Neutral Citation Number: [2020] EWHC 2061 (Ch) Case No: PT-2019-00982

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice Rolls Building, 7 Rolls Buildings Fetter Lane, London EC4A 1NL

Date: 31/07/2020

Before :

PENELOPE REED QC
(Sitting as a Deputy Judge of the High Court)

- -

Between :

EMI GROUP LIMITED	**Claimant**
- and -	
THE PRUDENTIAL ASSURANCE COMPANY LIMITED	**Defendant**

- -

Jonathan Seitler QC and **Nicholas Taggart** (instructed by **GSC Solicitors LLP**) for the **Claimant**
John McGhee QC and **Maxim Cardew** (instructed by **Hogan Lovells International LLP**) for the **Defendant**

Hearing dates: 2nd & 3rd July 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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PENELOPE REED QC

Penelope Reed QC:

Introduction

1. This claim concerns a sublease of premises part of 360/366 Oxford Street/Stratford Place, London W1 ("the Lease") granted by Sears Properties Netherlands BV to HMV UK Limited on 19th June 2000 for a term of 25 years commencing on 29th September 1999. The Lease was later promoted to a headlease and the Defendant ("Prudential") became the landlord. The Claimant ("EMI") was the guarantor of the Lease. The parties have helpfully agreed facts and a chronology.

2. The Claimant guaranteed the tenant's liabilities under the Lease. HMV assigned the Lease to Forever21 (UK) Limited ("Forever21") on 1st April 2011. Licence to assign was granted prior to that on 17th November 2010 ("the Licence"). Under that Licence, a guarantee of the tenant's liabilities was provided by Forever 21 Inc, Forever21's parent company. HMV also provided a guarantee and EMI in turn provided a guarantee of its liabilities although the validity of both guarantees is disputed in these proceedings. The guarantee provided by HMV was stated to be an authorised guarantee agreement ostensibly within section 16 of the Landlord and Tenant (Covenants) Act 1995 ("the 1995 Act") commonly referred to as an AGA. The guarantee of the obligations under that AGA by EMI was by way of what is commonly referred to as a GAGA. Those terms will be used in this judgment.

3. On 15th January 2013 HMV went into administration and was dissolved on 14th October 2015. On 24th June 2019 Forever21 failed to pay the rent and service charge under the Lease and on 29th September 2019 Forever21 Inc (its guarantor) sought a chapter 11 Bankruptcy Protection Order in the State of Delaware. Forever21, the assignee, entered into administration the following day.

4. Prudential as the current landlord claimed the outstanding rent and service charges from EMI (by way of service of a notice under section 17 of the 1995 Act) and EMI responded by disputing it is bound by the guarantee.

The Proceedings

5. By part 8 claim form EMI seeks declarations that:-
   a. Both the GAGA and the wider guarantee in the Lease of which it forms part are void as they fall foul of section 25 of the 1995 Act;
   b. Alternatively, EMI was released from its ongoing obligations under the guarantee and the GAGA on the dissolution of HMV;
   c. Alternatively, the benefit of the guarantee did not pass to Prudential when it became landlord.

   Mr. Seitler QC who appeared for EMI abandoned the claim to that final declaration in his Reply, having heard the arguments put by Mr. McGhee QC on behalf of Prudential. It seemed to me that he was right to do so and I make no further comment on this head of relief.

6. By order of Master Clark dated 4th February 2020 Prudential was given permission to bring a counterclaim by which it seeks the following relief:-
   a. A declaration that the GAGA imposed by the Lease is valid;
   b. Judgment for sums due from EMI: standing at £4,909,645.81 at the date of the hearing according to the latest evidence.

7. The central issue is therefore whether EMI is liable under the GAGA contained in paragraph 5.1.1 of Schedule 1 to the Lease. To understand and answer that question it is necessary to have regard to the provisions of the 1995 Act.

The 1995 Act

8. The 1995 Act in its nearly quarter of a century of existence has been the subject of a number of cases as to its meaning and effect. Its purpose is clear. Following a Law Commission Report it was enacted "*to make provision for persons bound by covenants of a tenancy to be released from such covenants on the assignment of the tenancy and to make other provision with respect to rights and liabilities arising under such covenants; to restrict in certain circumstances the operation or rights of re-entry, forfeiture and disclaimer and for connected purposes*." In essence it abrogates the common law rule that an original tenant remained bound by the covenants in a lease sometimes long after he had assigned it. I set out some of the salient provisions for the

purpose of this judgment below, with some of the most significant provisions highlighted in bold.

