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AGAs and GAGAs: EMI case settles

Parties have settled the EMI guarantor assignment case. The controversial High Court decision still stands - a tenant cannot assign its lease to its guarantor.

For just over one year after Amanda Tipples Q.C. ruled in the High Court that a tenant cannot assign its tenancy to a guarantor, tenants, landlords and legal professionals alike have been awaiting a potential reversal of this decision in the Court of Appeal. Hopes were dashed in April this year when the EMI Group Ltd v O&H Q1 Ltd case settled, on confidential terms, out of Court.

EMI had been the latest in a series of cases, starting with the decision in Good Harvest in 2010, which called for an interpretation of the guarantee provisions of the Landlord and Tenant (Covenants) Act 1995 (the "1995 Act").

This Act gave tenants an automatic release from liability under their leases on assignment, and brought into effect the ability for landlords to request 'authorised guarantee agreements' – better known as 'AGAs' - from tenants. However, it left open (amongst other things) the issue of how far existing guarantors could be required to remain liable following an assignment.

In the EMI case, the judge held that the assignment of the lease by the tenant to its guarantor was void by the anti-avoidance provisions at 25(1) of the 1995 Act. Tenants and landlords are now in a quandary. How are they to proceed when all parties wish to assign to the tenant's guarantor and, in many instances, no other entity of sufficient covenant strength is available to take or guarantee an assignment? Pending another case coming to the higher courts, or legislative reform, the unfortunate answer is that options for assignment are limited.

FOR FURTHER INFORMATION, PLEASE CONTACT

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CURRENT AGA/GAGA POSITION:

PERMITTED:

- **Tenant guarantee (AGA)**
Tenant can guarantee its assignee under an AGA.
- **Sub-guarantees (SAGA):** Original guarantor can guarantee the original tenant's obligations under an AGA .
- **Subsequent guarantees:** Original guarantor can guarantee future assignees, just not the immediate assignee of the tenant it is guaranteeing.

PROHIBITED:

- **Repeat guarantees (GAGA) by guarantor**
Guarantor cannot guarantee the obligations of the tenant's assignee directly.
- **Repeat guarantees by tenant**
Tenant cannot give an AGA to anyone other than its immediate assignee.
- **Assignment to a guarantor**
Tenant cannot assign to its guarantor.