Witnessing deeds: More than a formality

30 deeds amending a pension scheme were held to be ineffective as they had not been properly executed

The recent decision in Briggs and others v Gleeds and others [2014] provides a reminder to those executing deeds and other documents of the need to abide by the formalities and to take extreme care when executing any document. Failure to do so resulted in a pension scheme being in deficit by up to £45 million as a number of attempted amendments to the scheme were invalid. This decision will be of interest to those in the construction industry who have entered into appointments or building contracts intended to take effect as a deed.

Formalities for the execution of a deed

Section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 (“LPA 89”) requires an instrument to be signed in the presence of a witness, who attests the signature of the document, for it to be validly executed as a deed by an individual. In the case of a document executed by the partners of a partnership, this means that each partner’s signature must be attested by a witness for it to be valid as a deed.

The Scheme

The Gleeds Retirement Benefits Scheme (“the Scheme”) was established in 1974, and was intended to be amended by 30 separate deeds between 1991 and 2008. In 2010 it was discovered that the partners’ signatures in these documents had not been attested by a witness. The amendments which Gleeds had attempted to make to the Scheme included the introduction of member contributions, the extension of membership of the Scheme and the retirement of trustees, as well as the closing of the final salary section of the Scheme.

The trustees brought proceedings under Part 8 of the CPR to determine whether the “deeds” had been validly executed. Gleeds argued that the trustees and members were estopped from arguing that the defective deeds, were invalidly executed. Gleeds relied upon the fact that the draft deeds had been supplied by the administrators of the Scheme acting on the trustees’ instructions and that the deeds contained execution clauses appropriate for a limited company, not a partnership, i.e. they did not specifically state that the partners must sign. Gleeds claimed that it relied upon the administrators’ implied representations that execution of the deeds as set out there in would be sufficient and argued that such representations had made on behalf of the trustees to its detriment.

Key facts:

The requirements of the Law of Property (Miscellaneous Provisions) Act 1989 were very strictly applied.

Estoppel could not be invoked in relation to the requirements for execution.

A number of amendments to the pension scheme were ineffective

Those drafting and executing deeds should take care!
The Decision

In the High Court it was held that the deeds had no effect and that the members of the Scheme were not estopped from denying that the deeds were validly executed. Newey J concluded that estoppel could not be invoked as the requirements for execution in the LPA 89 must be adhered to for there to be certainty and these requirements had not been complied with. In addition, the administrators who drafted the deeds were acting on behalf of Gleeds, as well as the trustees, which was described as being “fatal” to this argument.

The High Court also considered whether an “extrinsic contract” had been formed between Gleeds and the member, including whether such a contract existed in relation to the closure of the final salary section in 2005. Members of the final salary section were sent a letter offering membership of the money purchase section of the Scheme, although the letter stated that Gleeds had been advised that it was permitted to make the change itself. Those who signed and returned a copy of the letter were offered a one-off salary increase and most of the relevant members signed and returned the letter. The salary increases were not “ex-gratia” payments but were conditional on the members signing and returning the letters. Accordingly, those members who returned the 2005 letters were held to have contractually bound themselves to accept changes set out in a subsequent deed, even though it was not validly executed. It should however be noted that the “extrinsic contract” argument was rejected in relation to certain other amendments.

Take Care!

This decision will have very serious consequences for the Scheme. In particular, measures introduced by Gleeds in an attempt to reduce costs for the Scheme were invalid and therefore the Scheme’s deficit has now increased significantly, to up to £45 million. In addition, some employees who thought they had become members of the Scheme never did so (although Newey J said that this did not mean that they will not have acquired any rights as a result of contributions made to the Scheme by them or Gleeds).

In the words of Newey J “unfortunate consequences are, I am afraid, unsurprising when so many documents have not been validly executed” and therefore, whilst this decision does seem to be a very strict application of the requirements of the LPA 89, it serves as an important reminder to those executing and drafting deeds of the need to ensure that they follow the relevant formalities in doing so. Those who have entered into a document which was intended to be executed as a deed but failed to comply with the LPA 89 may be able to rely on this decision to argue that the deed was invalid. This could have significant consequences, in particular on the limitation period, which under a deed is 12 years, compared to 6 years under a simple contract.

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