9. Section 5(2) of the 1995 Act provides:-

> *"If the tenant assigns the whole of the premises demised to him, he—*
>
> *(a) is released from the tenant covenants of the tenancy, and*
>
> *(b) ceases to be entitled to the benefit of the landlord covenants of the tenancy, as from the assignment".*

10. The 1995 Act recognises that if the tenant is to be properly released any guarantor had to be released too so that the guarantor could not seek an indemnity from the tenant. Therefore section 24 (2) of the 1995 Act provides:-

> *"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".*

11. Section 25 of the 1995 Act contains an anti-avoidance provision preventing landlords, tenants and guarantors from attempting to circumvent the provisions of the Act. It has been described as a "*comprehensive anti-avoidance provision*" (by Lord Nicholls in *London Diocesan Fund v Pithwa* [2005] 1 WLR 3956 at para 14) and as it is of central importance to this case merits it being set out in full:-

> *"(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) To the extent that an agreement relating to a tenancy constitutes a covenant (whether absolute or qualified) against the assignment, or parting with the possession, of the premises demised by the tenancy or any part of them—

(a) the agreement is not void by virtue of subsection (1) by reason only of the fact that as such the covenant prohibits or restricts any such assignment or parting with possession; but

(b) paragraph (a) above does not otherwise affect the operation of that subsection in relation to the agreement (and in particular does not preclude its application to the agreement to the extent that it purports to regulate the giving of, or the making of any application for, consent to any such assignment or parting with possession).

(3) In accordance with section 16(1) nothing in this section applies to any agreement to the extent that it is an authorised guarantee agreement; but (without prejudice to the generality of subsection (1) above) an agreement is void to the extent that it is one falling within section 16(4)(a) or (b).

(4) This section applies to an agreement relating to a tenancy whether or not the agreement is—

(a) contained in the instrument creating the tenancy; or

(b) made before the creation of the tenancy"

12. The reference in sub-section 25(3) to an AGA refers back to section 16 of the 1995 Act which provides that nothing will prevent a tenant released from a tenant covenant entering into an AGA provided that it complies with section 16 which provides:-

"(1) Where on an assignment a tenant is to any extent released from a tenant covenant of a tenancy by virtue of this Act ("the relevant covenant"), nothing in this Act (and in particular section 25) shall preclude him from entering into an authorised guarantee agreement with respect to the performance of that covenant by the assignee.

(2) For the purposes of this section an agreement is an authorised guarantee agreement if—

(a) under it the tenant guarantees the performance of the relevant covenant to any extent by the assignee; and

(b) it is entered into in the circumstances set out in subsection (3); and (c) its provisions conform with subsections (4) and (5).

(3) Those circumstances are as follows—

(a) by virtue of a covenant against assignment (whether absolute or qualified) the assignment cannot be effected without the consent of the landlord under the tenancy or some other person;

(b) any such consent is given subject to a condition (lawfully imposed) that the tenant is

to enter into an agreement guaranteeing the performance of the covenant by the assignee; and

(c) the agreement is entered into by the tenant in pursuance of that condition.

(4) ***An agreement is not an authorised guarantee agreement to the extent that it purports—***

(a) to impose on the tenant any requirement to guarantee in any way the performance of the relevant covenant by any person other than the assignee; or (b) to impose on the tenant any liability, restriction or other requirement (of whatever nature) in relation to any time after the assignee is released from that covenant by virtue of this Act.

(5) Subject to subsection (4), an authorised guarantee agreement may—

(a) impose on the tenant any liability as sole or principal debtor in respect of any obligation

owed by the assignee under the relevant covenant;

(b) impose on the tenant liabilities as guarantor in respect of the assignee's performance of that covenant which are no more onerous than those to which he would be subject in the event of his being liable as sole or principal debtor in respect of any obligation owed by the assignee under that covenant;

(c) require the tenant, in the event of the tenancy assigned by him being disclaimed, to enter into a new tenancy of the premises comprised in the assignment—

(i) whose term expires not later than the term of the tenancy assigned by the tenant, and

(ii) whose tenant covenants are no more onerous than those of that tenancy; (d) make provision incidental or supplementary to any provision made by virtue of any of paragraphs (a) to (c).

