Beware companies executing documents

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It should be simple and straightforward. A company is a party to a contract relating to an interest in land. How does it effectively execute the contract? Similarly a company wants to enfranchise the freehold of the property in which it has a long lease. How does it give a valid notice under section 42 LRHUDA 1993? For those conscious that there is a need to exercise caution the answer is not a problem. Always comply with the requirements of section 44 Companies Act 2006. It just requires some boring attention to detail and some extra time spent obtaining the necessary signatures. However, for non-lawyers or lawyers in a hurry there is always the risk that this precautionary step will not have been considered and a document involving a company will have been executed as if by an individual or without some of the necessary formalities complied with. What if the safe course is not taken? Surprisingly the law on this subject is not clear cut and there continue to be painful experiences resulting from a failure to comply.

This prompted Mummery LJ to give yet another of his sensible but oft unheeded warnings to practitioners in Redcard Limited v Williams [2011] 2 EGLR 67 at para. 30 when on this topic he stated that from "a practical point of view, it may just be worth stating the obvious: expensive and long-drawn-out litigation concerning the execution of a document by a company can be avoided by taking greater care over compliance with the formalities at the time of execution, by, for example, adding words that expressly state the capacity in which an individual is signing a document to which a company is a party." At first instance in that case Lewison J. ([2010] EWHC 1078 (Ch) at para. 10) had suggested that the authors of Megarry & Wade had been "too sanguine" when stating that compliance with the statutory requirement that a contract to sell land be signed by or on behalf of the parties was "unlikely to be in issue very often" because they will rarely be made without legal advice.

1. Law – one of the complicating factors with the law is that the relevant statutory provisions (sections 43 to 46 CA 2006) cover not just deeds and contracts but "documents" which is a trap in itself for the unwary. In summary the statutory scheme for companies is:-

1.1 Contracts (section 43) – a company is given two ways to contract. One is in writing using its common seal. But there is no longer any need for a company to have a common seal (s.45). The other method on behalf of a company is by a person acting under its authority (whether express or implied). Whichever method is adopted must also comply with any formalities required by law. It seems to me logically this throws up a distinction between a company acting through an agent and a company acting on its own account. Although this has been raised and noted in some of the authorities there is yet to be a judicial analysis which really grapples with this distinction and explains what if any are the consequences of this distinction.

1.2 Execution of documents (section 44) – again two methods are available to a company. It can affix its common seal or sign the document in accordance with the provisions of section 44. The principal requirement as regards signatures is contained in sub-section (2). The documents must be signed "on behalf of the company" by

1.2.1 two directors or a director and the company secretary; or

1.2.2 a director in the presence of a witness who attests the signature.

Sub-section (4) provides that if signed in accord with sub-section (2) and expressed "in whatever words" to be executed by the company it has the same effect as executed under the company's common seal. This would seem to be adding an additional statutory requirement and this was agreed by Mummery LJ in the Redcar case (para. 24) but in practice this is unlikely to be a heavy burden and will be easily satisfied. There has been no explanation of what is needed to satisfy this requirement. Provided that the document identifies the company it is hard to see how this particular requirement cannot be satisfied.

In cases where a person is signing on behalf of more than one company then there must be separate signatures for each company (sub-section (6)). In contrast if a person signs both on behalf of a company and in that person's personal capacity one signature can be sufficient as in the Redcar case. In cases in which a company is executing in the name of and on behalf of another person these requirements will apply (sub-section(8)).

It is still not uncommon to come across a document to which a company is a party but which has the signature of a single director unattested.

1.3 Deeds – the company must "duly execute" the deed which means that the requirements of section 44 must be complied with as well as those applicable generally contained in section 1 Law of Property (Miscellaneous Provisions) Act 1989.

