Practitioner Page

Lease Guarantors and Joint Tenants—A Brief Guide for the Unwary

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Guarantors; Joint tenants; Leases; Rent; Subrogation

This Practitioner Page explores some of the rules governing liability of joint tenants and their guarantors for rent under the lease

Where a lease is granted to more than one person, it may be important to decide whether they are liable to the landlord individually or collectively for the rent. Moreover, if a guarantor is made a party to the lease, is he guaranteeing the liability of just one or all the tenants named in the lease? If the guarantor discharges the liability to pay rent to the landlord, can he recover the amount from the defaulting tenant(s)?

Some general principles

The legal estate in land (whether freehold or leasehold) can only be held by co-owners as joint tenants. Such a joint tenancy must satisfy the essential four unities of time, title, interest and possession. If so, there is just one single and indivisible legal estate held by all joint owners together, and they hold it on trust for whoever are the beneficial owners (whether themselves or others). Thus, where a landlord has granted a lease to more than one tenant, those co-tenants will hold the legal estate to the lease jointly.

Who is liable to pay rent if there are joint tenants?

This depends on whether the covenant to pay rent is expressed as being joint, several or joint and several. Most residential leases will impose both joint and several liability on co-tenants. This means that, when more than one person comprises the "Tenant" in the lease, they will each be responsible for complying with the tenant's obligations both individually and together. A typical clause will read as follows:

> "The Tenant hereby jointly and severally covenants with the Landlord during the term to pay the rent at the times and in manner aforesaid ..."

Sometimes, this liability is expressed in the interpretation clause of the lease as follows:

> "In this Lease, obligations owed by or to more than one person are owed by or to them jointly and severally."

If, therefore, the lease refers to several persons as the "Tenant" of the demised property, the landlord may seek to enforce the obligation to pay the whole rent against any one (or more) of those persons throughout the term of the lease.

Nature of a guarantee covenant

A guarantor for the obligations of the original tenant is invariably a party to the lease. In other words, the guarantor's covenant is made with the landlord and the latter can sue on the direct covenant between them. There are generally two forms of guarantee covenant—one, whereby the guarantor covenants that the tenant will perform all his obligations under the lease and the other, whereby the guarantor covenants to pay rent and perform the covenants in the event that the tenant does not.

The first is a typical *guarantee* covenant under which the guarantor promises to the landlord that he will "see to it" that the tenant performs his obligations and so will be in breach the moment the tenant is in default. This will give the landlord a remedy against the guarantor in damages for breach of covenant. The second type of covenant is in the nature of a covenant of *indemnity* (as opposed to one of guarantee) and gives the landlord a remedy in debt in the event that the tenant fails to pay. In some leases, *both* of these formulations will appear together in the guarantor's covenant. A typical composite covenant may read as follows:

> "The Guarantor, as primary obligor, guarantees to the Landlord that the Tenant will comply with all the Tenant's obligations in this Lease. If the Tenant defaults, the Guarantor will itself comply with those obligations and will indemnify the Landlord against all losses, costs, damages and expenses caused to the Landlord by that default."

Thus, under such a covenant, the guarantor is under a duty to ensure that the tenant performs his covenants and he also agrees to indemnify the landlord against losses suffered as a result of the tenant's breach of obligation.

When will the guarantor cease to be liable?

The general rule is that the guarantor's obligations will come to an end on the date on which the contractual term of the lease is expressed to expire: *GMS Syndicate Ltd v Gary Elliott Ltd* [1982] Ch. 1; (1981) 41 P. & C.R. 124. The lease may, however, extend the guarantor's liability beyond the original contractual term: *A. Plesser & Co Ltd v Davis* [1983] 2 E.G.L.R. 70.

