Neutral Citation Number: [2019] EWHC 941 (Ch)

Case No: CH-2018-000242

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

ON APPEAL FROM THE DECISION OF MASTER CLARK
OF 18TH MAY 2018

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12/04/2019

Before :

MR JUSTICE MANN

- -

Between :

Co-operative Group Food Limited	**Appellant**
and	
(1) A & A Shah Properties Limited	
(2) Frank Forney & Partners LLP	**Respondents**

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Mr Nicholas Taggart (instructed by **Co-operative Group Legal Department**) for the **Appellant**
Mr Mark Warwick QC and **Mr Neil Mendoza** (instructed by **Adams and Remers**) for the **First Respondent**

Hearing date: 27th February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MANN

Mr Justice Mann :

Introduction

1. This is an appeal from a decision of Master Clark of 18th May 2018 in which she decided a short point of construction on a summary judgment application. The essential questions raised in this action are whether or not guarantee provisions in a licence to assign certain leased premises are enforceable or whether they are struck down by the provisions of the Landlord and Tenant (Covenants) Act 1995 ("the Act"). She decided the point in favour of the landlord (who had the benefit of the guarantees) and the guarantor seeks to appeal that decision with the permission of Morgan J.

The facts

2. The claimant landlord (respondent to this appeal) is A & A Shah Properties Ltd, and it is the owner of a supermarket and car park at 1623 and 1631 Coventry Road, Yardley, Birmingham B26 1DD. By a lease dated 22nd June 2006 the property was let to Somerfield Stores Ltd for a term expiring on 21st June 2031. Somerfield Ltd stood as surety under the lease in familiar terms which do not need to be set out here; there was a qualified prohibition on assignment which again does not need to be set out here. In January 2011, via a transfer of engagements, Cooperative Group Food Ltd (the current appellant) assumed liability under the guarantee. It is agreed for the purposes of this action that that entity can be treated as being in exactly the same position as Somerfield Ltd.

3. In December 2011 the tenant wished to assign to 99p Stores Ltd. In that connection a Licence to Assign and an Authorised Guarantee Agreement ("AGA" - as referred to in the Act), both dated 6th December 2001, were entered into, and the assignment followed. In the Licence the appellant entered into guarantee obligations in relation to the future performance of the lease obligations, and it is those obligations which are the subject of this action. In due course both the original tenant and the assignee entered into administration and the landlord (claimant) sought the continuing rent from that guarantor (in using that term I do not prejudge any of the issues which arise in this appeal) under the provisions contained in the Licence, and the guarantor resisted on the footing that the Act prevents its being liable. It is that question which the Master determined against the guarantor.

4. In this appeal Mr Nicholas Taggart appeared for the appellant guarantor; Mr Mark Warwick led for the respondent landlord.

5. For the sake of completeness I record that the second defendants in the action are a firm of solicitors who acted for the guarantor in relation to the Licence and against whom a negligence claim is made. That claim has been stayed for the time being. The solicitors appeared and were represented before the Master, but they did not appear before me.

The documents

6. The licence to assign contained the following provisions. In what follows the respondent to this appeal was described as the "Landlord"; the then tenant was the "Tenant"; 99p Stores Ltd was the "Assignee"; and the appellant was described as "the Tenant's Guarantor".

7. Recital (E) recited the fact that the Tenant's Guarantor had entered into a guarantee and other covenants in respect of the tenant covenants in the Lease. Recital 1.1 defined the Authorised Guarantee Agreement as meaning the agreement set out in the form annexed in the Schedule to the Licence. Recital 1.7 reads:

> "1.7 The Schedule forms part of this Licence and shall have effect as if set out in full in the body of this Licence. Any reference to this Licence includes the Schedule."

8. Clause 2 contained the permission to assign which was expressed to be "In consideration of the obligations on the Assignee and the Tenant in this Licence…" (Clause 2.1). Clause 2.3 reads:

> "2.3 It is a condition of this consent that the Tenant enters into the Authorised Guarantee Agreement immediately after the completion of the assignment."

9. Clause 3 contains obligations within the assignment itself. They are referred to by Mr Taggart as being relevant part of his case, but it is unnecessary to set them out verbatim. It is sufficient to describe them as containing obligations undertaken by the Assignee not to occupy prior to completion of the assignment, to notify the landlord of name and address of the person to whom demands should be sent, to notify the landlord of completion, provide a certified copy of the assignment and pay a small registration fee (£50), and apply for registration of the assignment at HM Land Registry (and send official copies of the entries to the landlord). There is one obligation on the Tenant – not to allow the Assignee to occupy prior to completion.