(6) Where a person ("the former tenant") is to any extent released from a covenant of a tenancy by virtue of section 11(2) as from an assignment and the assignor under the

assignment enters into an authorised guarantee agreement with the landlord with respect to the performance of that covenant by the assignee under the assignment— (a) the landlord may require the former tenant to enter into an agreement under which he guarantees, on terms corresponding to those of that authorised guarantee agreement, the performance of that covenant by the assignee under the assignment; and
(b) if its provisions conform with subsections (4) and (5), any such agreement shall be an authorised guarantee agreement for the purposes of this section; and (c) in the application of this section in relation to any such agreement—
(i) subsections (2)(b) and (c) and (3) shall be omitted, and
(ii) any reference to the tenant or to the assignee shall be read as a reference to the former tenant or to the assignee under the assignment. (7) For the purposes of subsection (1) it is immaterial that—
(a) the tenant has already made an authorised guarantee agreement in respect of a previous assignment by him of the tenancy referred to in that subsection, it having been subsequently revested in him following a disclaimer on behalf of the previous assignee, or
(b) the tenancy referred to in that subsection is a new tenancy entered into by the tenant in pursuance of an authorised guarantee agreement;
and in any such case subsections (2) to (5) shall apply accordingly."

13. The crucial point to note is that the tenant (and I will refer to it as T1) cannot guarantee anyone other than its assignee (T2) and then only on the terms of an AGA. The Court of Appeal has stated obiter in *K/S Victoria Street v. House of Fraser (Stores Management) Ltd*. [2012] Ch 497 (CA) that there is no reason why T1's guarantor (G1) cannot guarantee T1's AGA (that is provide a GAGA). This is because by section 24(2), on any assignment, a guarantor of the assignor is only required to be released to the same extent as the tenant. What cannot happen is for G1 to guarantee the liabilities not just of T1 but of subsequent assignees (save T2 if there is an AGA and a GAGA), and it is common ground that is the effect of the statutory provisions.

14. In *K/S Victoria Street* the Court of Appeal approved (at least in part) the judgment of Newey J in *Good Harvest Partnership LLP v Centaur Services Ltd* [2010] Ch 426 where he held that:-

a. Section 24 of the Act was meant to ensure that any obligations undertaken by a guarantor should come to an end on the assignment of the lease.

b. If a guarantor is required to enter into a further guarantee (apart from a GAGA as subsequently explained in *K/S Victoria Street)* when the lease is assigned the guarantee can be said to frustrate the operation of any provision in the Act and so falls foul of the wide and generous application of that section (*London Diocesan Fund v Phithwa* [2005] 1WLR 3956);

c. There is a general prohibition on tenants giving guarantees for the obligations of an assignee except in accordance with the provisions of section 16 allowing for an AGA and that general prohibition applies to guarantors as well;

d. The Act is clearly designed to restrict freedom of contract and the question is how far.

e. The Act can operate in an arbitrary manner.

Relevant provisions of the Lease and Licence

15. Clause 9 of the Lease provides that EMI covenants with the Landlord by way of indemnity and guarantee in the terms set out in Schedule 1. There are two levels on which the guarantee operates. By paragraph 3 of Schedule 1 EMI covenants with the Landlord "*that while the Principal is bound by the tenant covenants of this lease*" it will pay the rents and comply with the tenant covenants and indemnify the Landlord against any costs or expenses etc arising as a result of the Principal's failure to pay the rents and otherwise comply with the tenant's covenants. By paragraph 5.2 of the First Schedule the Guarantor (EMI) covenants with the Landlord that the Principal will observe and perform his obligations under the AGA. Notably paragraph 6 provides that any provision of the Schedule which is rendered void by the 1995 Act shall be severed from all other provisions and those provisions will be preserved and paragraph 7 is to the effect that any provision which extends beyond the limits of section 25 of the 1995 Act will be "deemed varied" so as not to extend beyond those limits..

16. The AGA which the Guarantor is covenanting to guarantee arises from Clause 5.11 of the Lease which contains standard covenants against alienation preventing the tenant

from assigning the whole of the Demised Premises without first obtaining the consent of the Landlord which shall not be unreasonably withheld and without complying with the conditions, specified for the purposes of section 19 (1A), of the Landlord and Tenant Act 1927 (a section introduced by the 1995 Act) set out in clause 5.11.4 of the Lease as the Landlord might reasonably impose.

17. The condition (contained in clause 5.11.4 of the Lease) is that the tenant before any assignment will enter into an AGA in the terms set out in schedule 2. The terms of Schedule 2 are important in terms of the arguments advanced in this case and I will refer to them in more detail below. Clause 5.4.2 contains the condition that if reasonably required by the Landlord, the assignee shall on or before the assignment procure one or more guarantors who are reasonably acceptable to the Landlord to covenant by way of indemnity and guarantee in the terms of Schedule 1 to the Lease.