During the lease, the guarantor will be liable to pay not only the rent initially agreed under the lease, but also any increased rent which becomes payable on a review of the rent between the landlord and tenant. This is because the guarantor is not discharged from liability if the lease contains an express term (such as a rent review clause) permitting the variation in question: *Selous Street Properties Ltd v Oronel Fabrics Ltd* [1984] 1 E.G.L.R. 50. If, on the other hand, the terms of the lease are substantially varied so as to prejudice the guarantor (and his consent to the variation has not been sought), the guarantor will be automatically released from his covenant at common law: *Holme v Brunskill* (1877) 3 Q.B.D. 495. This will occur when the variation is so fundamental as to amount to a surrender of the existing lease and a re-grant of a new lease. To put it another way, the guarantor is not discharged by a variation of the lease unless the variation has the effect of varying the terms of the guarantee itself: *Metropolitan Properties Co (Regis) Ltd v Bartholomew* [1995] 1 E.G.L.R. 65, where the landlord had varied the tenant's assignment covenant by permitting shared occupation, but this did not alter the nature of the surety covenant which was to guarantee the tenant's obligations under the lease. Many leases, however, will seek to displace the common law rule by expressly providing that the guarantor's liability will not be reduced or discharged by any variation of the lease.

For the sake of completeness, it should be noted that a variation of the lease (on or after 1 January 1996) by an *assignee* of the term and the landlord is governed by s.18 of the Landlord

and Tenant (Covenants) Act 1995. Section 18(3) provides that, where a guarantor is not discharged at common law by a variation (because in the surety covenant the guarantor has agreed not to be), he will not be liable for any increase in liability caused by a variation of covenants in the lease. This will take effect notwithstanding any provision in the lease to the contrary.

If a landlord releases the tenant from liability under the lease, this will act as a release of liability for the guarantor: *Deanplan Ltd v Mahmoud* [1993] Ch. 151.

What is the extent of the liability of the guarantor if the tenant defaults?

This again depends on the wording of the lease. In many leases, as we have seen, the guarantor will covenant with the landlord that the "Tenant" shall pay the rent and, in the case of default in payment, shall pay and make good to the landlord all losses thereby incurred by the landlord. If the lease defines the expression "Tenant" as including several persons who are co-tenants under the lease, this will impose a liability on the guarantor not just for any one individual tenant, but all co-tenants individually and collectively.

Apart from imposing both individual and collective liability, the lease may also expressly provide that the guarantor will be responsible for discharging the obligation to pay rent regardless of whether the landlord elects to pursue any co-tenant or not or agrees to give the tenant time to pay an outstanding liability. A typical guarantor's covenant may, therefore, contain the following proviso:

> "Provided always and it is hereby agreed that any neglect or forbearance of the landlord in endeavouring to obtain payment of the rent when it becomes payable shall not release or exonerate or in any way affect the liability of the Guarantor under this covenant."

A simpler version of this type of proviso may read as follows:

> "Even if the Landlord gives the Tenant extra time to comply with an obligation, or does not insist on strict compliance with the terms of this lease, the Guarantor's obligation remains fully effective."

The legal effect of such a clause will be to impose on the guarantor a primary liability to pay rent which will operate co-extensively with the co-tenants' obligations to pay rent under the lease. It is important, therefore, to read the wording of the lease closely to identify: (1) the precise extent and scope of the guarantor's liability in the event of a failure to pay rent by any one co-tenant and (2) the nature of the guarantor's liability in terms of whether it is a primary or secondary liability in the event of tenant default.

Can the guarantor recover from the defaulting tenant?

If the landlord pursues the guarantor for the arrears of rent, will the latter have any legal recourse against the defaulting tenant?

In the absence of any contractual right of indemnity, the guarantor will have a restitutionary claim against the defaulting tenant to recover the rent arrears paid to the landlord. This claim is based on an implied right of indemnity recognised at common law (i.e. money paid to the landlord for the tenant's use). Since the defaulting tenant obtains the benefit of the payment by the discharge of his liability, he is held indebted to the guarantor in the amount of the payment: *Moule v Garrett* (1872) L.R. 7 Exch. 101 at 104 per Cockburn C.J. and *Brook's Wharf and Bull Wharf Ltd v Goodman Bros.* [1937] 1 K.B. 534 at 543–544, per Lord Wright M.R.