10. Clause 4 is the important clause on which this appeal turns:

> "**Authorised Guarantee Agreement**
>
> 4.1 The Tenant and the Tenant's Guarantor covenant to observe and perform the obligations set out in the Authorised Guarantee Agreement immediately after completion of the assignment.
>
> 4.2 The consent granted by this Licence is granted at the request of the tenant's Guarantor and the Tenant's guarantor consents to the Tenant entering into this Licence. In consideration of the consent granted by the Landlord and subject to clause 4.3 the Tenant's Guarantor agrees that its guarantee and other obligations under the Lease shall remain fully effective and:
>
> (a) to the extent that any provision of this Licence varies the terms of the Lease shall apply to the Lease as varied; and
>
> (b) shall extend and apply to the covenants given by and the obligations on the part of the Tenant under this Licence.
>
> 4.3 Nothing in this Licence shall prevent or limit the operation of section 18 of the Landlord and Tenant (Covenants) Act 1995."

11. Clause 5 obliges the Tenant to pay the Landlord's costs of the Licence on completion subject to a maximum of £3,250 plus VAT. Clause 7 contains an indemnity given to the Landlord by the Tenant and the Assignee against all costs and claims arising from any breach of the terms of the Lease.

12. The claims that the landlord makes against the guarantor are said to arise under clause 4. The crucial question is whether the obligations of the guarantor are under a sub-guarantee or whether they arise under a direct guarantee. They would be sub-guarantee claims if the effect of those provisions was that the former tenant guaranteed the obligations of the new tenant (Assignee) and the guarantor guaranteed those obligations of the former tenant; they would be a direct guarantee if both the former tenant and the guarantor guaranteed the obligations of the new tenant (Assignee) jointly and/or severally. The Master, in a short judgment, held that both clause 4.1 and clause 4.2 contained sub-guarantees with the result that the guarantees were valid and enforceable.

Had she held otherwise they would not have been enforceable because of the provisions of the Act. It is from that determination that the guarantor appeals.

The legal background

13. Prior to the Act an original tenant (and a subsequent tenant who gave a similar perpetual covenant) would be liable (as a result of privity of contract) for the performance of the obligations under the lease for the whole term of the lease. A guarantor of that obligation would be similarly so liable. The Act had effect of removing the perpetual liability. So far as tenants were concerned that liability was removed from tenants under tenancies coming into force after the Act (section 5), and it was also removed from guarantors (section 24). (Landlords also benefited but I do not need to dwell on that.) Tenants were, however, allowed to enter into Authorised Guarantee Agreements ("AGAs") under certain conditions and on certain terms, so as to provide an effective guarantee in relation to the liabilities of their assignees. The provisions of the Act are somewhat long and not straightforward, and they have been the subject of judicial decisions over the intervening period, most notably (for present purposes) in *Good Harvest Partnership LLP v Centaur Services Ltd* [2010 Ch 426 and *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2012] Ch 497. Mr Taggart's skeleton argument contained a learned discourse on how the Act operated in relation to tenants and guarantors, and Mr Warwick accepted that account of the law (for the purposes of the appeal before me – he reserved the right to challenge some of the decisions relied on by Mr Taggart if this case were to go further). Mercifully I am spared having to consider Mr Taggart's considerable level of detail both by that acceptance by Mr Warwick and by their joint acceptance of the following key propositions, based on the authorities:

    1. If clause 4 of the Licence contained a guarantee of the guarantee obligations of the former tenant under the AGA (or under similar obligations), it was valid and the guarantor was liable for the rent claimed. In other words, if it contained a sub-guarantee then it was valid.

    2. If clause 4 contained a direct guarantee by the guarantor of the obligations of the assignee its effect was nullified by the Act and the guarantor was not liable for the rent claimed.

    3. The AGA in this case, given by the Tenant, was a valid AGA within the Act and enforceable according to its terms.

14. Thus this case boils down to a short question of construction – are <u>either</u> of the obligations in clause 4 (there are separate obligations in each of clauses 4.1 and 4.2) sub-guarantees, in which case the landlord succeeds, or are they <u>both</u> in the nature of direct guarantees, in which case the guarantor succeeds. The landlord only has to win on one; the guarantor has to see off both of them if it is to escape liability.

Clause 4.1

15. The Master held that this clause 4.1 contained a sub-guarantee by the guarantor of the Tenant's liabilities under the AGA. She held, shortly, that the literal construction of the clause was a strained one because the guarantor ("Tenant's Guarantor") was promising to observe the obligations in an AGA to which it was not a party. She preferred a construction under which the guarantor was promising that the Tenant would perform its obligations under the AGA (ie it was a sub-guarantee) because that is the more likely construction where the guarantor was not (but could have been) a party to the AGA.