18. The Licence comprised not just a licence to assign but also licence for change of use. The Tenant (T1) provided an AGA of the assignee's liabilities and the assignee's guarantor (its parent company Forever21 Inc) also guaranteed the liabilities. By clause 8 EMI consented to the terms of the Licence, and confirmed that its obligations under the Lease continued until it was released by law.

Overview of EMI's Arguments

19. The primary argument on behalf of EMI is that the GAGA and the wider guarantor under the Lease are rendered void by s. 25 of the 1995 Act. That argument consists of three strands:-
    a. The true construction of paragraph 1.1 of Schedule 1 which defines "Principal" for the purposes of the Lease.
    b. The true construction of the word "while" used in paragraph 3 of Schedule 1, clause 5.1 and the terms of the AGA in Schedule 2.
    c. The equivalence of treatment of HMV and EMI in relation to the alienation provisions.
20. The second argument which does not depend on the terms of the 1995 Act is that EMI is no longer bound as HMV is dissolved and therefore can no longer be bound by the covenants in the Lease.

Arguments that the GAGA and wider Guarantee Provisions are Void

The Meaning of Principal in paragraph 1.1 of Schedule 1 to the Lease

21. Paragraph 1.1 reads: "*Principal" means the person who is or is to become the Tenant and whose obligations under this lease and any authorised guarantee agreement the Guarantor has been required by the Landlord to guarantee but shall not include any successor in title*".

22. Mr. Seitler QC's first point is that at the date of the Lease, the tenant was clearly HMV. Therefore, the words "or is to become the tenant" must refer to a future tenant, that is T2, T3 or T4 and so on. The use of the future tense itself indicates that. That being the case the provisions of the Lease have the effect that EMI is required to guarantee a future tenant, thus falling foul of the 1995 Act.

23. As for the concluding words of paragraph 1.1, those words would naturally seem to refer back to one person but Mr. Seitler's argument is that they refer back to the person who is to become the tenant by assignment, that is T2. Therefore, EMI is required to guarantee not only the obligations of T1 but also impermissibly T2. The closing words of paragraph 1.1 mean that EMI is not, however, obliged to guarantee the liabilities of T3 and T4. Those closing words, Mr. Seitler argued, naturally refer back to the last person mentioned that is the person who is to become the tenant i.e. T2.

24. If Mr. Seitler' s arguments on construction are right, there is an embedded repeat guarantee in the Lease which is impermissible under the 1995 Act.

25. Mr. McGhee QC has three arguments against that construction. The first is that "is or is to become" means HMV only. He broke that argument down into four points. The first was that the words "is to become" have to be construed in the light of the alienation provisions in clause 5.11 of the Lease. These contemplate that the new guarantee if required as a condition of assignment would be given upon or before any assignment. It might be that the guarantee and the AGA would be given on the point of assignment or prior to the assignment, Mr. McGhee pointing out that licences to assign are often

granted prior to the assignment itself taking place and indeed that happened in this case. Read against that background "Principal" means just one person, the tenant or if the AGA is being provided prior to the assignment the person who will become the tenant. He points to clause 9 of the Lease where Principal clearly means one person.

26. Mr. Seitler counters this by saying that this construction does not make sense at the date that the Lease was entered into because the tenant was HMV and the Guarantor was clearly EMI. Of course, paragraph 1.1 envisages EMI guaranteeing not just the tenant obligations of HMV but through a GAGA the obligations of a future tenant and that is how I understood Mr. McGhee's submissions.

27. The second point made on behalf of Prudential is that the word "or" in paragraph 1.1 means either the tenant or in the alternative the person who is to become the tenant. In other words, although as Mr. Seitler rightly says "or" can mean "and" it does not always do so and the most natural reading here is that it really does mean "or" in a disjunctive sense. Mr. McGhee relies on the concluding words of paragraph 1.1 ("that person") as supporting his construction that "Principal" only means one person; otherwise the clause would have concluded with "those persons".

28. Mr. McGhee went on to argue that the use of the words "is to become" to refer to T2 are odd in circumstances where there is no certainty that the lease will be assigned; more natural would be use of the words "may become". Further it would have been easier for the draftsman to exclude the words "or is to become" and instead make it clear that the first successor in title was included but not subsequent successors.