2. Documents – as said above these provisions encompass more than just contracts and deeds. Normally this will not be a problem because the document will not need as a matter of law to be made by the company. However, there is one area where this has been a problem. It is with enfranchisement. Notices under sections 13 (collective enfranchisement) and 42 (individual enfranchisement) LRHUDA 1993 are required by section 99(5) to be signed by the tenant or tenants and the signature of an agent is not acceptable. It has been held by Judge Reid in City & Country Properties Limited v Plowden Investments Limited [2007] LTR 225 that a section 42 notice must comply with the statutory requirements relating to execution of documents. This decision has been approved by the Court of Appeal in Hilmi & Associates v 20, Pembridge Villas Freehold Limited [2010] EWCA Civ 314 which held the same as regards section 13 notices. In both cases the notices bore one director's signature which had not been attested by a witness. The result was that the notice was ineffective. This may give rise to problems particularly if following service of the ineffective notice there has been a dealing with the leasehold interest. A fresh notice will

then need to be given by the new tenant with a need to satisfy the statutory enfranchisement requirements afresh. Any such notice needs to be signed by a director and an attesting witness or by two directors or a director and the company secretary. It is not hard to see how this highly technical point could be missed.

3. Contracts to sell land – section 2 of the 1989 Act requires the contract to be signed by or on behalf of each party. It cannot be emphasised strongly enough that section 44 should be complied with by a company executing such a contract. However, when one or more of the parties is a company will the unattested signature of a director suffice? A contract can be made on behalf of a company by an authorised person (section 43(1)(b)). That means that a company may contract through an agent but does that mean that such a method may be used when selling land? If it does can the unattested director's signature be justified on this basis? This distinction between the company acting on its behalf or by agent was relied on by the appellant in the Redcar case. It was argued that as well as the two directors signatures it was necessary for them to spell out that they were "by or on behalf of" the company. This was firmly rebutted by the Court of Appeal. The fact that the company was expressed to be one of the sellers was sufficient to make clear the contract was being executed on behalf of the company. That was a case which found that the contract had been executed in accordance with the requirements of sub-sections (2) and (4) of section 44. Nothing was said in the actual decision about the possibility of the contract being made for the company by an authorised agent. It appears to leave open the question whether a director's signature not satisfying section 44(2) can be treated as an agent's signature getting the contract home by virtue of section 43(1)(b). For such an argument to get off the ground it may be necessary to have wording indicating that the director is acting as an agent for the company rather than acting as the company.

One significant hurdle to the success of such an argument is that it would seem to drive a coach and horses through section 44(2). Why have it if in the case of a contract one director's signature will suffice. Lewison J. did not appear to consider that this two prong approach could be adopted. At para. 12 he stated that the "effect of section 43(2) is that a contract for the disposition of an interest in land must be signed by or on behalf of a company. Since a company cannot sign anything in the ordinary sense of that word it follows that such a contract must be signed on behalf of a company. How that is to be done is laid down by the next section, section 44." He does not analysis the phrase "by or on behalf" and does not consider the difference between the company acting and it acting through an agent. In his eyes section 44 provides the means by which section 43(1) is carried out.

It is odd that such an apparently simple point should not have a clear and certain answer. Although not a regular occurrence it is something which does happen from time to time. When it does it creates real damage. The contract may cease to be valid unless the facts are such that some form of estoppel can be relied on.

4. Conclusions –

4.1 Section 44(2) – When a company is required to execute a document either alarm bells need to ring or a thought through procedure spring into action. Whatever the document involving a company the safest course is to ensure that the company executes in a manner satisfying section 44(2) and (4) CA 2006. Although a nuisance it is in the long run the cheapest option. Litigation over compliance with formalities is a particularly painful but avoidable punishment.

4.2 Enfranchisement – notices under sections 13 and 42 of the 1993 Act given by companies definitely need to ring alarm bells. Section 44 CA 2006 must be complied with otherwise the notices will be invalid and it may be too late to start the process again immediately.

4.3 Contract to sell an interest in land –

4.3.1 there is no decision as yet whether such a contract bearing a single director's signature not attested by a witness can be saved on the ground that it is an agent's signature within section 43(1)(b).

4.3.2 two director's signatures will be valid whether the company is the sole buyer or seller or one of more than one probably even if there are no words describing their capacity.

4.3.3 Further if the person signing for the company has a personal capacity as well it will not be necessary for that person to sign twice on behalf of the company and in the personal capacity.

4.4 The Warren Buffett approach – the second rule of Mr. Buffett's approach to investment is to repeat the first – never make a loss. The same approach for execution of documents by companies is sensible – first rule comply with section 44; second rule remember the first.