This right of indemnity will be available to the guarantor if the following requirements are satisfied: (1) the guarantor must have made an actual payment of money in discharge of the tenant's liability under the lease; (2) the guarantor must have been compelled to pay this money to the landlord; (3) the guarantor must not officiously have intervened so as to expose himself to the liability to make the payment; and (4) the tenant must have been legally liable to pay the landlord. Given that the guarantor is a surety under the lease (and, therefore, compelled to pay the arrears of rent if demanded by the landlord), these pre-conditions would be satisfied once the guarantor discharges his obligations by making payment to the landlord.

Indeed, the most obvious example of a compulsory payment for the benefit of another occurs where a surety is called upon to pay a sum of money on the default of the principal debtor or the person primarily liable. The reason why he may recover the money so paid is because historically the common law implies a fictional contract of indemnity. A good illustration of this principle is to be found in *Re A Debtor (No 627 of 1936)* [1937] Ch. 156. Here, a surety had given a guarantee for an amount of money borrowed by the debtor up to a sum of £500. The latter made default in payment of the amount borrowed and the bank called on the surety to pay under the terms of the guarantee. The surety discharged the debt due to the bank and then issued proceedings against the debtor to recover the money she had paid. One of the issues before the court was the exact nature of the right of the surety against the debtor. Slesser L.J. stated (at 160):

> "There is no doubt that a surety paying a debt is entitled to recover against the principal, as for money paid to his use."

Similarly, Greene L.J. stated (at 163):

> "It is, in my opinion, settled beyond possibility of dispute that where 'A' at the request of 'B' guarantees payment of 'Bs' debt to 'C', the law implies an undertaking by 'B' to indemnify 'A' in respect of any sums which he properly pays to 'C' under the guarantee. This is merely a branch of a wider rule which is laid down in numerous authorities."

The implied contractual basis for an indemnity is clearly at the forefront of the earlier case law, although today the modern approach is to view the claim as one based on a legal duty to restore what has been obtained unjustly (i.e. a restitutionary claim based on unjust enrichment): see Goff and Jones, *The Law of Unjust Enrichment*, 8th edn (London: Sweet & Maxwell, 2010), Chs 19 and 20.

Does the guarantor have a right of subrogation?

In addition to an implied right of indemnity, the guarantor may be able to take over some of the landlord's rights against the defaulting tenant in respect of the unpaid rent. Normally, if a surety pays a creditor, the surety is entitled by way of subrogation to stand in the shoes of the creditor and pursue the creditor's rights against the debtor. In principle, therefore, this ought also to apply to the situation where a surety is made to indemnify the landlord for non-performance by a defaulting tenant.

A right of subrogation, however, is unlikely to provide any additional advantage to the guarantor (over and above his restitutionary right of indemnity) except, perhaps, where the defaulting tenant is a company in liquidation and the liquidator is using the premises for the purposes of the liquidation (giving the guarantor the opportunity to claim the rent as a liquidation expense with priority over the other creditors of the insolvent tenant). A right of subrogation could also prove useful where the premises are commercial and the tenant has goods which can be seized under

the commercial rent arrears scheme, or where there is a subtenant whose sub-rent can be diverted under the scheme: see, ss.72 and 81 of the Tribunals, Courts and Enforcement Act 2007.

Summary

1. Where there are co-tenants under a lease, liability to pay rent will usually be expressed as being joint and several. This means that each co-tenant will be responsible for complying with the tenant's obligations both individually and together.
2. If the lease defines the expression "Tenant" as including several persons who are co-tenants under the lease, this may impose a liability on the guarantor not just for any one individual tenant, but all co-tenants individually and collectively.
3. If the landlord pursues the guarantor for the arrears of rent, the latter will have a restitutionary claim against the defaulting tenant to recover the rent arrears paid to the landlord. He may also be entitled to be subrogated to the rights of the landlord against the tenant.
4. When acting for a prospective guarantor, it is important to check the wording of the lease to identify the precise scope and nature of his liability as surety under the lease.

The law is stated as at 8 February 2017.