

Advising guarantors

In this article, Alexa Walker explains the legal position of guarantors for tenancy agreements and what remedies may be available if a private landlord takes action against a guarantor.

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This article will consider the legal position of guarantors who are asked to pay rent or other costs arising from an assured shorthold tenancy agreement. The information in this article does not relate to guarantees given for money or other forms of consideration. Guarantees provided for financial reward may constitute insurance, which is an FCA regulated activity.

Initial considerations

Guarantee agreements provide additional security for certain debts and liabilities. If the principal debtor or tenant is unable to pay, the guarantor can be pursued for payment. This action may be in addition to or instead of pursuing the tenant.

It is increasingly common for landlords and agents to require a guarantee, particularly in cases where the prospective tenant is a student, has a poor credit rating, or is in receipt of means tested benefits. Prior to agreeing, potential guarantors should consider the possible extent of their liability, in case it extends to:

- other people who live in the property
- damage to the property
- variations to the tenancy
- tenancies beyond the initial term.

Caution should be exercised if the guarantee extends to tenants other than the family member or friend of the guarantor, or if it purports to be 'open-ended' or unlimited. The guarantor has no right to end the tenancy agreement, so it will normally be in their interest to ensure the guarantee is limited to the initial fixed term. Guarantors should always be given a copy of the tenancy agreement, which can be checked for rent review clauses.

It may be possible to negotiate a payment of rent in advance instead of a guarantee. If this is affordable, it may be a better option.

The guarantor could agree to be liable for a proportion of the rent if it relates to a joint tenancy.

Enforceability of the guarantee

Getting answers to the following questions will help to determine whether the guarantee is enforceable, and if so, to what extent.

Is the guarantee in writing and signed?

All guarantees must be in writing¹ and signed by the guarantor. Electronic signing is permitted.²

Does the tenancy pre-date the guarantee?

Where the tenancy pre-dates the guarantee, the guarantee must be drawn up and executed as a deed. This applies whether or not the tenant has moved in.

The valid execution of a deed imposes the following formal requirements:³

- the document must make it clear that it is intended to be a deed
- it must be signed by the guarantor
- the guarantor's signature must be witnessed at the point of signing.

The absence of a date will not invalidate a deed.⁴

Are there joint guarantors, and have they all signed?

If the guarantee names more than one person as the guarantor, they must all sign it. Failure to do so means it is not binding on any of the named⁵ individuals, including any who have signed.

If all the joint guarantors have signed, they may be pursued individually or jointly.

What does the guarantee cover?

Most guarantees for tenancy agreements cover unpaid rent and damage to the property. The guarantee will only cover liabilities specified in the guarantee agreement, so if the agreement only mentions rent arrears, it will not cover damage to the property.

Does the guarantee allow for variations in the tenancy?

Unless expressly stated, the guarantee liability will normally be confined to that in the tenancy agreement. If the tenancy is for a 12-month fixed term, with no express provision in the contract for it to continue afterwards, the guarantee liability will also end. This is the case even where the tenancy does continue after the fixed term.

Any variation to the guarantee must be agreed by the guarantor. Otherwise, the guarantee will only be enforceable if the variation is 'self-evidently insubstantial or non-prejudicial'.⁶

It is common for tenants to remain in their homes beyond the fixed term when there is no contractual provision for the tenancy to continue. In these cases, the tenancy is 'statutory periodic'.⁷ This constitutes a new

tenancy, and the guarantee will cease to be enforceable for any arrears or other liability arising after the variation.⁸

Where the tenancy agreement allows for a contractual periodic phase, the wording of the guarantee will have to be carefully checked to determine whether the liability continues.

Increases in rent may be enforceable if the tenancy contains a rent review clause and the guarantee specifies rent due 'under the tenancy' (or similar⁹).

If the guarantee does allow variations, including rent increases or a new periodic tenancy, the court may release the guarantor from any additional liability if it substantially exceeds the amount they initially agreed to.¹⁰

If the guarantee purports to cover 'any extension or variation' to the tenancy, this may be an unfair contract term, and unenforceable.

How much is really owed by the tenant?

The guarantor's liability cannot exceed that of the tenant, so it is always useful to check whether the tenant has a defence or a claim against the landlord. Specialist advice may be needed to deal with issues such as disrepair at the property.

