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***Where does EMI leave the law on assignments?***

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**1. The mischief of the Act:**

- 1.1. The purpose of the Act is reflected in its long title – *“An Act to make provision for persons bound by covenants of a tenancy to be released from such covenants on the assignment of the tenancy ...”*;
- 1.2. In Avonridge v Mashru [2006] 1 EGLR 15, Lord Nicholls said (at paragraphs 10 and 11): *“One of the principal mischiefs the Act was intended to remedy was that, as the law stood, the original tenant of a lease remained liable for performance of the tenant's covenants throughout the entire duration of the lease. A tenant might part with his lease and many years later find himself liable for substantial amounts of unpaid rent, perhaps much increased under rent review provisions, and for the cost of making good extensive dilapidations...This was considered unfair. This potential liability was not widely understood by tenants, and it could lead to hardship...”*;
- 1.3. Law Commission Report in 1988 (No. 174). The Law Commission concluded in respect of guarantors that: *“4.54 Most of the people now named in leases as guarantors for the tenant actually assume liabilities which make them principal debtors, with obligations independent of those of the party whose covenants they are said to guarantee. They have rights of reimbursement against their principals, but they will not, as a matter of law, be released from their obligations merely because the principal is released. To permit such guarantors, or more strictly indemnifiers, to remain liable when the tenant has been wholly released under our proposals, would undermine the thrust and purpose of those recommendations. We therefore go further. Whenever the liability of a tenant would be wholly cancelled under our recommendations, we recommend that liabilities which had been undertaken in parallel and are essentially to the same effect would also be terminated. .... 4.55 When a tenant is partially released from his obligations under our proposals, we recommend that a third party who has entered into a parallel obligation supporting the tenant's liability be released to the same extent. This effect will be automatic, without the third party having to take any action.”*.

## 2. The structure of the Act:

- 2.1. Section 5(2)(a) provides that if the *“tenant assigns the whole of the premises demised to him .... he is released from the tenant covenants of the tenancy .... as from the assignment ....”*;
- 2.2. Section 24(2) is concerned with guarantors and provides that where *“ (a) ... by virtue of this Act a tenant is released from a tenant covenant of a tenancy and .... (b) immediately before the release another person is bound by a covenant of the tenancy imposing any liability or penalty in the event of a failure to comply with that tenant covenant .... then, as from the release of the tenant, that other person is released from the covenant mentioned in paragraph (b) to the same extent as the tenant is released from that tenant covenant ....”*;
- 2.3. Section 25 contains the anti-avoidance provisions, This does not descend to imagining every possible way in which the Act might be circumvented and then castigating that specific act of circumvention unlawful. It simply makes void anything – *anything* – with the purpose of circumvention: *“(1) Any agreement relating to a tenancy, is void to the extent that (a) it would apart from this section have effect to exclude, modify or otherwise frustrate the operation of any provision of this Act, or (b) it provides for (i) the termination or surrender of the tenancy, or (ii) the imposition on the tenant of any penalty, disability or liability, in the event of the operation of any provision of this Act, or (c) it provides for any of the matters referred to in paragraph (b)(i) or (ii) and does so (whether expressly or otherwise) in connection with, or in consequence of, the operation of any provision of this Act.”*;
- 2.4. Section 16 provides an exception to section 5: nothing in the Act precludes a tenant entering into an authorised guarantee agreement, under which the tenant guarantees its assignee’s (but only its assignee’s) compliance with its covenants while such assignee remains the tenant.

### 3. The cases under the Act:

#### 3.1. Release:

- 3.1.1. T1 must be released from the *'tenant covenants of the tenancy'* – section 5(2)(a) – when it assigns the premises;
- 3.1.2. G1 must therefore be released when that tenant effects that assignment *'to the same extent as the tenant is released from that tenant covenant'* – section 24(2) – so therefore the guarantor must be released from any *'covenant falling to be complied with by the tenant'* – section 28(1);
- 3.1.3. This is because the Act cannot be contracted out from – indeed, because under section 25(1) *"any agreement relating to a tenancy is void to the extent that it would exclude, modify or otherwise frustrate the operation of any provision of .... [the] .... Act;*
- 3.1.4. Hence, in *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2012] Ch. 497, Lord Neuberger of Abbotsbury MR giving the judgment of the court, to which Etherton LJ and Thomas LJ had made substantial contributions, said at paragraph 37 that *'interpretation (i) – which prevailed – "would also appear to mean that the lease could not be assigned to the guarantor, even where both tenant and guarantor wanted it"*.
- 3.1.5. There are two exceptions:
  - (a) The narrow one relating to an AGA and a guarantee of obligations under an AGA – the question of whether this is what existed was considered (on the facts) in *Co-operative Group Food Ltd v A&A Shah Properties Ltd* [2019] EWHC 91 (Ch);
  - (b) The wider one for when G1 has already been released and *'comes back'* either to guarantee T3's obligations or T1's if the lease is assigned back from T2 to T1.

