



After good harvest: House of Fraser sets new fashion in guarantees

A recent Court decision has clarified the position for landlords and tenants in relation to assignments and tenant's guarantors. Since 1996, it has been the case that, when a tenant assigns its lease, it is released from all liabilities under that lease. Often a landlord will insist that an outgoing tenant gives a form of guarantee known as an authorised guarantee agreement (an AGA) on assignment. This has always been valid. Sometimes a landlord will insist that an outgoing tenant's guarantor stands as guarantor for the assignee (a direct guarantee) and/or guarantees the outgoing tenant's liability under the AGA (a sub-guarantee). The Court has now clarified whether a landlord can validly require these guarantees.

Key decisions

Can an outgoing tenant's guarantor guarantee the tenant's liabilities under an AGA (a sub-guarantee)?

Yes. If the tenant can continue to be on the hook by virtue of an AGA, then there is no reason why the guarantor cannot similarly remain on the hook.

Can an outgoing tenant's guarantor guarantee the liability of an immediate assignee (a direct guarantee)?

No, even if it does so voluntarily. Once a tenant assigns its lease, a guarantor should be released from its liabilities under the lease in the same way as the tenant

Are there any circumstances in which the outgoing tenant's guarantor can guarantee the liability of an assignee?

Yes, but only that of a subsequent assignee (i.e. not the immediate assignee). Also, although parties may, in practice, make such an arrangement after any assignment, they will not be able to bind themselves to such an arrangement in, say, the lease or a licence to assign.

Can a landlord require the outgoing tenant's guarantor to accept an assignment of the lease from the outgoing tenant?

No, for the same reason as it cannot require a direct guarantee.

Implications for tenants/guarantors

- All existing direct guarantees are invalid so landlords cannot use these to collect rent from guarantors where the tenant/assignee defaults.

- Landlords cannot in any circumstances legally require an outgoing tenant's guarantor to provide a direct guarantee for an immediate assignee.
- Be prepared for landlords to scrutinise tenant covenant strength more carefully when granting new leases or considering applications for consent to assign. Expect requests for alternative security (e.g. rent deposits).
- Expect landlords to introduce a more rigorous regime for intra-group assignments without consent because direct guarantees are invalid, such as the introduction of financial tests.

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