

Number 23

Limited Liability Partnerships (“LLP”) and Applications for Assignment of Leases

Introduction

We recently acted on behalf of a major institutional landlord who was approached by an existing tenant, a partnership, that had converted to a Limited Liability Partnership (“LLP”) and wanted to assign their lease to the LLP. This paper will briefly explain what an LLP is and will consider the issues arising from the assignment of an ‘old’ and ‘new’ lease to an LLP.

What is an LLP?

LLPs were introduced by the Limited Liability Partnerships Act 2000. An LLP is not a partnership in the traditional sense but is a body corporate existing as a legal entity separate from its members. As such, an LLP has legal capacity and can operate in much the same way as a limited company. For example, it can contract on its own behalf with third parties and can sue and be sued in its own right.

An LLP has members, not shares, partners, directors or shareholders. The relationship between the LLP and its members is governed by the terms of a private members agreement and not, as in the case of a limited company, by the publicly available memorandum and articles of association.

There are two main advantages of an LLP structure. Firstly, because an LLP is a separate legal entity it can incur liabilities and obligations in its own name (rather than that of its members) and assets can be owned directly by it (as opposed to being held on trust for the members like a traditional partnership).

The second advantage is the members’ limited liability. There is no joint or several liability of the members for the liabilities of the LLP. Although the members’ capital invested in the LLP is at risk, the members liability to contribute to the assets of an LLP in the event of insolvency is in most cases limited to what has been agreed between the member and the LLP. Similarly, provided the members are careful not to assume personal responsibility for their actions in the course of the LLP’s business, they should not suffer direct liability to third parties in respect of the LLP’s business.

Assignment of Leases

Essentially, a landlord’s position is much the same whether the assignment is to an LLP or to a limited liability company.

Assignment of an ‘Old’ Lease to an LLP

The matter we advised on related to an ‘old’ lease i.e. one granted before the Landlord and Tenant Act (Covenants) Act 1995 came into force. When an ‘old’ lease is assigned, the original tenant continues to be liable to the landlord for payment notwithstanding the assignment. In the matter we advised on, the existing tenant was an established tenant of the landlord and therefore the assignment was of an ‘old’ lease to a known organisation, albeit converted into the new LLP.

Since the assignment related to an ‘old’ lease, provided the assignment was expressly subject to the assets and undertakings of the business being held within or conducted through the LLP, there was no

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need for personal guarantees from the members because they remained liable as original tenants. However, some Landlords may insist on personal guarantees as they may view the conversion from a partnership to an LLP as a 'watering down' of the covenant being offered. Each application therefore, turns on its facts.

Assignment of a 'New' Lease to an LLP

Relevant for this purpose is Section 19(1) of the Landlord and Tenant Act 1927 which applies in modified form to new tenancies as defined by the 1995 Act. This section allows the parties to state at the outset the circumstances in which a landlord may refuse consent to an assignment.

Where the assignment is of a 'new' lease (i.e. granted after 1 January 1996 and therefore falling within the 1995 Act) then on assignment the original tenant is no longer liable to the landlord for payment. Consequently, where the proposed assignee of a 'new' lease is a LLP, upon default of payment, a landlord will be unable to pursue the assets of the partners in the original tenant, the partnership. For this reason a landlord will probably require personal guarantees from the members or another form of additional security.

A landlord will need to consider whether such guarantees should remain in place for the remaining period of the term of the lease or whether the standard institutional profits test should be implemented. A landlord may ask for an authorised guarantee agreement which remains in place until the next lawful assignment.

If the LLP is accepted as an assignee without guarantees or other security, then a landlord will be unable to pursue the assets of the partners in the original partnership. Consequently, it is advisable to ask for personal guarantees from the members of the LLP. A landlord should also have regard to whether the guarantees should remain in place for the remaining period of the term of the lease or whether the standard institutional profits test should be considered. It may also be reasonable to ask for an authorised guarantee agreement which remains in place until the next lawful assignment.

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August 2005

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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