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Case Nos: CR-2020-LIV-000003
CR-2020-LIV-000004

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
INSOLVENCY AND COMPANIES LIST (ChD)

Liverpool Civil & Family Courts,
35 Vernon Street,
Liverpool L2 2BX

Date: Thursday 9 January 2020

Before:

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

- -

Between:

SIGNATURE LIVING HOTEL LIMITED

Applicant

- and –

ANDREI SULYOK
ROXANA MONICA COCARLA

Respondents

- -
- -

MR SEBASTIAN GOLLINS (instructed by **MSB Law LLP**) for the **Applicant**
MR MARTIN OUWEHAND (instructed by **Baker Skelly LLP**) for the **Respondents**

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APPROVED JUDGMENT

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JUDGE HODGE QC:

1. This is my extemporary judgment on two applications for injunctions seeking to retrain the respondents from presenting any petition to wind up the applicant company founded upon two statutory demands dated 29 November 2019 which were served on the applicant company on 2 December 2019.

2. The grounds of the application are said to be issues surrounding the validity of the deeds of guarantee which formed the basis of each statutory demand, as set out in the supporting witness statement of Mrs Katie Christine Kenwright served with the applications. The applications themselves were issued on 6 January 2020. They were referred to me on the same day and I directed that there should be a hearing in Liverpool today.

3. The applicant is represented by Mr Sebastian Gollins (of counsel). The respondent to each application is represented by Mr Martin Ouwehand (also of counsel). Both counsel have submitted detailed written skeleton arguments.

4. Subject to one minor difference of fact, the two applications involve the same evidence and issues. Each statutory demand relies upon a deed of guarantee given by the applicant company on 27 November 2018 in support of a loan agreement of the same date entered into between Signature Heritage (Belfast) Limited as borrower and the respondent in each case as creditor. In the case of the application against Mr Andrei Sulyok, the loan was for a sum of €220,000 (equivalent to some £188,000). In the case of the respondent Roxana Monica Cocarla, the loan agreement was in respect of a sum of €60,000 (equivalent to some £51,000). Mr Sulyok's loan was, according to the statutory demand, made on the same day as the loan agreement and guarantee were entered into. Again according to the relevant statutory demand, the loan made by Miss Cocarla was made on 14 November 2018, and thus the day before the entry into the loan agreement and guarantee on 15 November 2018. It is not disputed that neither loan has been repaid, although the due date for repayment has now passed. It is not disputed that a formal demand has been made pursuant to the loan agreement and guarantee in each case on the applicant company.

5. The basis upon which this application is brought is set out in the supporting witness statement of Mrs Kenwright. She describes herself as a director of the applicant company although the relevant documentation at Companies House which is in evidence before the court suggests that she had in fact resigned as a director last month. Paragraph 3 of Mrs Kenwright's witness statement asserts that the deed of guarantee is not enforceable against the applicant and, as such, that it should not form the basis of any insolvency proceedings. The deed of guarantee is not witnessed and is therefore said to be unenforceable against the applicant as the requirements to create a valid deed have not been complied with. In addition, the requirements of section 44 of the Companies Act 2006, which also requires the execution on behalf of the company to be witnessed, have not been complied with. As such, each deed of guarantee is said to be unenforceable, and on that basis the application seeks an order restraining each respondent from seeking to present a winding-up petition.

6. There is evidence in answer in the form of a witness statement dated 8 January 2020 from Mr Russell James Beard, who is a solicitor and partner in the firm of Baker Skelly LLP, which represents the respondents to both applications. Mr Beard exhibits various

documents within exhibit RJB1. Mr Beard notes that the applications in both cases raise identical issues, and he therefore responds in his single witness statement to both applications. At paragraphs 5 to 9 Mr Beard addresses the parties involved in this litigation. He points out that the applicant is part of a group of companies involved in the development of hotels and residential units. It has sought funding for development projects by marketing investment opportunities to individuals and has invited them to make loans to separate entities created for the purpose of each project, offering security by way of a corporate guarantee from the applicant. The borrower, Signature Heritage (Belfast) Limited, is one such entity. It has received loans from the respondents expressed to be for the purpose of developing the former Crumlin Road Courthouse in Belfast as a hotel to be known as The Lanyon (after the name of the distinguished Belfast architect who had originally designed the Courthouse). Mr Beard notes that the two companies are under common ownership and are associated companies, with the same individual recorded as being the sole director of both companies and the person with ultimate significant control (via another group company) of the borrower company and, together with his wife, being two of the persons with significant control of the applicant company. It was Mr Kenwright, as the director of both the applicant company and the borrower, who was the only person to execute the guarantee on behalf of the applicant company.

