The precise ambit of the sealing requirement for deeds:
***Lim Zhipeng v Seow Suat Thin* [2020] SGCA 89**

I. Executive summary

Parties ("**creditors**") who loan money to others ("**debtors**") are often concerned that the debtors will be unable or unwilling to repay them. Such creditors may then enter into deeds of guarantee with third parties ("**guarantors**") to secure the repayment of their loans if their debtors default on payment of the same. Unlike a contract, a deed does not require consideration to be legally enforceable.[1] However, for a deed to be legally enforceable, several other formalities must be fulfilled. In particular, the deed must be "signed, sealed, and delivered".

The Court of Appeal ("**CA**") in *Lim Zhipeng v Seow Suat Thin* [2020] SGCA 89 considered the precise scope of the sealing requirement. Seals are placed on documents to authenticate and validate their execution.[2] The sealing requirement goes back to medieval times in England, when sealing was the only way of effectively authenticating a document. Parties would seal a document by pouring molten wax on a document and impressing their own crest on the wax. In modern times, a small red circular sticker has taken the place of the wax seal; this is usually placed by the lawyer who prepared the document. However, as these seals are not durable, a document which purports to be "signed, sealed, and delivered" often has no trace of a physical seal when its enforceability is questioned in court. Therefore, courts have frequently had to consider whether the sealing requirement has been satisfied.

In this case, the debtor Cheong Wee Ker Derek ("**Cheong**"), who had borrowed money from the creditor Lim Zhipeng ("**Lim**"), later asked his mother Seow Suat Thin ("**Seow**") to act as guarantor for his debt. Seow agreed. Lim and Seow signed a document entitled "Deed of Guarantee" (the "**Guarantee**"). Cheong subsequently defaulted on his debt, and Lim then sued Seow to enforce the Guarantee.

In response (i.e. as her counterclaim), Seow argued that the Guarantee was unenforceable because it was not "sealed". In the alternative, she argued that even if the Guarantee was a contract, it was unenforceable because no consideration had been pleaded or furnished by Lim. Seow also sought repayment of $40,000 that she had earlier paid to Lim to help Cheong satisfy the debt.

The High Court ("**HC**") held that the Guarantee was unenforceable as a deed, as it had not been sealed. It further held that the Guarantee was also unenforceable as a contract, as consideration for the Guarantee had neither been adequately pleaded nor furnished. Consequently, the HC dismissed Lim's claim and allowed Seow's counterclaim.

On appeal, the CA held that a document could be "sealed" if it was executed by a person with the intention of delivering it as his act and deed. No physical impression of a seal was required. While the sealing requirement was not satisfied in this case, the CA held that the Guarantee

[1] Consideration refers to either a benefit gained or a loss incurred by one party in exchange for the other party's promise. For example, A agrees to sell her bag to B for $500. B's payment of $500 (i.e. a loss incurred by B) serves as consideration for A's promise to sell the bag to him. An agreement without consideration is not legally enforceable.

[2] Generally, the presence of a seal authenticates the identities of those who signed the document, i.e. that the document is genuine, and actually signed and accepted by the signatory.

remained enforceable as a contract, because Lim, as creditor, had provided consideration by forbearing from taking any action against Cheong with respect to the debt for some time.

II. Material facts

In 2016, Lim extended a loan to Cheong, which Cheong agreed to repay by a specified date. Cheong failed to make the scheduled repayments to Lim. Subsequently, Cheong was made a bankrupt in May 2017 after bankruptcy proceedings were filed against him on the basis of another debt. Cheong was advised by his trustee in bankruptcy that the bankruptcy order could be annulled if all his creditors agreed to an annulment. As such, Lim requested Seow to act as a guarantor for the debts he owed to Lim.

Seow received the Guarantee from Lim and was asked to sign it before a lawyer. The lawyer read the document and translated it into Mandarin for her. The lawyer also explained that Seow would have to pay Lim if Cheong defaulted on payment of the loan. After witnessing Seow's signature on the Guarantee, the lawyer appended his signature as a witness; he also wrote next to it that he was "not acting as her lawyer".

On 21 November 2017, Seow paid $40,000 to Lim pursuant to the Guarantee. Thereafter, Seow did not make any further payments. A few months later, Lim informed Seow that she had failed to discharge the terms under the Guarantee and requested repayment of all outstanding sums immediately. Seow did not meet Lim's demands. Lim subsequently commenced proceedings against Seow to claim the outstanding sum under the Guarantee. Seow counterclaimed for the return of the $40,000, on the basis that Lim had been unjustly enriched by the same.

III. Issues

The CA considered the follow issues on appeal:

(a) First, whether the Guarantee was a deed;
(b) Second, if the Guarantee was not a deed, whether consideration had been sufficiently pleaded and furnished by Lim;
(c) Third, whether Seow could avoid liability under the Guarantee; and
(d) Fourth, whether Seow's counterclaim for $40,000 ought to succeed.

A. Whether the Guarantee was a deed

Generally, deeds are considered enforceable if they are "signed, sealed, and delivered". It was undisputed that the Guarantee was signed and delivered; the only question was whether it was "sealed" even though no physical seal was attached to the document.

The CA held that, notwithstanding the perceived outdatedness of the sealing requirement, it remained a necessary requirement for the enforceability of a deed. However, the CA also held that a physical manifestation of the seal was not required if the document was executed by a party with the clear intention of delivering it as the party's act and deed. Whether such an intention existed depended on the circumstances of the case. A document which described itself as a deed; contained a clause which stated that it was "signed, sealed, and delivered"; and was signed over the place where there ought to have been a physical seal, showed the requisite intention.

