Landmark Chambers

Sureties: how do CVAs impact upon their obligations?

Evie Barden

What is a guarantee?

- The purpose of a guarantee is to secure the performance of the principal's obligations.

- "It follows from the secondary nature of the [guarantee] obligation that the guarantor is generally only liable to the same extent that the principal is liable to the creditor, and that there is no liability on the part of the guarantor if the underlying obligation is void or unenforceable, or if that obligation ceases to exist. This is known as the "**<u>principle of co-extensiveness</u>**"" (emphasis added): *Dennis v the Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 0735 (TC) at [31].

The principle of co-extensiveness

- Discharge of the principal leads to discharge of the surety?
  - Payment by the principal will discharge surety.
  - Release of the principal will discharge surety.

- The rule in *Holme v Brunskill*: variation of the principal's obligations, without the surety's consent, will result in the discharge of the surety unless it is self-evident that the alteration is insubstantial or cannot be prejudicial to the surety.

- <u>BUT</u> all dependent on the terms of the surety's obligations.

What is the effect of approval of a CVA?

- Section 5 of the Insolvency Act 1986:
  - CVA takes effect *as if* made by the company at the time the creditors approve it, <u>and</u>
  - It binds everyone who was entitled or would have been entitled if they had had notice of the decision procedure.

- The hypothesis of a “statutory contract”.

How does that impact a surety's obligations?

- A CVA can expressly 'strip' a creditor of their rights of recourse against a guarantor.

- Otherwise, the 'general law' applies: *Johnson v Davies* [1999] Ch. 117 at 138.

- Time to reconsider in light of recent cases on the "statutory contract"?

Authorised guarantee agreements

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- Section 17(2) of the Landlord and Tenant (Covenants) Act 1995 :

  “(2) The former tenant shall not be liable under that agreement or (as the case may be) the covenant to pay any amount in respect of any fixed charge **<u>payable under the covenant</u>** unless, within the period of six months beginning with the date when the charge becomes due, the landlord serves on the former tenant a notice informing him—

  (a) that the charge is now due; and

  (b) that in respect of the charge the landlord intends to recover from the former tenant such amount as is specified in the notice and (where payable) interest calculated on such basis as is so specified (emphasis added).”

Practical challenges for landlords

Thank you for listening

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