

In the recent decision of *Topland Portfolio No.1 Limited v Smiths News Trading Limited* [2014] EWCA Civ 18, the Court of Appeal has given a timely reminder of the need for landlords to tread carefully when dealing with leases to ensure that a tenant guarantee remains effective.

In this case a failure by the parties to seek the consent of the guarantor before entering into a licence for alterations, which led to increased tenant liabilities, was held to operate to release the guarantor from its obligations under the lease. As a result, the landlord was unable to recover against the guarantor for unpaid rent after the tenant had become insolvent.

## Facts

The landlord, Topland ("L"), purchased freehold premises in 2001. The premises were subject to a lease to Payless DIY Ltd ("T") entered into in 1981 for a 35-year term. T's parent company, Smiths News Trading Limited (formerly W.H. Smith & Son Ltd), was the guarantor under the Lease ("G").

Under the terms of the lease T was permitted to carry out alterations to the premises, subject to the standard requirement of obtaining the consent of the landlord in advance. In September 1987, L's predecessor granted consent for T to carry out alterations to convert the premises for use as a garden centre and entered into a licence for alterations with T for this purpose ("Licence"). However, neither party sought the consent of G to the proposed alterations nor was G made a party to the Licence.

By 2011, T had fallen into rent arrears under the lease, and went into administration on 5 May 2011. On 21 June 2011, T's administrators disclaimed the lease, leaving total rent arrears of £281,038.36 plus interest outstanding.

L therefore sought to rely on the guarantee obligations in the lease and served notice requiring G to enter into a new lease for the remainder of the term and to pay the outstanding rent arrears.

## G's Defence

Faced with this claim, G relied on the common law rule (*Holme v Brunskill* (1878) LR 3 QBD 495) to argue that because the terms of the Licence had increased the burden on T under the lease (e.g. for repairs, decoration, reinstatement of the premises etc.), G's own potential liability had increased.

G argued that it should have been informed and required to give its consent before the Licence was entered into and, as G's consent had not been sought, it was argued that this had the effect of releasing the G from its obligations under the Lease, including any obligation to pay the outstanding arrears.

## Decision

The Court of Appeal upheld the first instance decision and concluded that the terms of the Licence had the clear potential to increase T's lease obligations, and potentially those of G in the event of T's default. The court held that G's consent to the Licence should have been sought, and the failure to do so entitled G to be released from its obligations under the Lease.

This case reinforces the importance for lease parties to ensure that a guarantor's position is properly considered when dealing with leases generally and, in particular, the need to consider obtaining a guarantor's prior consent before entering into licences to alter where the terms may have the effect of increasing the tenants obligations under the lease.

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