7. Mr Beard addresses the making of the loans and guarantees and the background to them at paragraphs 10 to 17 of his witness statement. He addresses the attempts by each respondent to recover payment of the sums due to them at paragraphs 18 to 21 of his witness statement. Mr Beard addresses the procedural history following the service of the statutory demands on 2 December 2019 at paragraphs 22 to 26 of his witness statement. Mr Beard addresses the grounds of the application to restrain the presentation of any winding-up petition at paragraphs 27 to 33.

8. It is said to be the applicant's position that the guarantees are not witnessed and are therefore not enforceable because (so it alleges) the requirements to create a valid deed and the requirements of section 44 of the Companies Act 2006 have not been complied with. It is said to be the respondents' position that the guarantees are nonetheless enforceable as a matter of contract and therefore there is said to be no bona fide dispute raised on substantial grounds or any triable issue. The formalities for execution of a simple contract by a company under section 43(1)(b) of the Companies Act 2006 are said simply to be that the contract is made "by a person acting under its authority, express or implied". Both guarantees are in writing and both are signed by the sole recorded director of the applicant and the borrower companies.

9. It is said that the director can be taken to have been duly authorised to sign each guarantee. There is said plainly to be consideration on the face of the agreements because clause 2.1 of each guarantee states that it is made in consideration of the lender entering into the loan agreement. That is said to be consistent with the way in which the documents were presented to the lenders and the fact that the loans clearly appear to have been beneficial to the applicant, as indicated by the facts identified at paragraph 33.

10. At paragraph 34 Mr Beard states that it appears clear that the applicant is unable to pay its debts as they fall due. He exhibits extracts from the applicant's filed accounts for the year ended 31 March 2018 which he has obtained from Companies House. They are said to show substantial current liabilities. Amounts falling due within one year

would appear to have increased from almost £74 million as at 31 March 2017 to just over £87 million as at 31 March 2018. Net current liabilities are said to have increased from just under £32.5 million as at 31 March 2017 to almost £36 million as at 31 March 2018. Net assets are said to have increased from almost £15.5 million to just under £25.5 million over the same two-year period, but that net asset position is said to pertain only because of the valuation of the company's fixed assets. It is said that the applicant has extended its accounting period, as a result of which accounts which should have been due by the end of December 2019 are now not due until March 2020.

11. Mr Ouwehand has made the point that the applicant has made no attempt to file any evidence of its up-to-date financial position, and there is no assertion, still less any evidence, that the applicant is able to pay its debts as they fall due. All the evidence before the court, in the form of the applicant's failure to honour its guarantee in respect of its associated company's loan liability, indicates that the applicant is in serious cash flow difficulties, whatever its ultimate asset position on its balance sheet may be.

12. Mr Beard also makes the point that the applicant's attempt to dispute the enforceability of the guarantee has been raised very late in the day following the threat to present a winding-up petition. Mr Beard also notes that there would appear to have been, and to be, a number of other winding-up petitions extant in relation to the applicant.

13. Mr Beard concludes, at paragraph 37 of his witness statement, by saying that the applicant is seeking to rely on purported errors in its own documents to avoid its obligations to the respondents. Those errors are said not to affect the binding nature of the guarantees. These applications are said to appear to be no more than an attempt to delay matters, and he therefore respectfully asks the court to dismiss the applications.

14. That is the evidence before the court.

15. In his written skeleton argument Mr Gollins reminds the court that it will grant an injunction to restrain presentation of a winding-up petition if such a petition is found to be an abuse of process. Finding that a petition is bound to fail is one, though not the only, possible indication of an abuse of process. To that end, Mr Gollins submits, and I accept, that an injunction would be granted where a petition is bound to fail as a matter of law. Mr Gollins submits that the deed is not enforceable against the applicant. That is because, in order to be validly executed as a deed, the instrument must be executed by the person making it. The deeds of guarantee referred to in the statutory demands are said not to have been properly executed.

