

GUARANTEE

Guidance Notes



Introduction

This Guarantee is for use in circumstances where a straightforward guarantee in respect of the tenant's obligations under the lease is required. It is prepared on the assumption that a "full" guarantee is to be given, in which the Guarantor is not only a cautionary obligant, but also a principal debtor in its own right (in addition to and separate from the Tenant's liability as the principal debtor), and in addition provides for the guarantor to indemnify the Landlord in respect of any failure by the Tenant as principal debtor to meet its obligations. This should ensure that even if the principal obligation is void or unenforceable for any reason, or if the guarantee obligation is unenforceable as such for any reason, the Landlord can still look to the guarantor for payment or performance.

It is suitable both in cases where a new lease is being entered into, or where an existing lease is being assigned and a guarantee of the assignee's obligations is sought. Although drafted for use where the parties are corporate bodies, it may be adapted for use where the Tenant and/or Guarantor are individuals, in which case the definition of "Tenant" should be drafted accordingly, and "Relevant Event" (iii) in the Definitions, and Clause 7.5 should be included. Note also to provide, where the Tenant consists of more than one individual, that liability should be joint and several.

This style deals with circumstances where there is a **single guarantor** only.

1 Clause 1 Definitions and interpretation

Although the PSG does not consider it necessary, you can if you wish refer to all the letting documentation, in which case the definition "Lease" should be amended accordingly and the letting documentation listed in a schedule.

In the definition of "Relevant Event" we have made provision for the statutory moratorium introduced by the Corporate Insolvency and Governance Act 2020. While the existence of a moratorium does not automatically mean the Tenant will become insolvent, it has been included as it can be a warning sign that there is financial distress, although there is a prospect that the company could trade out of it. The moratorium can also be brought to an end early or terminated for various reasons including a failure on the part of the tenant to make payment of rent during the period of the moratorium. In addition, the 40 day period can be extended for an unlimited period of time with the court's consent and/or extended where there is a restructuring plan, scheme of arrangement or CVA being proposed. In this instance the Relevant Event need not be an automatic trigger, but provides the landlord with the discretion to call a Relevant Event, and choose whether to serve the appropriate notice within [six] months in terms of Clause 5 of the Guarantee. It is worth bearing in mind that the moratorium provisions are such that irritancy cannot be exercised without the consent of the Court where a moratorium is put in place.

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2 **Clause 2 Guarantee**

There are two principal obligations expressed in this Deed – first the obligation to make payment of any sums due by the Tenant, and second the obligation to perform other non-monetary obligations of the Tenant. These obligations have been drafted as widely as possible to include all relevant obligations, without the necessity of listing them separately.

This clause creates a *secondary* obligation that supports the *primary* obligation of the Tenant.

3 **Clause 3 Primary Obligation**

Because the Guarantor's obligation in Clause 2 is only a secondary obligation, to protect the Landlord, this clause provides that the Guarantor grants a primary obligation in respect of the obligations under the Lease.

Without the primary obligation, the Landlord would have to rely on the default common law position when enforcing the guarantee. This presents risks to a Landlord, as in these situations the courts have traditionally proven to be protective of guarantors.

4 **Clause 4 Indemnity**

It might be thought that with the primary obligation in Clause 3, there would be no need for the further indemnity in this Clause 4. However, there has always been some uncertainty about whether this primary obligation would be judicially enforced. For this reason, the Guarantee includes a separate primary obligation on the Guarantor in the event of failure for whatever reason of the primary obligation in Clause 3.

In addition, this clause includes a specific indemnity to deal with the potential consequences of the issues involved in the case of *Prudential Assurance Co Limited and Others v PRG Powerhouse Limited and Others* [2007] EWC 102 Ch.

While to a certain extent the interplay of Clauses 2, 3 and 4 in the Guarantee could be said to represent a “belt and braces” approach, due to the lack of judicial certainty, the Landlord should seek all three clauses to ensure that it is adequately protected in all circumstances. It should also be borne in mind that when a guarantee is required, this is invariably due to a lack of adequate covenant on the Tenant's part. Accordingly it is not unreasonable for the Landlord to insist that it is protected from any deficiency in performance by the Tenant, and any judicial loophole through which the Guarantor can evade liability.

5 **Clause 5 Guarantor to take New Lease**

The time limit contained in the insolvency event provision in Clause 5 of six months is a typical period in such circumstances. A longer or shorter period can be substituted if agreed between the parties.

Where the Relevant Event is receivership, or otherwise where the Lease has not been terminated or ceased to exist, before the Landlord can grant a new lease to the Guarantor, it should obtain a valid renunciation of the existing Lease, and it is recommended that this is done at the same time as granting the new lease.

6 **Clause 8 Restriction of Guarantee**

It is now common practice for a guarantee to apply only to a named tenant – where a parent company is guaranteeing the obligations of a subsidiary for example. If the particular circumstances of the transaction are different, then this clause may be deleted.

7 Clause 9 Assignment

The PSG recommends that as a matter of good practice, rights under a Guarantee should be assigned to successors of the Landlord.

8 Clause 10 Postponement of Claims by Guarantor

In addition to standard postponement provisions, Clause 10.3 again deals specifically with the potential consequences of the *Powerhouse* case.

9 Clause 14 Notices

The format of this clause is intended to cover the most common circumstances, but may be amended to suit other particular requirements. In Clause 14.3, particulars should be completed of the relevant parties, for ease of reference in the future. If desired, e-mail addresses can also be given, but it is not recommended that e-mail be used as the sole method of notification of any notice, in case of system failure or text corruption or interception.