If a court claim has been issued against the guarantor, it is possible to ask for an adjournment to allow the tenant to bring a claim or counterclaim to challenge the amount of the debt.

Was the deposit protected?

If the landlord has not taken the correct steps to protect the tenancy deposit, the tenant can bring a claim for up to three times the amount of the deposit.¹¹

A guarantor cannot bring the claim unless they have paid the deposit on the tenant's behalf.¹² If the tenant brings a successful claim it can be set off against arrears and reduce the guarantor's liability.

Was the guarantor misled, coerced or unduly influenced?

A guarantor can seek to set aside a guarantee on the basis of fraud, misrepresentation or undue influence, but this will require specialist advice.

In contract law, if one party wants to be relieved of their responsibilities due to the undue influence or misrepresentation of a third party, it is necessary to show that the other party knew, or should have known, that this was

the case. Guarantor agreements are not subject to this test.

A landlord accepting a guarantee is already on notice of these issues, and should take steps to ensure the guarantor is aware of their responsibilities and is not giving the guarantee as a result of undue influence.¹³ This is referred to as a 'rebuttable presumption' of undue influence.

To rebut the presumption of undue influence, a landlord should consider:

- speaking to the guarantor personally and explaining the full extent of the liability
- recommending the guarantor seeks legal advice about their responsibilities and allowing time for this to take place.

Are there unfair terms in the guarantee or tenancy agreement?

Consumer contracts include tenancy agreements, and by extension guarantor agreements for tenancies. This means rules about unfair terms apply.¹⁴

The Consumer Rights Act 2015 came in to force on 1 October 2015 and applies to contracts entered into on or after that date. There are a number of examples of unfair terms in Schedule 2 to the Act, including terms which allow the landlord to:

- extend the tenancy without giving the tenant enough chance to end it¹⁵
- alter the terms of the contract without a valid reason which is specified in the contract¹⁶
- claim large default sums if the tenancy is breached.¹⁷

Guarantees which allow the landlord and tenant to extend the liability of the guarantor, such as a term in the guarantee allowing 'any variation or extension', may be an unfair term.

For agreements executed before 1 October 2015, similar provisions are contained in the Unfair Terms in Consumer Contracts Regulations.¹⁸ The examples of unfair terms above are also contained in Schedule 2 to the regulations. If the court finds that a term in a tenancy agreement or a guarantee is unfair, that term is not binding on the guarantor. The agreement is still enforceable as if the unfair term did not exist.¹⁹

The Tenant Fees Act 2019 applies to guarantors for tenancy agreements.²⁰ This limits the rate of interest on unpaid rent to 3 per cent above the Bank of England base rate.²¹

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Footnotes

- ¹ s.4 Statute of Frauds 1677.
- ² s.7(3) Electronic Communications Act 2000.
- ³ s.1 Law of Property (Miscellaneous Provisions) Act 1989.
- ⁴ *Morrell v Studd & Millington* [1911-13] All ER Rep Ext 1426.
- ⁵ *Harvey v Dunbar Assets plc* [2003] EWCA Civ 952.
- ⁶ *Holme v Brunskill* [1878] 3 QBD 495.
- ⁷ s.5 Housing Act 1988.
- ⁸ *Junction Estates v Cope* (1974) 27 P & CR.
- ⁹ *Torminster Properties Ltd v Green* [1983] 1 WLR 676 (CA).
- ¹⁰ *Triodos Bank NV v Dobbs* [2005] EWCA Civ 630.
- ¹¹ s.214 Housing Act 2004.
- ¹² s.213(10) Housing Act 2004.
- ¹³ *Royal Bank of Scotland v Etridge* [2001] UKHL 44.
- ¹⁴ *Brusse and Garabito v Jahani BV* [2013] EUECJ C-488/11.
- ¹⁵ Para 9, Part 1, Schedule 2 CRA 2015.
- ¹⁶ Para 11, Part 1, Schedule 2 CRA 2015.
- ¹⁷ Para 11, Part 1, Schedule 2 CRA 2015; see also Schedule 1 Tenant Fees Act 2019.
- ¹⁸ SI 1999/2083.
- ¹⁹ s.67 CRA 2015 & Reg 8 UTCCR 1999/2083.
- ²⁰ SI 1999/2083.
- ²¹ s.67 CRA 2015 & Reg 8 UTCCR 1999/2083.
- ²⁰ s.1(9)(b) Tenant Fees Act 2019.
- ²¹ Para 4(5), Schedule 1 Tenant Fees Act 2019.

