

## **Property PSL Drafting Notes**

### **Authorised Guarantee Agreement**

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.....[Extract from Property PSL Authorised Guarantee Agreement].....

- 2.1.8 any obligation on any party not to do, or omit to do anything includes an obligation not to allow that thing to be done or omitted to be done by any employee, servant, agent, consultant or other person acting on that party's behalf, or under that party's control;
- 2.1.9 references to any statutes or statutory instruments include any statute or statutory instrument amending, consolidating or replacing them respectively from time to time in force, and references to a statute include statutory instruments and regulations made pursuant to it.
- 2.2 If any provision of this Deed is held to be invalid or unenforceable then such provision shall (so far as invalid or unenforceable) be given no effect and shall be deemed not to be included in this Deed but without invalidating any of the remaining provisions of this Deed.

### **3. AUTHORISED GUARANTEE**

This guarantee [is given pursuant to a provision in the Lease requiring it to be given and] is an authorised guarantee agreement for the purposes of section 16 of the 1995 Act.

### **4. FORMER TENANT'S COVENANTS<sup>1</sup>**

#### **4.1 Agreement to guarantee**

The Former Tenant agrees with and guarantees to the Landlord, and (without the need for any express assignment) the Landlord's successors in title, throughout the Term<sup>2</sup> and until such time as the Assignee is released<sup>3</sup> pursuant to the 1995 Act to observe and perform all the requirements of this guarantee.

#### **4.2 Guarantee and indemnity**

The Former Tenant covenants by way of primary obligation that the rents and other payments to be made by the Assignee will be paid in the manner and at the times specified and that all the Tenant Covenants will be duly performed and observed, and further that if the Assignee defaults the Former Tenant will by way of indemnity fully compensate the Landlord for all losses and expenses of any kind incurred as a result.

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<sup>1</sup> See also Property PSL Drafting Notes on Guarantee provisions in leases.

<sup>2</sup> Use of the term "the Term" works so that, if the assignee holds over under the 1954 Act, then the former tenant remains liable. A former tenant might reasonably argue that such an extension of liability is unfair since the former tenant has no say over whether, and for how long the assignee might hold over.

<sup>3</sup> If the assignee lawfully assigns before then, and obtains a release under section 5 LTCA 1995, the AGA comes to an end (as it must under section 16(4)(b) LTCA 1995).

## Property PSL Drafting Notes

### Authorised Guarantee Agreement

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#### 4.3 Events disregarded<sup>4</sup>

None of the following will release, exonerate, or in any way lessen the liability of the Former Tenant:

- 4.3.8 the giving of extra time to the Assignee to comply with an obligation, or any forbearance<sup>5</sup> on the part of the Landlord to enforce the Tenant Covenants;
- 4.3.9 the invalidity or unenforceability of any obligations of the Assignee, or the disclaimer<sup>6</sup> of the Lease;
- 4.3.10 any refusal by the Landlord to accept any money tendered as rent by or on behalf of the Assignee at a time when the Landlord is entitled (or would be entitled after the service of a notice under section 146 of the Law of Property Act 1925) to re-enter the Property;
- 4.3.11 the taking of or refraining from any action by the Landlord in connection with any security given or to be given by the Assignee;
- 4.3.12 any variation<sup>7</sup> of the terms of the Lease agreed between the Landlord and the Assignee, whether or not the Former Tenant is a party;
- 4.3.13 the event that the Assignee (being a corporate body) is wound up or ceases to exist or (being an individual) dies or becomes incapable of managing his affairs;

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<sup>4</sup> The ordinary law relating to sureties applies to an AGA. Therefore, a surety is released if the principal contract is altered, or if the parties to the principal contract otherwise act in a manner which prejudices the surety. Accordingly, the AGA will contain provisions to attempt to maintain liability in those cases. In certain circumstances (mainly where the landlord and tenant act in a manner which is detrimental to the guarantor), the guarantor will be completely released from his obligations by operation of law. The leading authority is **Holme v Brunskill** (1877) 3 QBD 495. In respect of any agreement between landlord and tenant relating to the lease, consultation should be conducted with the guarantor. To avoid any argument that the authorised guarantor has been released, it is advisable to attempt to ensure that the authorised guarantor executes any supplemental document.

