarantees* (7th edition, 2015) in the penultimate paragraph of 2-021. In short, it was held that as a matter of principle 'if an otherwise complete contract of guarantee is intended to be embodied in a deed but the formalities have not been complied with, the creditor can still enforce the agreement.' (at para [29]).

While from the judgment there appears to have been little argument on the point, the judge accepted the submissions of the respondents that, on the specific facts of the case before the court, there had been sufficient consideration for the guarantees.

The guarantees were accordingly enforceable, and the applications for injunctions as against the respondents were dismissed.

Case details

- Court: High Court, Business and Property Courts (Insolvency and Companies List)
- Judge: HHJ Hodge QC
- Date of judgment: 9 January 2020

Ben Archer is a barrister at 4 New Square Chambers. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysis@lexisnexis.co.uk.

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