

Co-operative Group Food Ltd v A & A Shah Properties Ltd and others [2019] EWHC 941(Ch)

One of the covenants given by a guarantor in a licence to assign was construed as a sub-guarantee and was therefore valid.

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Facts

The appellant (G) was the guarantor (following a transfer of engagements) under a lease granted in 2006 and expiring in 2031. The original tenant under the lease was Somerfield Stores Ltd (T).

In 2011, a licence to assign was granted by the landlord (L) and the lease was duly assigned from T to 99p Stores Ltd (A). The form of authorised guarantee agreement (AGA) required on assignment was in a schedule to the licence and a recital in the licence provided that:

“The Schedule forms part of this Licence and shall have effect as if set out in full in the body of this Licence. Any reference to this Licence includes the Schedule.”

Clause 4.1 of the licence provided that:

“The Tenant [T] and the Tenant’s Guarantor [G] covenant to observe and perform the obligations set out in the Authorised Guarantee Agreement immediately after completion of the assignment.”

Clause 4.2 of the licence provided that:

“.....the Tenant’s Guarantor agrees that its guarantee and other obligations under the Lease shall remain fully effective and:

- (a) to the extent that any provision of this Licence varies the terms of the Lease shall apply to the Lease as varied; and*
- (b) shall extend and apply to the covenants given by and the obligations on the part of the Tenant under this Licence.”*

Both T and A went into administration. L therefore sought rent from G.

Issue

Were clauses 4.1 and 4.2 of the licence to assign direct guarantees by G of A’s obligations under the lease (in which case they were void) or guarantees by G of T’s obligations under the AGA (i.e. sub-guarantees or GAGAs) (in which case they were valid)?

Decision

1. Clause 4.1 was a direct guarantee. Both T and G covenanted to observe the obligations under the AGA and the obligations under the AGA were direct guarantees of A’s obligations under the lease.
2. Clause 4.2 was a sub-guarantee. The recital to the licence made it clear that the licence included the AGA. By clause 4.2(b) of the licence, G was therefore agreeing to guarantee T’s obligations under the AGA.

Points to note/consider

1. Whilst this case is about interpretation, it is a useful reminder of how the Landlord and Tenant (Covenants) Act 1995 (the 1995 Act) has been interpreted by the courts. Both parties in this case accepted that the relevant case-law in this area (Good Harvest Partnership LLP v Centaur Services Ltd [2010] EWHC 330 (Ch) and K/S Victoria Street v House of Fraser (Stores Management) Ltd [2011] EWCA

Civ 904) meant that a direct guarantee by a guarantor of an assignee's obligations under a lease was void (as falling foul of the anti-avoidance provisions in section 25 of the 1995 Act), but a guarantee of a former tenant's liability under an AGA was valid.

2. For the sake of completeness, it is also important to remember that the case of *EMI Group Ltd v O & H Q1 Ltd* [2016] EWHC 529 (Ch) decided that an assignment from a tenant to its guarantor is void (again for falling foul of the anti-avoidance provisions in section 25 of the 1995 Act).

Contact



David Harris

Professional Development Lawyer

david.harris@brownejacobson.com

+44 (0)115 934 2019

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