<sup>5</sup> To prevent release from happening, the obligations of the authorised guarantor are stated to apply notwithstanding any neglect on the part of the landlord to pursue rent or other breaches of covenant. An authorised guarantor may exercise rights of indemnity against the assignee by subrogating to the landlord's rights. If the landlord forgoes its rights, the authorised guarantor is prejudiced.

<sup>6</sup> A disclaimer arising out of the assignee's insolvency will not in any event result in the discharge of the guarantee. See **Hindcastle Ltd v Barbara Attenborough Associates Ltd** [1996] 15 EG 105.

<sup>7</sup> A variation of the lease agreed between landlord and assignee will operate to release an authorised guarantor from his covenants. See, for example, **Howard de Walden Estates Ltd v Pasta Place Ltd** [1995] 1 EGLR 79. A concession often asked for is that this clause is restricted to non-prejudicial variations (so that prejudicial variations would operate to release the guarantor). A landlord should resist offering this.

## Property PSL Drafting Notes

### Authorised Guarantee Agreement

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- 4.3.14 where the Former Tenant is more than one person, any release of one or more such persons which is not expressed to relate to all such persons, and where there is more than one guarantee of the liability of the Assignee under the Lease then a release of any person under such other guarantee;
- 4.3.15 in relation to the remainder of the Property the surrender of part of the Property; and
- 4.3.16 any other act or omission of the Landlord or any other circumstances which, but for this clause, would discharge the Former Tenant.

#### 4.4 Acceptance of new lease

If the Landlord so requires by notice<sup>8</sup> served on the Former Tenant within three months after either the disclaimer or forfeiture<sup>9</sup> of the Lease then the Former Tenant will accept from the Landlord a new lease of the Property:

- 4.4.8 for a term equal to the residue of the contractual term of the Lease unexpired at the date of such disclaimer or forfeiture;
- 4.4.9 at an initial annual rent equivalent to the annual rent payable (or which would be payable but for a rent cesser or abatement) at the date of such disclaimer or forfeiture and payable from such date, but on the basis that any rent review then outstanding under the Lease is completed as between the Landlord and the Former Tenant<sup>10</sup>; and
- 4.4.10 containing the same covenants, conditions, provisions and other terms (including the proviso for re-entry) as are contained in the Lease at the date of such disclaimer or forfeiture so far as they are still applicable;

and the Former Tenant will, on execution of the new lease, pay all rents for the period from the date of the disclaimer or forfeiture to the quarter day.....

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<sup>8</sup> A desire for certainty after a disclaimer usually allows the landlord to require the authorised guarantor to take a new lease from the landlord. Such a clause operates as a put option, and any request of the authorised guarantor should be made before the landlord secures possession of the premises. See **Active Estates Ltd v Parness** [2002] EWHC 893 (Ch).

<sup>9</sup> It is not entirely clear whether this provision is permitted by section 16 LTCA 1995. While that section expressly permits new leases to be forced upon authorised guarantors where there is a disclaimer, no equivalent provision is included in relation to forfeiture. However, most leases include such a provision. The validity of a clause requiring a new lease following a forfeiture is untested. (See obiter comments casting doubt in **Active Estates Ltd v Parness** [2002] EWHC 893 (Ch). A requirement to take a new lease in the event of the tenant's administration (such lease to override the occupational lease) is unfair on the authorised guarantor.

<sup>10</sup> Where there is an unactivated rent review clause in the old disclaimed lease, the landlord needs either to activate the rent review under the disclaimed lease (which, despite the disclaimer, the Court of Appeal appears to think is achievable – see **Beegas Nominees Ltd v BHP Petroleum Ltd** [1998] 31 EG 96) so as to increase the level or rent carried forward, or carry over the rent review into the new lease.