Beware the ghost in the machine

Ben Brayford and **Hannah Kramer** consider a recent case involving Gordon Ramsay's personal liability under a guarantee executed by a 'signature machine'

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A recent case involving Gordon Ramsay's personal liability under a guarantee made media headlines, but also raised interesting questions of procedure for practitioners when checking that documents have been duly executed.

Executed guarantees

The High Court found Ramsay liable under a personal guarantee for the lease of the York and Albany gastropub, of which his company, Gordon Ramsay Holdings International Limited, is the tenant.

Although Ramsay's witnessed signature appears on the agreement for lease and the lease, he sought a declaration that he was not bound by it on the basis that he had not signed the document personally. Rather, Ramsay claimed that his father-in-law, who was CEO of the business at the time, had placed his signature on the documents using a 'ghost writer' signature machine without his authority.

However, Mr Justice Morgan dismissed Ramsay's argument that he did not know the full extent of his father-in-law's use of the signature machine. Instead, he took the view that Ramsay had known that this machine was used to sign legal documents on his behalf long before the agreement was entered into. It was also held that Ramsay had given his father-in-law a 'wide general discretion' to enter into such legal documents on his behalf. His father-in-law had therefore been acting with implied authority when the document was signed in 2007. The decision means Ramsay is now liable to pay annual rent for the remaining 17 years of the term, as well as legal fees.

The decision also raises a number of questions for those of us reviewing executed guarantees. This case largely turned on its facts, and the decision may have been different had there been greater ambiguity over whether Ramsay had implicitly authorised his father-in-law to enter into such legal documents on his behalf.

However, there is no obvious way to tell whether a document has been signed personally or by such a signature machine. While this can probably be ruled out for most non-celebrity signatories in a personal capacity, it may be of relevance to busy company directors. As a general practice point, where practitioners are not dealing directly with the principal, it is important to ask questions about the extent of a representative's authority to bind them and, where relevant, seek confirmation that documents have been executed by, or with the express authority of, the signatory.

CDM regulations

The Health and Safety Executive (HSE) has announced that the Construction (Design and Management) Regulations (CDM) 2007 will be replaced on 6 April 2015 by the Construction (Design and Management) Regulations 2015. To enable the property and construction industry to prepare for the changes, the HSE has published the new regulations together with draft guidance, which will replace the existing Approved Code of Practice.

The 2015 regulations will bring about a number of changes to the existing health and safety regime. Most notable is that the role of the CDM co-ordinator will be replaced by that of the 'principal designer', who has control over the pre-construction phase of a project.

The 2015 regulations will also apply to areas which are not caught by the 2007 regulations, such as:

- commercial and domestic clients (though domestic clients will be able to delegate many of their duties); and,
- clients will be required to appoint a principal contractor and a principal designer where there is more than one contractor (or it is reasonably >>

>> foreseeable that there will be more than one contractor) working on site at any point in time.

The 2015 regulations include transitional arrangements which confirm how they will apply to projects which are on site or due to commence on site on 6 April 2015.

Practitioners should familiarise themselves with the transitional arrangements and with the 2015 regulations to ensure that clients comply with their duties. Construction and property agreements will also need to be reviewed and may need to be amended to reflect the requirements of the new regime.

Guarantees on assignment

The 2011 case of *KS Victoria Street v House of Fraser* caused consternation among both landlord and tenant lawyers when it was decided that a parent company acting as guarantor for the outgoing tenant could not guarantee the assignee's obligations and any provision requiring it to do so was invalid. Concerns were raised regarding how this might affect a tenant's ability to make an intra-group assignment as a part of a group reorganisation and how existing contractual provisions which were in breach would be interpreted.

Two recent connected cases have helped shed some light on the position. First, in *Tindall Cobham 1 Ltd v Adda Hotels* [2014] EWHC 2637 (Ch), the Court of Appeal was asked to consider the validity of a lease provision which obliged the landlord to give its consent to a group company assignment, provided that the tenant's guarantor also guaranteed the assignee's obligations and that notice of the assignment was given to the landlord.

As a result of the *KS Victoria* case, the tenant had taken the view that the guarantee requirement was invalid under section 25 of the Landlord and Tenant (Covenants) Act 1995 (LTCA 1995) and assigned the lease to a group company, giving notice to the landlord but without obtaining the landlord's consent.

The Court of Appeal held that section 25 was not intended to invalidate more of a lease than was necessary, but equally the court was entitled to take a common-sense approach to the construction of the terms of the lease so as to avoid an arbitrary result that would lead to an unintended imbalance in the contractual position. Accordingly, it decided that the notice requirement was necessarily linked to the guarantee requirement and that therefore both (rather than just the latter) should be severed, leaving a qualified covenant for the landlord's consent to the assignment.

As a result of the Court of Appeal's decision, the intra-group assignment was in breach of the terms of the lease and, as such, an 'excluded assignment' within section 11 of the LCTA 1995. This meant that neither the original tenant nor the guarantor was released from their lease covenant. The parties therefore wished to rectify the position by re-vesting the lease in the original tenant with the guarantor guaranteeing its obligations, and the parties approached the court for a second time seeking a declaration as to how this could be achieved.

In *Zinc Cobham Ltd v Adda Hotels* and *UK Leasing Brighton Ltd v Topland Neptune Ltd* [2015] EWHC 53 (Ch), the High Court held that it was not a breach of the LTCA 1995 for a tenant (with a guarantor) to assign a lease to an assignee (without the guarantor or with a different guarantor) and for that lease to then, in due course, be assigned back to the original tenant with the original guarantor providing a fresh guarantee of the original tenant.

Both cases provide some useful clarity for practitioners post-*KS Victoria* and reflect a common-sense approach taken by the courts.

Service charge caps

The rate of inflation slowed to just 0.3 per cent in early February 2015, with some economists, and indeed the governor of the Bank of England, indicating that the UK may see a period of deflation in spring 2015. With this in mind, practitioners acting for both landlords and tenants should consider carefully the drafting of any index-linked service charge cap provisions in leases.

Where payment provisions are index-linked, this will most commonly be by reference to the retail prices index (RPI).

While providing cost certainty for tenants, a fixed service-charge cap throughout the duration of the term of the lease does not allow any leeway for changes in the cost of living or, more specifically, the cost of goods and services provided under the service charge regime by the landlord. RPI-linked caps are popular due to the increased flexibility they provide – the initial service charge cap is recalculated annually by reference to the change in the RPI between the base month (often the month before the lease was granted) and the month before the service charge review date.

When acting for landlords, practitioners will want to ensure that RPI reviews are on an upwards-only basis, so that even if there is a fall in the RPI, the amount of the cap will never decrease. Conversely, tenants will argue that as the cap increases with inflation, so it should decrease with deflation. Either way, practitioners should ensure that they explain the consequences of the final drafting clearly to clients and they may wish to revisit the wording they have agreed on previous transactions. **SJ**

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