

Legal alert

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Landlord and Tenant (Covenants) Act 1995 – Assignment to guarantor is void

EMI Group Limited v O&H Q1 Limited [2016] EWHC 529 (Ch)

In 1996, the now-defunct music retailer, HMV, took a lease of shop premises in the Crowngate Centre, Worcester. EMI Group, the parent company of HMV, joined in the lease as guarantor.

In 2014, as part of a plan to try to keep the HMV business afloat, the lease was assigned (with landlord's consent) by HMV to EMI. Sadly, it soon became apparent that the business was no longer viable.

EMI then tried to argue that, under the provisions of the Landlord and Tenant (Covenants) Act 1995, its obligations had been "suspended".

When this argument came to court, the judge, Amanda Tipples QC, quite rightly dismissed it as nonsense. The notion of "suspended" lease obligations did not work as a matter of law.

But unfortunately, in deciding the case in the landlord's favour, the judge failed to resist the temptation to opine on the precise effect of the 1995 Act on an assignment by a tenant to its guarantor. She had two conflicting strands of judicial analysis to choose from.

On the one hand, if the assignment by the tenant to the guarantor was valid under the 1995 Act (as so hinted by Morgan J in *UK Leasing Brighton Ltd v Topland* (2015) and in a subsequent talk by him to the Property Bar Association), then EMI remained liable to the landlord in its capacity as assignee.

On the other hand, if the assignment by the tenant to the guarantor was void under the 1995 Act (as so hinted by Lord Neuberger in *K/S Victoria Street v House of Fraser* (2011)), then HMV remained liable to the landlord as original tenant and EMI remained liable to the landlord in its capacity as HMV's guarantor.

Judge Tipples said that she preferred Lord Neuberger's analysis over Morgan J's, although she acknowledged that it was "unattractively limiting and commercially unrealistic".

For example, many leases in the past have been assigned by tenants to guarantors as part of group restructuring arrangements. All interested parties, including the Land Registry, assumed that such assignments were valid. If, however, they are all void, as the Neuberger analysis suggests, the effects could be far reaching.

Moreover, it logically follows from the Neuberger analysis that an assignment by the tenant to itself would also be void under the 1995 Act. For example, consider a lease granted to partners A,B,C and D. If D retires from the partnership and is replaced by E, then any attempt by A,B, C and D to assign the lease to A,B,C and E will be void. Again, the effects of unravelling such arrangements could be far reaching.