16. As the applicant is a limited company incorporated in the United Kingdom, the rules governing execution formalities are those set out in sections 43 to 52 of the Companies Act 2006. Section 44 of the Companies Act 2006 states (so far as material to the present case) that under the law of England and Wales or Northern Ireland a document is executed by a company by signature in accordance with the provisions of sub-section (2). That requires, for valid execution by a company, the document to be signed on behalf of the company either "(a) by two authorised signatories, or (b) by a director of the company in the presence of a witness who attests the signature" Here, the deed of guarantee was signed on behalf of the applicant company only by its sole director, and then not in the presence of a witness who attested his signature. Thus, Mr Gollins submits, as the document was simply signed by the sole director of the applicant

company, and was not executed in the presence of a witness, the formalities required by section 44 of the 2006 Act have not been complied with.

17. Mr Gollins draws the court's attention to the decision of Newey J in the case of *Briggs v Gleeds* [2014] EWHC 1178 (Ch), [2015] Ch 212. I accept Mr Gollins's submission that since the invalidity of the guarantee as a deed appears on its face, it is not possible for the respondents to rely upon any estoppel to assert that the documents are nevertheless binding on the applicant company. Mr Gollins submits that the two guarantees were not properly executed, and therefore they are not valid as deeds and, as such, cannot be enforced against the applicant company.

18. Mr Gollins anticipates an argument that the respondents might seek to rely upon the guarantees as a contract. Mr Gollins submits that the documents cannot survive as a contract. He acknowledges that by section 43 of the Companies Act 2006 a contract can be formed between a company and another party on behalf of the company by a person acting under its authority, express or implied. However, he submits that it is quite clear that the parties did not intend to enter into any contract so that section 43 of the Companies Act 2006 is not applicable. He relies upon the decision of Underhill J in the case of *R (On the application of Mercury Tax Group) & Another v HMRC* [2008] EWHC 2721 (Admin),]2009] STC 743. That case is said to share a similar factual matrix to the present case. At paragraph 40 Underhill J is said to have held that a defective deed cannot survive as a simple contract. He said at paragraph 40:

> "[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."

19. In the light of what was set out in Mr Ouwehand's skeleton argument, Mr Gollins submitted that the law had moved on since the authority relied on by Mr Ouwehand was decided in 2005, and the law was now said to be represented by Underhill J's decision. Mr Gollins submitted that it would be highly prejudicial to the applicant if the two documents were treated as anything other than invalid deeds.

20. In his written skeleton argument Mr Ouwehand began by reminding me of Norris J's summary of the principles relevant to the court's jurisdiction to restrain further proceedings and to strike out a winding-up petition, which were said to be of relevance also to an application to restrain presentation of such a petition, as summarised at paragraph 22 of Norris J's judgment in *Angel Group Limited v British Gas Trading Limited* [2012] EWHC 2702 (Ch), [2013] BCC 265. In particular, I note that:

(1) A creditor's petition can only be presented by a creditor, and until a prospective petitioner is established as a creditor he is not entitled to present the petition and has no standing in the Companies Court.

(2) A company may challenge the petitioner's standing as a creditor by advancing in good faith a substantial dispute either as to the entirety of the petition debt, or at least to so much of it as would bring the undisputable part below £750.

(3) A dispute will not be substantial if it really has no rational prospect of success.

(4) A dispute will not be put forward in good faith if the company is merely seeking to take for itself credit which it is not allowed under the contract.

(5) There is thus no rule of practice that the petition will be struck out merely because the company alleges that the debt is disputed. The true rule is that it is not the practice of the Companies Court to allow a winding-up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds because the effect of presenting a winding-up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is quite different in nature from the effect of an ordinary action.

(6) But the court will not allow this rule of practice itself to work injustice and will be alert to the risk that an unwilling debtor is raising a cloud of objections on affidavit in order to claim that a dispute exists which cannot be determined without cross-examination.

(7) The court will therefore be prepared to consider the evidence in detail even if, in performing that task, the court may be engaged in much the same exercise as would be required of a court facing an application for summary judgment.

21. Mr Ouwehand submits that if an otherwise complete contract of guarantee was intended to be embodied in a deed but the formalities had not been complied with, a creditor can still enforce the agreement. Such agreement must, of course, be supported by consideration. The consideration for such a contract need not directly benefit the surety but can consist entirely of some advantage conferred on the principal debtor by the creditor at the surety's request, such as lending the debtor money. Even if the guarantee post-dates the entry into that transaction, the court will look at the commercial realities. If the parties always envisaged that a guarantee would be part and parcel of a series of interlinked transactions, it will not avail the guarantor to argue that the consideration provided by the creditor was past consideration.