29. Finally, it was argued that if I consider there are two possible interpretations of these provisions in the Lease I should adopt the construction which is valid. That is based on the principle set out in the recent case of the Supreme Court in *Egon Zehnder Ltd. V. Tillman* [2020] AC 154 where it was said by Lord Wilson (paragraph 68):-

"Better considered without reference to its original formulation in Latin, which nowadays few people understand, the validity principle proceeds on the premise that the parties to a contract or other instrument will have intended it to be valid. It therefore provides that, in circumstances in which a clause in their contract is (at this stage to

use a word intended only in a general sense) capable of having two meanings, one which would result in its being void and the other which would result in its being valid, the latter should be preferred."

30. He further approved the formulation of this principle by Patten LJ in *Tindall Cobham 1 Ltd. V. Adda Hotels* [2015] P & CR 5 para/paras 30 and 32 that the principle will be engaged when there is a realistic rival construction.

31. In approaching the questions of construction, I have taken into account the authorities which have been cited in Mr. Seitler QC and Mr. Taggart's skeleton argument. In particular it seems to me that the following principles can be derived from the authorities:-

    a. The Court should look at the ordinary and natural meaning of the words used against the relevant factual matrix taking into account the document as a whole.
    b. While the Court should always construe a contract with regard to the commercial consequences of any rival interpretations, it should not prevent the Court from giving effect to the clear words used by the parties: *Wood v Capita Insurance Services Limited* [2017] AC 1173 and *Arnold v Britton* [2015] AC 1619, the latter case being a prime example of the Court not departing from the ordinary, natural meaning of the words to avoid unfortunate commercial consequences.
    c. While it has been held that guarantees should be construed strictly with the benefit of any doubt given to the guarantor, that is very much a rule of construction which should only be resorted to if the words cannot be fairly construed in their context (*K/S Victoria Street*).
    d. The principle that a construction should be reached which will validate the provision which I have referred to above is based on the common sense proposition that the parties did not mean to enter into an unlawful contract but it cannot save a provision which cannot be construed in that valid way without ignoring the normal rules of construction. The Court has to find a realistic rival construction for the principle to be engaged (*Tindall Cobham 1 Ltd v Adda Hotels*
    [2015] P & CR 5 paras 30 and 32);
    e. It may be possible to sever offending words. I deal with this in a little more detail below.

32. Looking at the ordinary and natural meaning of the words in paragraph 1.1, I do not consider that Mr. Seitler's construction is the natural one. First of all, it seems to me that only one person is being referred to in that paragraph. That follows if "or" is read in its natural way rather than as meaning "and". It further follows from the concluding words of paragraph 1.1 which refer to "that person" rather than those persons. While it may be possible to interpret singular words as including the plural, to do so makes no sense in this clause. Further I accept Mr. McGhee's arguments that "is to become" relates to the possibility of an assignee providing a guarantee before the assignment as acknowledged in the alienation provisions in the Lease. It is also an odd form of words to use if it is designed to refer to an assignee who might or might not come into existence whereas the wording implies that it is something which will come to pass.

33. I therefore do not consider that Mr. McGhee's interpretation is just a realistic alternative but is the most obvious reading of the words in paragraph 1.1. I consider that the parties intended to refer only to T1 in their definition of "Principal". I therefore do not have to express any views on the rest of the arguments which were raised on this specific point but will do so in case this matter goes further and in deference to the excellent written and oral arguments presented to me.

34. Mr. McGhee's second point is that the effect of clause 8 of the Licence is that a valid stand-alone guarantee has been given in relation to HMV's AGA and the effect of the words "*until such time as EMI is released by law*" refer to the effect of section 24(2) of the 1995 Act terminating EMI's liability. That of course takes place on the assignment to Forever21 when the AGA ceases to have effect. Therefore, regardless of whether the clause 9 guarantee is too wide and has to be excised from the Lease, a perfect valid guarantee has been given in the Licence.

35. Mr. Seitler disputes that the Licence has that effect and relies on the use of the term "confirms" meaning that the parties are not entering into any new obligations (which are dealt with quite differently elsewhere in the Licence) but merely confirming the terms of the Lease and the guarantees contracted for in the Lease. I consider that this argument is right and I doubt whether clause 8 of the Licence provides a guarantee which is valid if the terms of the Lease from which it springs are not.

36. Mr. Seitler's further answer to this point was that clause 8 in the Licence is in fact designed to get round the rule in *Holme v Brunskill* (1878) 3 QBD 495 to the effect that a material variation in the terms of a lease may release a guarantor and here the Licence was for change of use as well as to assign. That cannot be right as the Lease itself contains an anti-*Holme v Brunskill* clause (paragraph 2 of Schedule 1 to the Lease).

