

Personal Guarantees – When Blue Turns To Grey

It's not often we reflect on cases we lost. However, a recent case on personal guarantees has reminded us of the risks that financiers face when a Court is asked to decide between the evidence of the financier who believes he has a valid and enforceable guarantee, and the evidence of the guarantor who believes he either never signed a guarantee or if he did it is in any event unenforceable.

Our case, which came before the Court in 2012, involved a claim against a guarantor whose defence was that the personal guarantee he had signed was unenforceable by reason of his never having intended to be bound by it. In other words, although he did not deny having signed the guarantee he didn't expect it to be relied upon until he had agreed final terms on the proposed facility with the financier. The financier was unable to satisfy the Court that final terms had ever been agreed in relation to the proposed facility despite the fact advances had subsequently been made under it, and as a consequence the financier could not show that the guarantor had intended to be bound by the guarantee.

Since that case we have advised clients that they should always make sure that there is no doubt the guarantor intends to be bound by his or her personal guarantee. This can be done by sending the guarantor a copy of the (signed and dated) personal guarantee and asking the guarantor to return a suitably worded acknowledgement.

In the more recent case of Lynch v Cadwalladar and Aldermore Bank the Court was again asked to consider the evidence of the financier who believed it held a signed personal guarantee from Mr Lynch, and the evidence of Mr Lynch who denied ever having signed the guarantee. The case came before the Court as Mr Lynch disputed Aldermore's proof of claim in his bankruptcy (we acted for the trustee in this case, Alex Cadwalladar of Leonard Curtis, but took a neutral stance in relation to this application).

At trial, Aldermore were unable demonstrate to the Court's satisfaction that a personal guarantee had ever been presented to Mr Lynch for signing or that he had in fact signed such a document.

Also, the person who allegedly witnessed Mr Lynch sign the guarantee recalled during cross-examination that, as the financial controller of Mr Lynch's business, she had witnessed him sign many important documents over the years and he always signed such documents with a black pen. The copy of the personal guarantee that she had been handed in Court was signed with a blue pen so it would have been completely out of character for Mr Lynch to have signed such a document.

The Court decided that Aldermore had not demonstrated on the balance of probabilities that Mr Lynch had in fact signed a personal guarantee in its favour. Accordingly, as Aldermore could not rely on the guarantee, Mr Cadwalladar, in his capacity as Mr Lynch's trustee in bankruptcy, could not accept Aldermore's proof of claim in the bankruptcy.

There is no new law arising out of this case but it does act as a reminder that executing personal guarantees requires a higher degree of care than normal as any flaw in the document or in the manner in which it was obtained can render the guarantee invalid and unenforceable.