



**KEEPING YOUR
GUARANTEE OR
INDEMNITY IN TACT:
TIPS FOR LANDLORDS**

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One of the critical business terms often negotiated in a commercial lease is the provision of a guarantee or indemnity by a party related to the tenant. This is typically done in order to bolster the tenant's financial covenant should the landlord think the tenant may not be able to meet all its obligations under the lease, to ensure there are sufficient pockets to dip into. But once the guarantee or indemnity is negotiated, signed and delivered to the landlord, often no more thought is given to it until the tenant has breached the lease and the landlord wishes to enforce the guarantee. At that time however, a landlord may discover through its legal counsel that the guarantee or indemnity is no longer enforceable. This paper will outline some ways in which a landlord can protect itself.

The term "guarantee" as used herein refers to either a guarantee or indemnity (although there are differences) and the term "guarantor" as used herein refers to either a guarantor or indemnifier. This article presumes that a guarantee given was enforceable in the first place, in that it was properly drafted and signed and the guarantor was properly named.

Unintentional Release of Guarantor Generally

A lease may be modified by the parties either in writing (e.g. by lease amending agreement), or by a course of conduct of the parties in practice. One of the defences to a claim under a guarantee is that the lease was amended without the consent of the guarantorⁱ. Any amendment to a lease (whether written or by conduct) which increases the guarantor's obligations under the guarantee in a material manner (typically resulting from an increase in the tenant's obligations which were guaranteed by the guarantor), will release the guaranteeⁱⁱ. Why? Because it would not be fair for a guarantor to guarantee obligations that it did not initially agree to guarantee.

Many landlords routinely enter into lease amendments without adding the guarantor as a party and having the guarantor sign; therefore the guarantee may fall away if the lease amendment increases the tenant's obligations and therefore the guarantor's obligations. Landlords can protect themselves by not entering into (or allowing their agents to enter into) written lease amendments that increase a tenant's obligations under its lease, without having the guarantor also execute the lease amendment, in effect consenting to the amendment and adding specific language whereby the guarantor agrees that the guarantee continues to apply to the lease, as amended. Is this necessary where the guarantee contains language saying it will continue to apply to the lease "as may be amended?" Yes, because the amendments are unknown at the time of signing the guarantee and courts will generally not require a guarantor to be bound by unknown amendments.

It is well established that a pattern of conduct by the landlord and tenant over time may also be deemed to be an amendment to the lease (e.g. if a tenant consistently pays and the landlord consistently accepts less rent, after a period of time a court may find the lease has been amended in that the rent has been reduced to the amount routinely paid). A landlord should be quite careful to ensure that no pattern of conduct occurs that would amend a lease in a way that would result in an increase in the guarantor's obligations, unless the landlord obtains from the guarantor a written agreement acknowledging the amendment of the lease/tenant

obligations, and agreeing the guarantee continues to apply to the lease, as amended by the conduct.

Unintentional Release of Guarantor Upon Expiry of the Initial Term

A guarantee may have been intended to extend beyond the initial term to extensions and renewals, but will not do so if the guarantee does not specifically state that it applies to extensions and renewals. If that language is lacking, then the guarantee will expire upon the end of the initial term. However, if the guarantee is stated to extend to extensions of the term, the guarantee will continue in effect until the end of extension terms provided for in the lease (if exercised)ⁱⁱⁱ. Landlords can protect themselves by ensuring the form of guarantee they are using contains language that states the guarantee extend to extensions and renewals (and not negotiate that language out of the guarantee!).

Unintentional Release of Guarantor By Negotiating Extension Other Than As Set Out in the Lease

Even where a guarantee specifically states that it applies to extensions and renewals of the term, a guarantee may be released if the landlord and tenant negotiate an extension that is different from extension options set out in the lease. Why? Because the lease was essentially amended without the consent of the guarantor; the terms of the current extension entered into were unknown when the guarantee was provided. If the tenant simply exercised its option to extend contained in the lease, most likely the guarantee would continue to apply as the extension would be on the terms known when the guarantee was given.

How can a landlord protect itself in this case? Again, the best way is to have the guarantor execute any lease extension which states the guarantee continues to be effective for the extension term, and consenting to any amendments in the lease extension agreement. In the case of a renewal, a landlord should obtain a new guarantee signed by the guarantor that covers the new lease plus all extensions thereof

The moral of the story is for a landlord to protect itself, it should document in writing and have a guarantor sign all amendments, extensions and renewals of a lease and agree the guarantee applies to such amendment, extension or renewal.

ⁱ *Manulife Bank of Canada v. Conlin* [1996] 3 S.C.R. 415

ⁱⁱ *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995) 125 D.L.R. (4th) 193

ⁱⁱⁱ *Guarantee and Indemnity Agreements*, Herbert, Brenda in Tenant's Rights and Remedies in a Commercial Lease. Haber, Harvey, Canada Law Book Inc., 1998