37. What, however, I think the terms of clause 8 of the Licence do indicate is the basis upon which the parties considered that they had contracted, namely that any guarantee would be discharged when the tenant was.

38. The third point made on behalf of Prudential is that if the guarantee purports to be more than a guarantee of HMV's AGA, the effect of s. 25 of the 1995 Act is that it is invalid only to the extent of it being a guarantee for more than HMV's AGA. I was referred to the decision of the Court of Appeal in *Tindall Cobham Ltd. V. Adda Hotels* [2015] 1 P & CR 5 where Lord Justice Patten at para 47 indicated that none of the parties in that case (which involved the construction of a covenant in a lease which offended s. 25 of the 1995 Act) had argued that the general rules of severance applied. That was on the basis that section 25 itself rendered an agreement void to the extent that it excluded, modified or otherwise frustrated the provisions of the 1995 Act. There was some debate before me as to the effect of that decision, particularly in the light of the recent examination of common law principles of severance by the Supreme Court in *Egon Zehnder Ltd. V. Tillman* [2020] AC 154 a case concerning whether covenants in an employment contract were in restraint of trade and whether the offending provisions could be severed. The first point made by the Supreme Court in respect of those common law rules is that a blue pencil can only ever be used to remove words and if what is required is the adding in of words, that cannot take place, however capricious that rule might be. The second point relevant for this judgment is that the removal of the unenforceable words must not generate a major change in the overall effect of the contract (paragraph 87).

39. It seems to me quite clear that in *Tindall Cobham* the Court did not find it necessary to have regard to the common law rules of severance because section 25 has its own test which applies to invalidate provisions to the extent that they offend provisions of the 1995 Act. I do not see anything in the *Tillman* case that suggests that the common law

rules of severance have to apply if terms are struck out which offend section 25. However, it is clear from *Tindall Cobham* (to adopt the words used by Patten LJ at paragraph 46) what is left must not be emasculated by the removal of the offending words.

40. Mr. McGhee's argument was that if the words "*or is to become*" are omitted, the clauses are not emasculated because a perfectly workable obligation rests on EMI to guarantee HMV's obligations. He referred me to *Inntrepreneur Estates GL v Boyes* (1994) 68 P & CR 77 which concerned the severability of unlawful beer ties contained in the lease of a public house. The Court there gave weight to a clause whereby the parties had agreed that any clauses rendered unenforceable should not invalidate the lease when deciding whether to sever. Mr. McGhee relies on paragraph 6 of Schedule 1 to the Lease to the effect that "*Any provision of this Schedule which is rendered void by section 25 of the Landlord and Tenant (Covenants) Act 1995 shall be severed from all remaining provisions and the remaining provisions shall be preserved*" as demonstrating that the parties agreed between themselves what should be preserved if severance had to take place.

41. If I had considered that the words "*or is to become*" meant that EMI was required to guarantee not just the obligations of HMV but also those of T2, I would have had no difficulty omitting them because section 25 invalidates only to the extent that the provisions of the Act are offended and the guarantees in the Lease could have continued to operate limited to the obligation of EMI to guarantee HMV's liabilities and its AGA. I do not see that the terms the parties had agreed as to the guaranteeing of obligations under this lease could be regarded as emasculated by removal of the offending words (if offending words they be).

42. Mr. Seitler's argument was that if the words were removed, EMI would be in a different legal position because while it would have a right of indemnity against T2 if directly guaranteeing (albeit impermissibly) its liabilities, that would not be the case if guaranteeing under a GAGA. That might well be right but that could hardly be said to be emasculating the Lease and Guarantee provisions entered into. The authorities do not establish that the precise legal position has to apply before and after severance.

43. That view is reinforced by the terms of paragraph 6 of Schedule 1 whereby the parties have agreed that insofar as terms offend s. 25 of the 1995 Act they should be severed. Mr. Seitler has criticised paragraphs 6 and 7 of Schedule 1 as having no effect. I see the force in some of his criticisms of paragraph 7 as to how the Agreement would be varied to comply with the limits of the Act. However, what it seems to me that paragraph 6 in particular signifies is that the parties intended their agreement to comply with the 1995 Act. Insofar as it did not, their expressed agreement was that offending parts should be severed. Clearly there are circumstances where such a clause would not save matters, but that is not the position here.

44. I therefore prefer Prudential's construction of paragraph 1.1 and do not consider that it has the effect of creating a void embedded guarantee under the 1995 Act. However, in any event, I would be prepared to omit the words "*or is to become*".