16. I respectfully disagree with the Master on this clause. There is an oddity about a clause which purports to bind the guarantor to performance of an agreement to which it is not a party, but there is an almost equal oddity in the Tenant's apparent repetition of obligations which it is going to be under pursuant to the AGA anyway. The oddity is not removed by the Master's construction. The wording of the clause seems pretty plain – the Tenant covenants to observe the obligations under the AGA, and the guarantor (Tenant's Guarantor) covenants to observe the obligations under the AGA. They both promise to do the same thing. The obligations under the AGA are guarantees of the obligations of the assignee, so that that would make the guarantor's obligation in effect a direct guarantee of the assignee and it is accepted (for the purposes of this appeal) that that would be avoided under the Act. I do not think it is really possible to read the clause in a way which provides the alternative proposed by the Master, so there is not an alternative construction to choose from. Mr Warwick submitted that the Master's construction is the more natural one when one knows that the surety is not a party to the AGA. Again, I disagree. Knowing that fact makes the clause puzzling, but it does not really open up the alternative construction. It does not make it possible to read the clause as though it read "The Tenant's Guarantor will ensure that the Tenant performs the obligations in the AGA", even with an awareness that the parties had the Act in mind (see clause 4.3).

Clause 4.2

17. The Master decided this point too in favour of the landlord. In essence she accepted the submissions of the landlord to the effect that sub-paragraph (b) of the Licence created a new obligation which guaranteed obligations arising under the Licence and that those obligations included the Tenant's obligations under the Licence, which included the obligations under clause 4.1 which in turn included the obligations under the AGA. Thus it was a sub-guarantee which survived the avoiding provisions of the Act.

18. The appellant challenged that determination. Mr Taggart submitted that clause 4.2 contained variations of the existing guarantee, to cover new obligations. That was its natural meaning, and its effect would be avoided by the Act. It was not a new guarantee, or at least not in any material respect. Clause 4.1 already seemed to contain an agreement to observe the terms of the AGA, and it would be eccentric to read clause 4.2 as containing a guarantee that the former Tenant would do the same. The clause was not redundant because it had a separate and unobjectionable effect, which was to guarantee the new obligations which the Tenant undertook under the Licence itself.

19. Clause 4.2(b) is a slightly odd provision. It was presumably intended to have some useful effect, but the effect proposed by Mr Taggart is a somewhat strange one. Other than obligations in relation to or under the AGA, the only covenants given by the Tenant under the Licence itself, or obligations undertaken by the Tenant under the Licence itself are very limited. They are the obligation not to allow the Assignee to occupy before completion, the obligation under clause 5 to pay the costs of the Licence up to a maximum sum of £3,250 and to indemnify the Landlord against all costs and claims arising from a breach of the terms of the Licence. Those obligations do not naturally call for a guarantee, especially since a future obligation to pay the costs would inevitably be discharged on completion anyway. It is, however, one way of reading the clause.

20. However, I do not consider it to be the correct way. I consider that on the true construction of this Licence the "obligations on the part of the Tenant under this Licence" include the Tenant's (ie former tenant's) obligations under the AGA. There are two routes to this conclusion.

21. The first is the Master's route. Clause 4.1 contains a covenant by the Tenant to observe and perform the obligations set out in the AGA. That gives rise to obligations under the Licence. I can see no reason why those should not be covered by the clear guarantee given by clause 4.2(b). The wording is capable of achieving that result, and there are no real contra-indications. Mr Taggart points out what he says would be the eccentricity of the direct covenant by the guarantor in clause 4.1 (which is avoided by the Act) and a co-extensive guarantee obligation under clause 4.2. I agree it may be a little odd, but if clause 4.2 were not to apply to the former tenant's obligation under clause 4.2 one would have to read in words such as "save for those in clause 4.1". I can see no reason for reading those words in, and to do so would be contrary to the principles of contractual interpretation.

22. The other route is via the provisions of clause 1.7. It seems that the provisions of clause 1.7 did not feature in the debate before the Master, but I consider them to be important. Both sentences are relevant for these purposes but the second sentence is probably the more important. It provides that any reference to the Licence includes the Schedule. That means that one should read clause 4.2(b) as if it read "… the obligations on the part of the Tenant under this Licence and the Schedule". There is no apparent reason not to – clause 1 (the definitions clause) does not express the definitions to be "save

where the context otherwise requires", or anything like that. Strictly the Schedule does not itself contain obligations – it sets out the terms of a separate document which is to be entered into. However, once one reads the words in the only sensible effect that can then be given to the clause is to treat the reference to the Schedule as being to the obligations described in the schedule. That means that under the clause the guarantor guarantees those obligations, and that guarantee would be a sub-guarantee.

