

Court of Appeal confirms the effect of the disclaimer of a lease upon the liabilities of a guarantor

The recent decision of the Court of Appeal in *Gabriella Shaw v Hazel Doleman*¹ will offer some reassurance to landlords who are facing a period of increasing tenant insolvencies. In *Doleman* the Court of Appeal affirmed that the liability of a tenant guarantor under an authorised guarantee agreement (“AGA”) continues despite the disclaimer of the lease by the liquidator of the insolvent current tenant.

Facts

A tenant (“T”) assigned its lease to a corporate assignee (“A”) with the consent of the landlord (“L”). This was a “new lease” for the purposes of the Landlord and Tenant (Covenants) Act 1995 as it was entered into after 1 January 1996. As a condition of L’s consent, T was required to enter into an AGA in L’s favour in respect of A’s obligations under the assigned lease. Were it not for the AGA, in accordance with the statutory rules introduced by the 1995 Act for “new leases”, T’s obligations under the lease would cease on a lawful assignment. The express terms of the AGA provided that T would remain liable as guarantor for “the period during which the Assignee is bound by the tenant covenants of the Lease” (the “**Liability Period**”).

A subsequently encountered financial difficulties. It fell into arrears regarding its rent liability, vacated the premises and was eventually wound up. A’s liquidator disclaimed the assigned lease as ‘onerous property’ (pursuant to s178 Insolvency Act 1986 (the “**IA 1986**”)), effectively terminating A’s liabilities under the lease.

In reliance upon the terms of the AGA, L sought to make T liable for the tenant covenants under the lease. T contested liability on the basis that its liability as guarantor under the AGA terminated with the liquidator’s disclaimer of the lease, as this had effectively terminated A’s liability under the tenant covenants in the lease.

L argued that T’s obligations under the AGA continued by virtue of the express terms of the AGA as construed in the context of s178(4) IA 1986, which provides that the rights and liabilities of any party other than the insolvent company in respect of disclaimed property will be unaffected by a liquidator’s disclaimer. L submitted that T’s liability as guarantor under the AGA was, therefore, unaffected by the liquidator’s disclaimer and, as the Liability Period was current, T remained liable under the AGA.

¹ [2009] EWCA Civ 283

The Decision

The Court of Appeal² held that T remained liable under the AGA even though the lease had been disclaimed. The effect of s178(4) IA 1986 was that A was deemed to be bound by the tenant covenants under the lease for the purposes of the AGA, notwithstanding that A's covenants to L had been terminated by way of the liquidator's disclaimer.

In reaching its decision the Court of Appeal followed *Hindcastle Limited v Barbara Attenborough Associates Limited*³, which established the position of pre-1995 Act tenancies which do not have the benefit of a statutory release on lawful assignments.

Comment

The decision of the Court of Appeal in *Doleman* confirms the general principle that liability of a tenant guarantor under an AGA may continue for the benefit of the landlord despite the disclaimer of the lease by a liquidator of the current tenant. However, the decision also makes it clear that the Court will look to the precise terms of an AGA in order to establish whether there is an exception to this principle in any given case and legal advice should be sought in each instance to establish whether or not a guarantor remains bound by the terms of a guarantee notwithstanding that the lease has been disclaimed.

If you would like further information regarding this case or the issues raised by it please contact

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² Upholding the first instance decision.

³ [1996] UKHL 19

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