

Another guarantee struck down

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Background

As we previously reported in our Legal Alert in March 2010, the industry was startled by the Court's decision in *Good Harvest* that a guarantee agreement of an assignee's obligations entered into by the previous tenant's guarantor was unenforceable in the light of the anti-avoidance provisions of the Landlord and Tenant (Covenants) Act 1995 ("the Act"). We anticipated then that the consequences of that decision would be to render some existing guarantees unenforceable and, from a tenant's point of view, might make assignments more difficult to achieve, especially in inter-group transfers, because a landlord will not be free to accept guarantees from the existing guarantor.

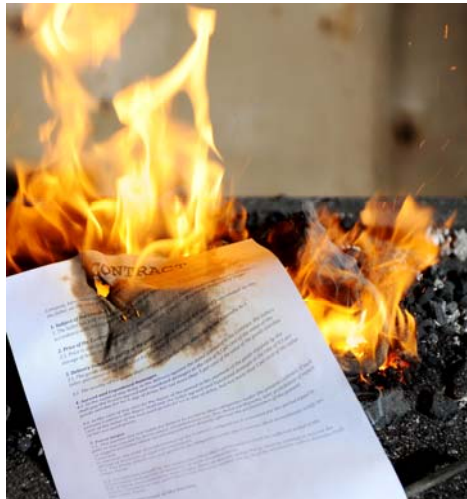
It was then understood that *Good Harvest* was being appealed but unfortunately that appeal was settled without being heard and instead the decision in *Good Harvest* has been applied in another recent High Court case, *K/S Victoria Street v House of Fraser (Stores Management) Ltd and Others*, in which a similar guarantee has been held to be unenforceable.

Facts

The landlord claimant entered into an agreement with various companies within the House of Fraser group by which it was to grant a lease to one group company, guaranteed by the parent company and then subsequently the lease was to be assigned to a different group company and the parent company was to guarantee that assignee's obligations. The lease was subsequently granted and guaranteed by the parent company but the tenant then refused to assign the lease to the other group company as agreed and the parent company refused to guarantee the proposed assignee. Accordingly the landlord brought proceedings for specific performance of the agreement. One of House of Fraser's defences was that the agreement for the parent company to guarantee the proposed assignee was void as a result of the anti-avoidance provisions of the Act. Both parties applied for summary judgment.

Decision

Although the Court considered that the judge's reasoning in *Good Harvest* was flawed in certain respects, it was unable to say that the decision was wrong and accordingly it should be applied. On this basis the Court held that the guarantee was indeed void as a result of the anti-avoidance provisions of the Act and House of Fraser was therefore successful on this aspect of its defence. Accordingly it was a matter for the landlord to decide whether it still wished to push for specific performance of the tenant's obligation to assign the lease to the other group company but without the benefit of the parent guarantee. We do not presently know whether or not this judgment will be appealed.



Consequences

The decision reinforces the position established by *Good Harvest* and it will be necessary for a litigant to go to Court of Appeal level to challenge the principle established by *Good Harvest*. In the circumstances landlords should continue to assume that any guarantee given by the previous tenant's guarantor is likely to be void and tenants who wish to undertake a group reorganisation entailing an intra-group assignment of leasehold interests will have to give careful thought to whether or not there is another company within the group which could offer a viable guarantee of the proposed assignee's liabilities.