

liability under a guarantee

In what circumstances is the liability of a co-guarantor conditional on the document being signed by the other guarantors? Recent case law has confirmed that it will depend on the specific wording of the guarantee and that the prima facie position is that it is a condition of liability that the guarantee is signed by all intended guarantors. Anyone considering providing a joint and several guarantee in circumstances where they may not see their co-guarantors signing the document, or perhaps more unusually, where they do not know their co-guarantors, should ensure the document is worded to require proper execution by all guarantors as a condition of liability.

This issue was considered by the Court of Appeal in John Spencer Harvey –v- Dunbar Assets Plc [2013] EWCA Civ 952. In this instance a guarantor was challenging liability in circumstances where one of his intended co-guarantors had not signed the document (his signature was alleged to be a forgery).

Dunbar Assets Plc (“Dunbar”) made loan facilities available to a company to refinance a development site in the North East of England. One aspect of the security required by Dunbar was a guarantee signed by four gentlemen including the claimant, Mr Harvey.

The development project failed, Dunbar called in the loan and issued statutory demands against the guarantors. Mr Harvey applied to set aside the statutory demand against him but his application was dismissed.

The statutory demand was set aside in respect of one guarantor, a Mr Lenney, following Mr Lenney’s claim that his purported signature on the guarantee was a forgery and that this allegation required investigation.

Once Mr Harvey discovered this, he asked the Court to reconsider his application. This was treated as an appeal and the matter was referred to the Court of Appeal on the question of whether, on the construction of the guarantee, Mr Harvey would be liable in circumstances where Mr Lenney never signed the guarantee. If not, the statutory demand should be set aside and the matter reconsidered when Mr Lenney’s allegations had been fully investigated.

The Court of Appeal considered the specific terms of the guarantee and found that if Mr Lenney’s signature was proven to be a forgery, Mr Harvey would not be bound by the guarantee. The guarantee was, on its construction, subject to a condition that it would be signed by all the intended guarantors. The liability of the guarantors was therefore only imposed in circumstances where that condition had been met.

The Court of Appeal was at pains to point out that the authorities do not establish a rule in respect of the liability of co-guarantors, but instead require the specific terms of a guarantee to be considered. However, it did state that the prima facie position when considering a joint guarantee would be to assume that a condition of liability is that the guarantee is signed by all intended guarantors. It is then necessary to consider whether there are any terms contained in or implied by the actual wording of the guarantee which would necessitate a departure from that prima facie position.

It is worth noting that a situation in which the signature of a purported guarantor was forged would be a situation in which the guarantee had never been given. The Court of Appeal distinguished that from a situation in which the guarantee was found to be unenforceable or invalid.

Anyone taking a joint guarantee as security for a debt should ensure it is properly executed in the first place. However, to ensure the guarantors will not be able to avoid liability, the guarantee should be carefully worded to displace the prima facie position requiring it to be signed by all intended guarantors. Likewise, anyone acting as guarantor should seek to ensure that, if they are providing the guarantee on the assumption that liability will be shared, they are protected from liability in the event that any of the guarantors did not sign the guarantee.

For further information please contact:

Mary Hodgson

Associate

+44 (0)20 8394 6469

Mary.Hodgson@russell-cooke.co.uk

This material does not give a full statement of the law. It is intended for guidance only and is not a substitute for professional advice. No responsibility for loss occasioned as a result of any person acting or refraining from acting can be accepted by Russell-Cooke LLP. © Russell-Cooke LLP. January 2014

www.russell-cooke.co.uk