22. In the present case, clause 9 of the loan agreement, headed "Security", expressly provides that the borrower agreed to secure the repayment of the loan by executing the security documents, including the guarantee from the applicant company, and was to deliver the security documents on the commencement date, which was defined as 16 December 2018, dependent on funds being received by 29 November 2018.

23. Mr Ouwehand also observes that the courts are extremely reluctant to conclude that a commercial transaction which the parties plainly intended should be binding and enforceable should fail for want of consideration. Mr Ouwehand submits that both deeds of guarantee are in writing and both are signed by the sole director of the applicant company. He can therefore be taken to have been duly authorised to sign each guarantee. Mr Ouwehand acknowledges that section 44(2) of the Companies Act 2006 provides that a document is validly executed by a company if it is signed on behalf of the company (so far as material) by a director of the company in the presence of a witness who attests the signature, and that no witness attested to the director's signature in the case of either of the two guarantees. However, Mr Ouwehand submits that whilst

this may prevent the deeds of guarantee having effect as deeds under section 43(1)(b) of the 2006 Act, all that is required for the validity of a contract entered into by a company is for it to be made by a person acting under its authority (express or implied). Mr Ouwehand submits that that is clearly satisfied, and so the deeds took effect as contracts of guarantee. There was said to be plainly consideration for them. Reliance is placed on the terms of clause 2.1 of each of the deeds of guarantee which in terms provide that they were given in consideration of the lender entering into the loan agreement. That indisputably took place. Mr Ouwehand points out that the loan agreements were in any event presented for execution together with the deed of guarantee by those purporting to act for both the borrower and the applicant company. Each contemplated the execution of the other and they were clearly intended to be enforceable and interlinked. In addition, the loan agreements have been promoted to the respondents as being secured by the guarantees.

24. It follows, so it is said, that the respondents were requested on behalf of the applicant company to enter into the loan agreements, or they did so in reliance upon a promise on behalf of the applicant company to enter into the guarantees. All of that is said to be of itself sufficient; but in any event it can be clearly inferred from the applicant company's own documents that it has derived benefit from the loan agreements if it were necessary also to demonstrate this.

25. For all of these reasons, Mr Ouwehand submits that the deeds of guarantee are clearly enforceable, even though they were not duly executed in accordance with section 44. He submits that the applicant company has no rational prospect of successfully claiming otherwise. Since no other reason is advanced for disputing the applicant company's liability, it is unable to demonstrate that there was any substantial dispute on bona fide grounds to justify the court restraining the respondents from presenting winding-up petitions. Mr Ouwehand therefore asks the court to dismiss both applications with costs.

26. In his oral submissions, Mr Ouwehand submitted that it would be extraordinary if these guarantees were not enforceable. The authority relied upon by Mr Gollins, the case of *Mercury*, was said to be completely different to the present case on its facts. Mr Ouwehand submits that, on their face, the guarantees were intended to be contracts and to be enforceable. There is just one sentence in Underhill J's judgment which is said to support Mr Gollins's submissions, and Mr Ouwehand invites me not to follow that decision on that basis on the footing that it is contrary both to principle and to authority. Mr Ouwehand submits that the sole director of the applicant company clearly intended to authenticate the two guarantees. He submits that the two guarantees can stand as simple contracts, and they are sufficiently supported by consideration to be enforceable as simple contracts.

27. In his reply, Mr Gollins reiterated that the authority relied upon by Mr Ouwehand had been decided in 2005, since when Mr Gollins asserted there had been a sea change in the law, which had moved on considerably since then.

28. Those were the submissions.

29. I have no hesitation in preferring the submissions of Mr Ouwehand. I am entirely satisfied that the law is (and still is) as stated in the penultimate paragraph of paragraph 2-021 of the 7th (2015) edition of *Andrews and Millett: The Law of Guarantees*. There

it is said that 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. That proposition is said to be exemplified by the decision of Mr Simon Brown QC (sitting as a Deputy Judge of the Queen's Bench Division) in the case of *Lloyds TSB Bank plc v The Dye House Limited* [2005] EWHC 1998 (Comm). There W, the alter ego of a group of five companies, had signed an omnibus guarantee in respect of a facility afforded by the bank to those companies at his request. The guarantee required another signature in order to make it effective as a deed. Mr Simon Brown QC granted summary judgment against W on the basis that although the guarantee was not a deed, W had sought a facility for his companies which the bank had provided in consideration of his promise to guarantee repayment. Consequently, a contract had arisen which the bank was entitled to enforce.