23. This effect of clause 4.2(b) is reinforced by the first sentence of clause 1.7. That provides that the Schedule is to have effect as if its terms were set out in the Licence itself. This is a slightly odd provision, but if one treats it as done then, when set out in the Licence, its terms would be capable of having direct contractual effect. That effect would then be an obligation of the former tenant in the Licence, which would in turn be an obligation covered by the guarantee in clause 4.2(b). There would then be a guarantee (in clause 4.2(b)) of a guarantee (in the Schedule, which is an AGA). So clause 4.2(b) would be a sub-guarantee which would not be invalidated by the Act.

24. In my view each of those constructions of clause 4.2(b) is a proper one. I have borne in mind Mr Taggart's submissions to the effect that clause 4.2 starts from an existing guarantee which is itself avoided by the Act, but the answer to them is that the guarantee is "appl[ied] and extended" by paragraph (b), and the natural effect of the use of those words in their context is to create a fresh obligation.

25. I have reached that conclusion without, for the moment, having to bring into play the authorities on the process of construction which each side invoked. I consider it to be the more natural effect of the words in their commercial context than one which leaves paragraph (b) covering only the limited obligations contained in the Licence itself (and not in the AGA). Nothing in the cited authorities dissuades me from my view or approach. Those authorities were, briefly, as follows.

26. Mr Warwick sought to invoke the principle from a line of authorities which are dealt with by Sir Kim Lewison in his book on The Interpretation of Contracts (6th Edition) at p425 where he summarised the principle as follows:

> "Where two interpretations of an instrument are equally plausible, upon one of which the instrument is valid, and upon the other of which it is invalid, the court should lean towards that interpretation which validates the instrument."

27. Mr Warwick's invocation of the principle is obvious. If clause 4.2(b) is capable of bearing a construction which gives rise to a sub-guarantee and a construction which

does not, then on the basis of this principle the court should favour the former interpretation.

28. I agree that that principle supports the two interpretations of clause 4.2(b) which I have just set out. The principle is based on the premise that businessmen intend their bargains to have effect - indeed, commercial effect:

> "[The principle] is a continuing echo in all the modern cases on construction which stress the need to opt for a meaning which will produce the most commercially workable version of the contract." (per Patten LJ in *Tindall Cobham 1 Ltd v Adda Hotels* [2015] 1 P & CR 5 [2014] EWCA Civ 1215 at para 30).

While it is apparent from clause 4.3 that the parties acknowledged the effect of the Act and did not intend to prevent or limit its operation (not that they could have done so anyway), it is equally apparent that they intended meaningful obligations to be assumed by the guarantor notwithstanding the Act. The constructions which I have proposed are consistent with that. Attention was drawn to the fact that the principle is, in some of the cases, said to apply only where two apparent constructions were equally plausible, but that does not help Mr Taggart. In my view his construction is not equally plausible; if I am wrong and it is equally plausible, then the principle applies to deprive him of victory.

29. Nothing else in *Tindall Cobham*, relied upon by Mr Taggart, gainsays this result. In that case Patten LJ held that the principle should not be applied to support a construction which was not available on the words used (see in particular paragraph 36), but that is not the case in the present matter.

30. The principles in *Wood v Capita Insurance Services Ltd* [2017] AC 1173 were invoked by both parties. I have borne them in mind in reaching my conclusion, which in my view gives effect to the choice of words of the parties and, so far as applicable, the commercial sense of the agreement.

31. Mr Warwick was keen to stress the factual matrix, which he said involved the knowledge of the drafting lawyers of the judgment in the *K/S Victoria Street* case delivered on 27th July 2011, just over 4 months before the Licence was concluded. He submitted that in the light of that case any lawyer would have known that a joint guarantee would be struck down under the Act. Assuming in his favour that such knowledge is part of the factual matrix against which this contract should be construed, I do not think that that helps in the process of construing this contract. It does not help in ascertaining the plain meaning of the words and effect of clause 4.1, and does not help in choosing the obligations to which clause 4.2(b) refers.

32. It is unnecessary for me to refer to the other well-known authorities to which reference was made.

Conclusion

33. I therefore find that clause 4 imposes valid guarantee obligations on the guarantor (appellant). Since that is what the Master found, I dismiss this appeal.