

GUARANTORS – THE ONE THAT GOT AWAY

The recent High Court decision in *Topland Portfolio No. 1 Ltd v Smiths News Trading Ltd* [2013] EWHC 1445 (Ch) acts as a reminder to landlords of just how easy it is inadvertently to release a guarantor from its obligations under a lease.

Facts

In *Topland* the lease was granted to the tenant in 1981 and the guarantor guaranteed the tenant's obligations. The lease contained an absolute prohibition on structural alterations. Despite this, the landlord gave the tenant permission, by way of a licence for alterations, to carry out substantial works which amounted to the construction of a new garden centre.

The tenant company went into administration and was subsequently dissolved. The landlord gave notice to the tenant's guarantor requiring it to pay the rent and other sums owed and to take a new lease of the premises for the remainder of the term.

The guarantor relied on the rule in *Holme v Brunskill* [1877] 3 QBD 495 that a guarantor's liability is discharged by amendments to the underlying contract unless either (a) the guarantor consents to the variation or (b) the variation is insubstantial or incapable of adversely affecting the guarantor. The guarantor argued that the licence for alterations substantially enlarged its obligations under the lease and as it was neither a party to the licence nor had given its consent, it had been released from its liability under the lease.

Decision

The High Court held that the guarantor had been released from its obligations under the lease. The

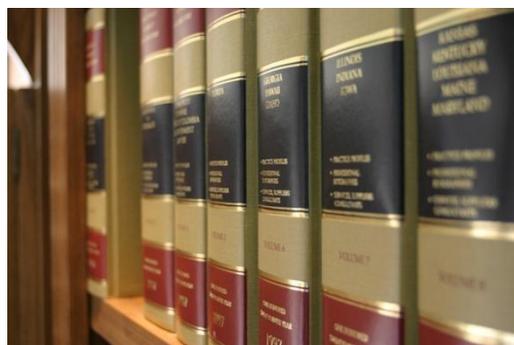
bargain that the guarantor had struck when guaranteeing the tenant's obligations did not

extend to the structural works permitted by the licence for alterations. The works under the licence could only be carried out by varying the lease, otherwise the works would have been in breach of the alterations covenant prohibiting structural alterations.

As such by increasing the guarantor's exposure and not making the guarantor a party to the licence or obtaining their consent, the licence for alterations amounted to a variation of the lease and the guarantor had therefore been discharged from its obligations.

Consequences

Where tenant's obligations are guaranteed, landlords need to be careful in agreeing variations or supplemental documents to the lease. Variations are not always immediately obvious and where there is any doubt, the guarantor should either be made party to the licence or their consent obtained.



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