

# Guarantees in play

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## Guarantees in play

Traditionally landlords have insisted on tenants providing a guarantor where covenant strength is weak; both to underpin compliance and to support valuation. In the current economic climate landlords are increasingly looking to guarantors as tenants default, but it is not plain sailing as it is easy to lose the benefit of a guarantee or to misunderstand what it covers.



### My tenant has failed to pay the rent, what do I do?

Where a tenant has failed to pay the rent the first port of call for a landlord is frequently to instruct a bailiff to enter the property and seize goods as security for payment of the debt. If the property is sublet, the landlord can serve notice on

the subtenant requiring it to pay rent to the landlord direct. Consideration may also be given to serving a statutory demand.

### Guarantors and other parties

A landlord may also have rights against both a guarantor and a previous tenant

who has provided an authorised guarantee agreement. For older leases (pre-dating January 1996) the landlord may also have recourse against previous tenants and guarantors.

The first step for the landlord is to work out what rights it has against whom, if they are likely to have the money to pay what is owed and if they can be easily found. The vogue for taking guarantees from offshore parent companies to improve valuation may come back to haunt some landlords, as the cost of enforcing judgments in other jurisdictions can be out of all proportion to the amount owed.

It is important to remember that a landlord's right to claim for rent and service charge from a former tenant or its guarantor will be lost if a notice detailing the amount claimed is not served on them within six months of the due date. Payment pursuant to such a notice will give the payer the right to require the grant to it of an 'overriding' lease of the space.

### Problems with guarantees

When considering what rights it has against a guarantor or former tenant a landlord should check to see if anything

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has happened that would either have released them or put them into a bargaining position. An extension of the term of a lease or of the area demised will have given an automatic release to a guarantor unless a new guarantee was completed at the same time. Depending on the wording of the lease, other changes to the lease or concessions to

the tenant might also have had the effect of letting the guarantor off the hook – for example changing the rent payment pattern from quarterly to monthly or varying a lease to permit underletting of part.

Landlords need to remember too that a guarantor is only liable for what it has

signed up to. So, for example, where a lease prohibits structural works but a landlord has nevertheless given consent to structural works, the guarantor will not be liable to reinstate if the tenant fails to do so, unless the guarantor was also a party to the licence for works and guaranteed the tenants obligations in it.

### Disclaimer

Where a tenant goes into liquidation the liquidator will be able to disclaim a lease if it is an 'onerous' contract – and that will be the vast majority of leases of commercial space. The disclaimer will release the current tenant but will not automatically release a guarantor. However, if the landlord takes 'possession', the guarantor will be automatically released from liability for future rent and compliance with lease terms. 'Possession', for these purposes is undefined but would certainly cover not only literally moving into the premises, but also going into the premises to inspect or carry out works, and is likely to cover putting the premises on the market or paying the rates on them.

A landlord therefore needs to consider its position very carefully following disclaimer. There is nothing to stop it sitting back and demanding rent quarterly from a guarantor as it is under

no duty to mitigate. A guarantor in such a position is likely to want to strike a deal, but great care needs to be taken during the negotiations to ensure that those negotiations themselves don't constitute taking 'possession'.

### Moral going forward

1. Do not vary lease terms, give side letters or agree to anything that is not strictly in accordance with the lease terms without first checking that you are not releasing a guarantor.
2. If you are willing to permit something outside what was originally contemplated by the lease, the guarantor will need to be signed up to it.
3. Remember that a claim for rent and service charge against a former tenant or its guarantor is lost if notice is not served within six months of the due date.
5. Following disclaimer, be careful that your actions do not release your guarantor.
6. On new lettings consider taking a rent deposit instead of a guarantee – cash is surely king!

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