Time limits for enforcing a guarantee

There are statutory limitation periods for bringing claims under contract, and under a guarantee. The time limit for enforcing a guarantee for rent is normally 6 years from the cause of action.²²

Liabilities under a guarantee are limited to those under the principal agreement, even if the guarantee has been executed as a deed. The time limit for bringing a claim for rent arrears or damage to a property is 6 years from the cause of action.²³

Where the guarantee is given for a tenancy agreement, the cause of action is the date the rent fell due unless the guarantee stipulates otherwise. The debt must still be enforceable against the tenant for it to be enforceable against the guarantor, so if the rent has become statute barred, this will also prevent enforcement of the guarantee.²⁴

Obtaining relief

The courts have the power to set aside a guarantee that has been obtained by fraud, misrepresentation or undue influence. The guarantor could issue a claim for a declaration of this from the courts. The claim is made under Part 8 Civil Procedure Rules, which

means the rules of procedure are complex and costs can be substantial. Specialist advice is always required, and representation may also be necessary. The risk of costs may be lower when defending a claim.

If the debt remains unpaid, the guarantor is likely to face a money claim to enforce the guarantee. The guarantor may file a defence at this stage. If the claim is for less than £10,000, it will be allocated to the small claims track and the costs will not be substantial.²⁵ If the claim is for more, the costs may be higher and the losing party is frequently ordered to pay the winning side's costs.

Advising guarantors is often complex, and because they are chosen as a result of their assets and/or income, they frequently have a lot to lose. A debt adviser may be able to offer advice about the extent of the liability, possible challenges and risks of litigation. A solicitor may be necessary if the guarantor would like to challenge the validity of the guarantee.

Shelter's [Specialist Debt Advice Service](#) can provide second tier advice about guarantor liability and assist with responding to court claims.

Footnotes

²² s.19 Limitation Act 1980.

²³ Romain and Wolfson v Scuba [1996] 2 All ER 377.

²⁴ Lakeman v Mountstephen (1874) LR 7 HL 17.

²⁵ CPR 26.6.

Advising guarantors - case study

Ben is seeking advice after signing a guarantee agreement for his friend Richard's assured shorthold tenancy. The guarantee agreement states Ben is liable for 'rent and other costs arising from the tenancy agreement, including any extension, renewal or variation'. Richard assured him that he had only signed up for a six-month fixed term. The six-month term is now over and Richard remains in the property. Ben would like to know whether his liability under the guarantee has ended. Ben has had no contact with the landlord or their agent.

Unfair term

It is common for a guarantee agreement to state it extends to renewals and variations. If it is a standard term in the agreement that was presented for signing, rather than individually negotiated by parties with the benefit of legal advice, the court may decide it is an unfair term.

Lack of information

Paragraph 6.16 of the Competition and Markets Authority [guidance for lettings professionals](#) states that guarantors should be provided with 'clear, accurate and full information', including the terms of the tenancy agreement.

Neither the landlord nor the agent has explained Ben's potential liability to him. Richard may not have understood the extent of the guarantor's

obligations. If Ben was not given a copy of the tenancy agreement, he had no way of knowing what the terms were.

Practical steps

An adviser could help Ben with drafting a letter to the landlord and their agent to make the following points:

- the terms of the tenancy were not provided
- the standard term suggesting Ben's liability is unlimited is likely to be an unfair term
- the landlord took no steps to protect Ben from being pressured to sign the agreement
- the landlord did not explain the extent of Ben's liability to him to allow him to make an informed decision.

If the landlord issues a money claim against Ben, specialist advice should be sought. Completing the acknowledgment of service (included in the claim pack) gives Ben 14 days to file a defence.

Ben's adviser can help him with:

- getting all the facts and evidence together
- preparing a witness statement by writing down everything that happened in Ben's own words and in chronological order.