#### 4. What's void?

- 4.1. Is (1) the whole assignment void or does the void-ness (2) just strike down the tenant's covenants?
- 4.2. Both are odd. (1) Puts us right back to Square 1. The generally accepted intention of the 1995 Act is that on a lawful assignment of a tenancy the tenant and its guarantor (if any) must be released from the burden of the tenant covenants;
- 4.3. T1 and G1 are returned to the positions in which they were prior to the lawful assignment of the tenancy with the landlord's consent, i.e. bound by the tenant covenants. The supposed construction and implementation of an Act granting freedom to an assigning tenant and its guarantor has, quite to the contrary, re-imprisoned the assigning tenant and its guarantor;
- 4.4. (2) Is a Frankenstein's monster but at least G1 is being released from what the Act requires it to have been released from to the same extent as the Original Tenant was released on the assignment;
- 4.5. The *EMI* case says it's (1);
- 4.6. Arguments for (2):
  - 4.6.1. The '*extent*' of the assignment which, in the language of section 25(1) of the Act, '*frustrates*' the operation of section 24(1), is not the assignment *per se* but is the aspect which involves the adoption of the burden of the tenant's covenants by G1.
  - 4.6.2. It is that which prevents its release from all liability to L and therefore it is that which must be void;
  - 4.6.3. Section 25(1) of the Act should only make void an agreement which relates to a tenancy which excludes, modifies or frustrates the operation of any provision of the Act, to the minimum extent required so as to effect a release of the guarantor when the tenant whose tenant covenants it has been guaranteeing, is released;
  - 4.6.4. T1 must be released from the '*tenant covenants of the tenancy*' – section 5(2)(a) – when it assigns the premises;

- 4.6.5. G1 must therefore be released when that tenant effects that assignment '*to the same extent as the tenant is released from that tenant covenant*' – section 24(2) – so therefore the guarantor must be released from any '*covenant falling to be complied with by the tenant*' – section 28(1);
- 4.6.6. Anyway an assignment which has taken place, completed and been registered as such, as if it had never taken place;
- 4.6.7. Section 58 of the Land Registration Act 2002 provides that "*If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration*";
- 4.6.8. A Lease can exist as a matter of law without tenant covenants.

5. **The rescue mission:**

5.1. Section 3 of the Act:

3. (1) *The benefit and burden of all landlord and tenant covenants of a tenancy—*  
*(a) shall be annexed and incident to the whole, and to each and every part,*  
*of the premises demised by the tenancy and of the reversion in them, and*  
*(b) shall in accordance with this section pass on an assignment of the*  
*whole or any part of those premises or of the reversion in them.*
- (2) *Where the assignment is by the tenant under the tenancy, then as from*  
*the assignment the assignee —*  
*(a) becomes bound by the tenant covenants of the tenancy except to the*  
*extent that— (i) immediately before the assignment they did not bind the*  
*assignor, or*  
*(ii) they fall to be complied with in relation to any demised*  
*premises not comprised in the assignment; and*  
*(b) becomes entitled to the benefit of the landlord covenants of the*  
*tenancy except to the extent that they fall to be complied with in relation*  
*to such premises.*
- (3) *Where the assignment is by the landlord under the tenancy, then as from*  
*the assignment the assignee—*  
*(a) becomes bound by the landlord covenants of the tenancy except to the*  
*extent that—*  
*(i) immediately before the assignment they did not bind the*  
*assignor, or*  
*(ii) they fall to be complied with in relation to any demised*  
*premises not comprised in the assignment; and*  
*(b) becomes entitled to the benefit of the tenant covenants of the tenancy*  
*except to the extent that they fall to be complied with in relation to any*  
*such premises.*
- (4) .....
- (5) .....
- (6) *Nothing in this section shall operate—*  
*(a) in the case of a covenant which (in whatever terms) is expressed to be*  
*personal to any person, to make the covenant enforceable by or (as the*  
*case may be) against any other person; or*  
*(b) to make a covenant enforceable against any person if, apart from this*  
*section, it would not be enforceable against him by reason of its not having*  
*been registered under the Land Registration 1925 c. 21. Act 1925 or the*  
*Land Charges Act 1972. 1972 c. 61.*

(7) *To the extent that there remains in force any rule of law by virtue of which the burden of a covenant whose subject matter is not in existence at the time when it is made does not run with the land affected unless the covenantor covenants on behalf of himself and his assigns, that rule of law is hereby abolished in relation to tenancies.*