30. A transcript of the approved judgment of the Deputy Judge was placed before me. Mr Ouwehand acknowledges that the case was not fully argued. Indeed, the defendants did not appear and were not represented. The judgment extends to only 5 paragraphs and cites no authority. Nevertheless, I am entirely satisfied that it is correct in principle. It has survived intact into the 2015 edition of Andrews and Millett's standard practitioner's work on the law of guarantees. The single paragraph observation of Underhill J in the *Mercury Tax Group* case is no more impressive than Mr Brown's judgment. No authority, still less the extract from Andrews and Millet or Mr Brown's decision, was apparently cited to Underhill J. That is not surprising, since Underhill J's decision was not a case involving a guarantee; rather, it was a judicial review challenge to the validity of search warrants issued under the Taxes Management Act and the validity of the basis upon which those warrants had been issued.

31. In the course of his oral submissions, Mr Gollins had relied upon a Law Commission Working Paper apparently dating back to the late 1990s entitled "The Execution of Deeds and Documents by or on behalf of Bodies Corporate". Mr Gollins had relied upon that document in support of the legal nature and effect of a deed. Nevertheless, I note that at paragraph 2.16 (at page 11) under the heading "Defective Deeds" the Law Commission noted that it understood that a difficulty sometimes encountered in practice was whether a document which was expressed to be a deed but which was not executed with the necessary formality could nonetheless take effect as a simple contract. The Law Commission could see no reason in principle why such a document should not be enforceable as a simple contract, assuming that all the other elements required for such a contract (such as consideration) were present, that the document had been signed by a person or persons with authority to bind the company to such a contract, and, of course, that the transaction was not one for which a deed was required. Mr Gollins submits that that passage is no longer good law in the light of the *Mercury* decision. I cannot accept that that is the case.

32. In support of his submission, Mr Gollins referred me to the very recent 2019 Law Commission Report No 386 on the electronic execution of documents. Mr Gollins referred me to the terms of reference at paragraph 1.11 which (at sub-paragraph (1)(d)) included the consequences of the *Mercury Tax Group* decision. However, when one goes to the relevant part of the substance of the Report, addressing the *Mercury* case at paragraphs 5.45 and following, it is clear that what was troubling the Law Commission was that part of Underhill J's decision that was directed to the need for a document to be "a discrete physical entity (whether in a single version or a series of counterparts) at

the moment of signing", and whether section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 had the effect that in the case of a deed the signature and attestation must form part of the same physical document.

33. I can see nothing in the "Executive summary: statement of the law" at paragraphs 1.1 to 1.6 (on page 1) that indicates any endorsement of the sentence at paragraph 40 of Underhill J's decision on which Mr Gollins places reliance, or any indication of the Law Commission resiling from the view it had previously expressed at paragraph 2.16 of its earlier working paper.

34. In my judgment, the law is accurately stated in the penultimate paragraph of paragraph 2-021 of *Andrews and Millett: The Law of Guarantees*. 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.

35. I am also satisfied that in the present case the guarantee agreements were sufficiently supported by consideration, again for the reasons given by Mr Ouwehand. In the case of Mr Sulyok, the loan would appear to have been made at the same time as both documents were entered into. In the case of Miss Cocarla, the loan appears to have been advanced the day previous to the entry into the relevant agreements. However, I am satisfied that the loan was entered into as part and parcel of a series of interlinked transactions involving not only the entry by the borrower into the loan agreement, but also the entry by the applicant company into the guarantee. Had the guarantee not been given, the respondent, Miss Cocarla, would have been entitled to call for the return of her money on the basis of a total failure of consideration (or, as Professor Charles Mitchell would prefer to characterise it, "failure of basis"). By clause 9 of the loan agreement, the giving of the guarantee was part and parcel of the loan transaction.

36. So, for those reasons I am satisfied that the guarantees are properly enforceable as against the applicant company, and on that basis that the applicant company is a debtor and each respondent is a creditor of it. On that basis, there is no reason to restrain presentation of any winding-up petitions founded on the statutory demands. I would however draw attention to paragraph 9.2 of the current (2018) Insolvency Practice Direction. That directs that:

> "Before presenting a winding-up petition, the creditor must conduct a search to ensure that no petition is pending. Save in exceptional circumstances a second winding-up petition should not be presented whilst a prior petition is pending. A petitioner who presents a petition while another petition is pending does so at risk as to costs."

That, however, is a matter for another day. It is sufficient to say that there is no basis for the grant of injunctive relief on the present applications, which are therefore dismissed.

This Judgment has been approved by the Judge.