The meaning of "while"

45. The covenant contained in paragraph 3 of Schedule 1 provides that "*the guarantor covenants with the Landlord that* ***while*** *the Principal is bound by the tenant covenants in his lease*" (my emphasis) the Principal will pay the rents etc. The word "while" is also used in paragraph 5.1 of Schedule 1 in relation to the AGA and paragraph 3 of Schedule 2 setting out the terms of the AGA. Mr. Seitler's argument is that what this clause should have said to avoid offending the 1995 Act was "*until the Principal is released*" rather than "*while the Principal is bound*". His reasoning is that the use of the term "while" allows for the possibility that an AGA given by T1 could be extinguished when T2 assigns to T3 but then reignited if T3 reassigns the lease back to T2. In this situation a contingent liability would arise under the original AGA after T2 has been released. Similarly, in relation to paragraph 3 of Schedule 1, there remains the possibility of a reassignment to the Principal.

46. The reason Mr. Seitler says that the possibility of this happening offends the 1995 Act is because of the provisions of s. 16(4)(b) which reads: "*An agreement is not an authorised guarantee agreement to the extent that it purports— (b) to impose on the tenant any liability, restriction or other requirement (of whatever nature) in relation to any time after the assignee is released from that covenant by virtue of this Act*."

47. According to Counsel this is not a sub-section of the Act which has received any judicial attention before now. His argument is that if "while" means "during", it does then the AGA offends against s. 16(4)(b) and is therefore void by reason of section 25(1)(a).

48. Mr. McGhee argues that the use of the term "while" was deliberate and provides for the circumstance contemplated by the alienation covenant in the Lease that a tenant might give an AGA before an assignment takes place but it would only be operative while the assignee was bound by the tenant covenants.

49. "While" is an expression which might contemplate a state of affairs which goes on for a time, stops and then starts again. However, it seems unlikely that the parties were contemplating a state of affairs where the lease was assigned back at some future time to a tenant and I am attempting to discern what the parties intended by their words. Mr. McGhee points to the definitions of Assignor and Assignee in the Lease which clearly contemplate a single assignment being in the parties' contemplation at any one time. In other words the parties were not contemplating the possibility of a tenant having the Lease assigned back to it.

50. In my view "while" in this context was clearly intended to mean a single period when the tenant is bound by the covenants and does not contemplate a future and unlikely assignment back to that tenant. It is perhaps here that the validation principle does have some role to play in that there are two competing constructions and I prefer that which validates the provisions in question in the Lease. In my view it is an entirely realistic construction.

51. Further, like section 25 section 16(4) invalidates only to the extent necessary and so I accept the argument that the AGA would be valid until the assignment on by Forever21. I cannot see in this case why that would not render the AGA valid insofar as it complied with the Act, invalidating only insofar as it did not.

The Equivalent Treatment Argument

52. Mr. Seitler QC's further argument on his first and main argument was that even if he is wrong on his construction of "Principal" (and for the reasons set out above, I hold that he is) then paragraph 5 has to release HMV and EMI to the same extent. It does not do so because whereas the landlord has to be reasonable in requiring the tenant to give an AGA, the guarantor is automatically bound to provide a GAGA under paragraph 5. In other words, the imposition of a GAGA is not subject to an independent test of reasonableness. Therefore, this provision offends s. 24(2) of the
1995 Act because, Mr. Seitler argues "to the same extent" in section 24 means in the same way and subject to the same conditions.

53. Mr. McGhee QC argues that section 24(2) concentrates on the circumstances in which the guarantor is released and not the circumstances in which the requirement for a guarantee is imposed. If the purpose of the 1995 Act is to release tenants from their obligations under the Lease on assignment, the obligations of the guarantor have to be released as well. Otherwise, if the guarantor was successfully sued he could look to the tenant for an indemnity. The tenant would not therefore be released contrary to the whole purpose of the 1995 Act.

54. In *K/S Victoria Street* when expressing the view that there was nothing to prevent a Landlord seeking that a guarantor guarantee an AGA Lord Neuberger MR (as he then was) said (at para 46):-

> "*By section 24(2), on any assignment, a guarantor of the assignor is only required to be released to the same extent as the tenant. Accordingly, if, where section 16(2) applies, the landlord is entitled to require the assignor to reassume liability under an AGA, it does not appear to us to be inconsistent with section 24(2), and hence it would not be void under section 25(1), for the landlord in such a case to require the guarantor to guarantee the liability of the tenant under the AGA. Where an assignor is lawfully required to enter into an AGA, then, when he assigns the lease, he is released from his obligations under the lease, save to the extent that he re-assumes those obligations under the AGA. There appears to be nothing inconsistent with section 24(2) if the assignor's guarantor is required to guarantee the assignor's liability under the AGA: the guarantor is released to precisely the same extent as the assigning tenant*."