- 5.2. The rescue mission involves saying that T1 can assign to G1 without frustrating the operation of the Act within the meaning of section 25(1) because section 3(2)(a) actually requires G1 (as it does any assignee) to become liable on the tenant covenants;
- 5.3. The theory then is that the release of the tenant effected by section 5(2)(a) of the 1995 Act and the imposition of the burden of the tenant covenants by section 3(2)(a) are *consecutive* events and that therefore the anti-avoidance provisions in section 25(1) do not need to be engaged as a release has occurred before the burden is (re-) imposed;
- 5.4. It's wrong because:
  - 5.4.1. Of the 12<sup>th</sup> and 13<sup>th</sup> words of section 3(2) of the Act, the assignee becomes bound by the tenant covenants '*as from*' the assignment;
  - 5.4.2. Of the fourth and third from last words in section 5(2) of the Act, the release of the tenant also only occurs '*as from*' the assignment;
  - 5.4.3. Under section 24(2) of the Act, G1 must also be released to the same extent as the tenant '*as from*' the release of the tenant;
  - 5.4.4. The use of those same words – '*as from*' - in each of those three sections in the same way, each time, means that the same time must be being referred to: the assignment. One assignment, one moment, one release of T1 and one release of G1 to the same extent. There is no room in that wording for any aspect to occur before any other aspect. Everything is '*as from*' the same single moment of assignment. There is no scintilla;
  - 5.4.5. This is not an arid point based on a careful reading of the Act. It goes to the essence of the statutory purpose. The purpose of the Act is to release T1 and G1 at the end of T1's term. That is a public policy objective. In order to ensure that it happens, T1 and G1 must be released at the same time. If they are not and if G1 is imposed with liability a scintilla later, what sort of release is that? One with no commercial reality at all. Anything which gets in the way of that

is void because it frustrates section 24(2), the release of G1 to the same extent as the release of T1. G1 will not have been released in any meaningful way;

5.4.6. And it is no answer to this reading of the Act to say that when G1 becomes T2, it does that with a different 'hat' and that *qua* G1 it has been released. The statutory purpose is *release* (which must be genuine and meaningful) - a period during which one entity wears no hat at all;

5.4.7. And if the backlash is right, the Act is basically a dead letter:

(a) If the release from the tenant covenants by section 5(2)(a) can be followed by the all but immediate imposition of the tenant covenants by reason of section 3(2)(a), on the basis of their being a *scintilla temporis*, there is a simple way to defeat the Act: in effect it self-combusts;

(b) Landlords would insert into new leases provisions permitted by LTA 1927 s.19(1A) that on any assignment of the tenancy, such assignment shall only be to the "new tenant" (T2) *together with*, as joint tenants, the assigning tenant (T1) and any guarantor of the assigning tenant (G1), all with joint and several liability. Landlords, in other words, could say to tenants, 'of course you, tenant, can assign away, but only if you and your guarantor join in with joint and several liability with such assignee all as my tenants';

(c) That will be the end of the Act, given its purposes. It would then be permissible for T1 to assign the tenancy to T1 and T2 as co-tenants. Or, indeed for T1 to be required to assign the tenancy to T1, G1 and T2 as co-tenants with G2 acting as guarantor. And then for T1, G1 and T2 to assign the tenancy to T1, G1, T2, G2 and T3 as co-tenants with G3 acting as guarantor. And then for T1, G1, T2, G2 and T3 to assign the tenancy to T1, G1, T2, G2, T3, G3 and T4 as co-tenants. And so on;

(d) If that is all ok, the Act *would* be frustrated. In such a way, the landlord could ensure that none of its tenants or their guarantors were ever released from the burden of the tenant covenants under the tenancy. Yet the whole point of the Act and the policy behind it, is to ensure that assigning tenants (and their guarantors) are, after the end of T1's term, no longer under obligations in relation to the tenancy and the demised premises;

- (e) If consequences of the Act are unpalatable, it is for Parliament, not the Courts, to rein in the scope of the Act by amendment;
- (f) Anyway:
  - (i) In *Avonbridge*, the House of Lords made reference to ‘far reaching’ provisions, describing section 25 as a “comprehensive anti-avoidance provision” in “wide terms” which is to be “interpreted generously”;
  - (ii) In *Wallis Fashion Group v CGU* (2001) 81 P&CR 28 Neuberger J at paragraph 21 said that “The 1995 Act represents a sea change in the law .... It does not merely represent a sea change in what had been common practice, but in what a landlord can lawfully require, both in terms of what is to be included in the lease initially and what he can demand on an assignment”;
  - (iii) Uncommerciality has always been evident and acknowledged. In *Avonridge v Mashru* [2006] 1 EGLR 15, Lord Nicholls said that Avonridge’s position (which the House of Lords found to be correct in law) was “not overburdened with merit. Indeed, on their face the transactions have the appearance of a scam”. In *Good Harvest* Newey J remarked that “It is fair to say, too, that, if the Act is to be construed as [Counsel for the guarantor] suggests [as Newey J construed it] ... it will be capable of operating in ways that look arbitrary ..... However, it appears to me that the Act could sometimes operate in apparently arbitrary (or at least uncommercial) ways even if I accepted [Counsel for the landlord]’s submissions”.

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