

## LEASE GUARANTEES- CAN THEY EXTEND TO AN “AGA”?

### The issue

Since the introduction of the Landlord and Tenant (Covenants) Act 1995 (**the Act**) it has been unclear whether a guarantee of the tenant’s obligations in the lease can be made to extend to any Authorised Guarantee Agreement (**AGA**) entered by the tenant. Leases granted after 1 January 1996 normally require the tenant to give an AGA as a condition of landlord’s consent to an assignment of the lease. The risk is that any clause which either:

- makes the guarantor liable for the assigning tenant’s covenants in the AGA, or
- requires the guarantor enter into a guarantee of the AGA as a condition of consent to assignment

is unenforceable because of the anti-avoidance provisions in the Act. Many leases and guarantees contain these clauses, although there has always been uncertainty about their effectiveness.

### The case

Now, 14 years after the Act came into force, the matter has finally been litigated and the High Court decision is that these clauses are indeed void as an attempt to restrict or frustrate the operation of the Act. Mr Justice Newey in the recent case of **Good Harvest Partnership LLP v Centaur Services Limited [2010] EWHC 330 (Ch)** concluded that the Act was meant to ensure that obligations of the tenant’s guarantor ended on the assignment of the lease. The anti-avoidance provisions were to be interpreted “generously” and if Parliament had intended a tenant’s guarantor to be able to guarantee the obligations of an assignee, the Act would have said so.

### The consequences

#### arrears

Where there has been an assignment and arrears have accrued the landlord will now be unable to recover these from the original guarantor. Where a guarantor has paid such arrears in the past it may consider claiming these back from the landlord.

#### requests for consent to assign

Landlords should look more carefully at the covenant strength of the proposed assignee and may require further security in addition to the AGA before granting consent now that the guarantee cannot extend to the AGA. The landlord cannot assume the original guarantee will cover the tenant’s obligations under the AGA, even if that is what it says.

#### new leases

Landlords should carefully consider the covenant strength of the proposed tenant rather than relying on the guarantor. In particular where a parent company guarantees a lease for its subsidiary of lesser covenant strength or where directors guarantee a lease granted to their newly created company. Landlords in these circumstances may wish to impose more stringent pre-conditions on assignment if they cannot have recourse to the guarantor after assignment and may be left with an AGA of questionable worth from the assigning tenant.

January 2010

**Disclaimer:** This briefing is not intended to be a complete coverage of the law in this area. Legal advice should always be taken in any particular case.

KNOWLEDGE\26251\v.2

Burges Salmon LLP Narrow Quay House Narrow Quay Bristol BS1 4AH  
tel: +44 (0) 117 939 2000 fax: +44 (0) 117 902 4400

Chancery Exchange 10 Furnival Street London EC4A 1AB  
tel: +44 (0) 20 7685 1200 fax: +44 (0) 20 7685 1266

[www.burges-salmon.com](http://www.burges-salmon.com)

