

Court of Appeal Considers Composite Guarantee

In *Harvey v. Dunbar Assets Plc* [2013] EWCA Civ 952, the Court of Appeal considered the situation in which only three of four intended guarantors had signed the guarantee. The appeal arose out of the service of statutory demands by the respondent and the application by Mr Harvey to set aside the demand served on him.

Mr Harvey's application to set aside the statutory demand was initially based on promissory estoppel and was dismissed. However, he was given permission to appeal on the basis that one of the other purported guarantors, Mr Lenney, had successfully applied to set aside the statutory demand served on him on the basis that Mr Lenney alleged that his purported signature was a forgery.

The issue before the Court of Appeal was whether failure by an intended guarantor to execute a joint and several guarantee would lead to the result that none of the intended guarantors was liable under it.

Gloster LJ considered that the question was one of construction. There was a distinction between a guarantee that on its true construction was required to be signed by more than one guarantor and a guarantee that was not required to be so signed, notwithstanding any expectation that more than one person might agree to be bound by it.

The starting point of the process was the form of the document itself. It contained four spaces for signatures and the term "the Guarantor" was defined so as to mean all four of the intended guarantors. Gloster LJ found that it was clear from those two elements that the guarantee was required to be signed by all four rather than merely available to be signed by all four.

The next stage was to examine the rest of the document in the light of the admissible evidence. The question was whether there was any term that meant that the absence of one signature would nevertheless not be fatal to the guarantee in relation to the other signatories. Clause 4 of the guarantee provided for invalidity and indulgence. It provided that the obligations of "the Guarantor herein contained" and the rights of the respondent "conferred...by...this Deed" would not be "discharged impaired or otherwise affected by":

"any obligations of the Guarantor or the Principal Debtor to the Bank being or becoming illegal invalid or unenforceable in any respect or any incapacity or lack of power authority or legal personality of or dissolution or change in the status of the Principal Debtor or any other person".

The interpretation that Gloster LJ applied focussed on the preservation elements of the clause rather than the events elements. She emphasised the phrase "herein contained" as demonstrating that it contemplated obligations imposed by the guarantee itself. Similarly, "conferred...by...this Deed" pointed to rights actually arising rather than rights purportedly granted. Lastly, "discharged impaired or otherwise affected" appeared to be premised on rights and obligations that had actually been created.

Accordingly, the conclusion was that there was no clause in the guarantee that displaced the prima facie position that the guarantee required the signatures of all four intended guarantors in order to be enforceable against any of them. The appeal was therefore dismissed.

The decision was clearly a close one. The case emphasises the importance of precision and attention to detail both in drafting guarantees and in attempting to enforce them. In this case, the subjective intention of the parties – or at any rate the respondent – may well have been that any signatory to the guarantee would be bound notwithstanding any failure to sign on the part of any other signatory.

However, that was not the objective intention expressed by the drafting. Creditors under guarantees must be careful to ensure that the drafting properly reflects their commercial intentions. This case provides an illustration of what may happen if such caution is not exercised.