55. Therefore, what makes a GAGA valid is the operation of section 24(2). The requirements for an AGA set out in section 16 do not apply to the GAGA but the guarantor can enter into the GAGA because he will be released at the same time as the tenant. This analysis in *K/S Victoria Street* makes it clear in my view that the focus is on the fact that the guarantor will be released when the tenant is released and not on the terms which require the AGA .

56. Mr. McGhee further argued that the effect of section 19(1A) of the Landlord and Tenant Act 1927 (inserted by the 1995 Act) was that any question of the tenant being able to object to the requirement of an AGA (if the lease so provided) on the basis that it was unreasonable, was illusory: the parties had already agreed it as a condition in the Lease. It seems to me that this too is right. Section 19(1A) has the effect of determining in advance if the lease so specifies that an AGA is a reasonable requirement.

The Dissolution Argument

57. Mr. Seitler's second point is that paragraphs 3 and 5 of schedule 1 and the AGA itself in Schedule 2 provide that EMI's liability only exists "while the principal is bound". HMV has been dissolved and no longer has any existence and therefore cannot be bound. When a company is dissolved its property vests in the Crown (section 1012 Companies Act 2006). Its liabilities continue but there is nothing in existence which can be sued.

58. Paragraph 2.4 of Schedule 1 to the Lease provides that the liability of the Guarantor shall not be affected by the Principal being dissolved or otherwise ceasing to exist which at first blush would appear to be an answer to the point. However, Mr. Seitler points to the provisions of paragraph 4 of the Lease which apply on a Trigger Event. A Trigger Event includes dissolution of the Principal. The Landlord on such an event but subject to the provisos dealt with below, can require the Guarantor to enter into a new lease, or can require the payment of six months' rent or the rent reserved until the premises are re-let. Clause 2.4, it is argued, therefore applies to those provisions and not more generally.

59. The difficulty with this argument is that paragraph 4.1 (which introduces the provisions as to what should happen on a Trigger Event) states that those provisions apply "without

prejudice to any other rights of the Landlord against the Guarantor or any other person". Further, the provisions of paragraph 4.2 to 4.4 of the Lease quite clearly do not provide a complete code as to what happens on the dissolution of the Tenant. The Landlord can require the Guarantor to enter into a new lease (but only if
the dissolution takes place while the Principal is the tenant which was of course not the case here) but can also require payment of a sum the maximum of which is 6 months' rent. However, this latter provision only applies where the tenant has been dissolved and the Lease has been determined with no possibility of being revived (for example, by a vesting order being made on a disclaimer or relief from forfeiture being granted). There is therefore a third situation (as applies here) where the tenant has been dissolved, the Landlord has not asked the Guarantor to take a new lease (or as is the case here, was not in a position to do so), and the lease has not determined.

60. Mr. Seitler argued that the provisions of section 178(4) of the Insolvency Act 1986 which provides that "*a disclaimer under this section (a) operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed; but (b) does not, except so far as is necessary for the purpose of releasing the company from any liability, affect the rights and liabilities of any other person*'' was specifically required because otherwise the guarantors would be released by the disclaimer. There being no such similar provision about the dissolution of the tenant company, then it must mean that the guarantors would cease to be bound. I confess that I do not find any assistance in this argument. The subsection deals specifically with the termination of the lease and not the status of the tenant.

61. In my view the Lease is clear in providing by paragraph 2.4 of Schedule 1 that the dissolution of the tenant will not affect the liabilities of the Guarantor. That is what the parties agreed, and there is nothing in paragraph 4 of Schedule 1 which seems to me to affect that in any way.

Conclusions

62. I therefore reject the declarations sought by EMI that both the GAGA and the wider guarantee in the Lease of which it forms part are void as they fall foul of section 25 of the 1995 Act and the alternative declaration that EMI was released from its ongoing obligations under the guarantee and the GAGA on the dissolution of HMV.

63. It therefore follows that I will give the declaration sought by Prudential that the GAGA imposed by the Lease is valid and give the money judgment sought. I will hear submissions (or deal with them in writing) as to the amount outstanding in respect of rent at the present time.