Here, the Guarantee expressly identified itself as a deed; the execution portions provided for it to be "signed, sealed, and delivered" by the parties; and Seow even sought a lawyer's advice before signing the document in front of said lawyer.

Nonetheless, the CA found no evidence that Seow was told about the sealing requirement. Importantly, Seow did not testify that the lawyer had explained to her the difference between a contract and a deed. She simply understood that the execution of the Guarantee meant that she undertook liability to serve as guarantor, i.e. to pay Cheong's debts in the event he could not. And unfortunately, the lawyer was not called as a witness.

Accordingly, the CA held that it would "be extending the legal fiction too far" if it found that the Guarantee had been "sealed". Since it was not "sealed", it was not enforceable as a deed. However, it was still possible that the Guarantee might be enforceable as a contract. In this regard, the burden lay on Lim to show that consideration had been sufficiently pleaded and furnished.

B. Whether consideration was sufficiently pleaded and furnished

Seow argued that Lim had himself failed to plead the issue of consideration, and that as such the court could not consider this issue.[3] The HC agreed with Seow. Conversely, the CA held that it was not necessary for Lim to plead the issue of consideration in his statement of claim (i.e. his initial court pleading); it was only necessary for him to address it (in his reply) when Seow raised the lack of consideration as a defence. This was especially since Lim's own claim was based on the relevant document being a deed, and not a normal contract. Accordingly, the CA held that consideration had been adequately pleaded by Lim.

The CA also held that consideration had been sufficiently furnished by Lim. It was well-established that valuable consideration might consist of forbearance, which typically "takes the form of the creditor refraining from instituting legal proceedings or proving in a bankruptcy or winding-up". In this case, Seow had asked Lim, in exchange for her signing the Guarantee, to refrain from taking any further action against Cheong. Lim had upheld his end of the bargain by refraining from suing Cheong on the debts owed, even when Cheong became bankrupt. However, after the initial payment of $40,000, no further payments were made by Seow, even after Lim informed her that she had defaulted on the debt. It was only then – when it appeared that Seow was not going to comply with the terms of the Guarantee – that Lim had lodged a proof of debt against Cheong. Lim's forbearance to file a proof of debt until that point amounted to good consideration.

C. Whether Seow could avoid liability under the Guarantee

Seow also argued that she was not liable under the Guarantee on two grounds. First, she claimed that the Guarantee was against public policy because it contravened the *pari passu* principle[4] in the now-repealed Bankruptcy Act (Cap 20, 2009 Rev Ed). Second, she alleged that there had been a unilateral mistake on her part. The CA rejected both arguments.

(1) Whether the Guarantee was against public policy

The CA reaffirmed that a creditor may enforce the full amount of his debt against any third party who has furnished security (or collateral) for the debt. A creditor does not contravene the *pari passu* principle by enforcing a third party security, because the security never formed part of the bankrupt's divisible assets. Therefore, such enforcement would not prejudice the bankrupt's remaining creditors. On the contrary, the enforcement of the third party security would benefit the rest of the bankrupt's creditors, as that creditor's claim against the bankrupt would be reduced based on the sum of the security that he successfully enforced.

[3] Generally, a court will only consider a party's arguments as specified in the party's written court pleadings.

[4] Generally, the *pari passu* principle means that all unsecured creditors share in the debtor's available assets in proportion to the debts owed to them.

Here, the CA held that Lim had only sought to enforce the Guarantee against Seow, who had furnished a third party security with respect to Cheong's debt. This was an alternative means of recovering the debt owed to Lim, and was entirely permissible. Accordingly, the CA held that the Guarantee did not contravene the *pari passu* principle.

(2) Whether a unilateral mistake vitiated the Guarantee

The CA also rejected Seow's argument that she had harboured a unilateral mistake which rendered the Guarantee invalid and unenforceable as a contract. For a unilateral mistake to invalidate a contract, it must be proven that: one party has made a mistake; the mistake was sufficiently important or fundamental as to a term of the contract; and the non-mistaken party has actual knowledge of the mistaken party's mistake. The CA held that Seow had not been mistaken as to her obligations as a guarantor under the contract. Instead, she had fully comprehended her role as a guarantor and had explained it correctly during trial. Further, there was no evidence that Lim had been aware of her alleged mistake.

D. Whether Seow counterclaim for $40,000 ought to succeed

Seow filed a counterclaim for the $40,000 which she had already paid to Lim, based on his alleged failure to provide sufficient consideration under the Guarantee. In other words, she claimed that Lim was unjustly enriched with the $40,000. This involved a two-part inquiry: what was the basis for the transfer in respect of which restitution is sought; and whether that basis failed.

The CA explained that regardless of the validity of the Guarantee, the counterclaim should have been dismissed, as the sum of $40,000 had been voluntarily paid to Lim towards the settlement of Cheong's outstanding debt. Even absent the Guarantee, Seow's desire to reduce Cheong's debt was a fundamental basis for the payment. As the $40,000 was indeed offset from his outstanding debt, the basis for payment did not fail, and there was no unjust enrichment.

IV. Legal implications and lessons learnt

The CA's decision is instructive for both legal practitioners and clients. It is unequivocal that a physical seal is not required to fulfil the sealing requirement for a deed. However, affixing a physical seal would make it eminently clear to the court that a guarantor intended to execute the guarantee as a deed and not a contract.

In the event where a physical seal is not affixed, lawyers should nonetheless be aware of the possibility that estoppel may be pleaded to stop the guarantor from denying that he intended to execute a deed. As recognised by the CA here, it is settled law "that a person who has executed a document that states it has been 'signed, sealed, and delivered' would, in the usual course, be estopped from denying the sealing if he has delivered the document to the other party knowing that the latter will rely on the document and that party did indeed rely on it to its detriment".

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