

The Guidance on Sureties in Commercial Leases

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In a case which gives important guidance on the correct approach to sureties given in commercial leases, the freeholder of a DIY store whose tenant became insolvent, leaving rent arrears of more than £280,000, has failed to convince the Court of Appeal that it is entitled to collect the debt from the tenant's parent company

The Court in *Topland Portfolio No.1 –v- Smiths News Trading* (2014) held that the parent company had been released from its obligations under a surety because it was not a party to, nor had it consented to, subsequent alterations to the lease which enabled the tenant to carry out significant structural alterations to the layout of the premises.

The freeholder had sought to enforce the rent arrears against the parent company after the tenant's administrators disclaimed the lease. The lease had barred the tenant from modifying the premises; however the freeholder had subsequently agreed to waive that provision and consented to alterations, including breaking through a wall and the laying out of a new garden centre.

The High Court found that the surety was not binding on the parent company in that it had neither been party to, nor consented to, the variation of the lease. Challenging that decision, the freeholder argued that the variation had not increased the rental burden under the lease and that the parent company had suffered no prejudice.

The freeholder also submitted that its express waiver of its right to prevent alterations to the premises amounted to a 'forbearance' from enforcing its absolute covenant and that the variation thus fell within a proviso incorporated in the lease.

In dismissing the appeal, however, the Court found that the variation of the lease had had the clear potential to increase the tenant's obligations and, thus, the parent company's potential liabilities under the surety. The variation could not be viewed as a forbearance in circumstances where the tenant was not in breach of the terms of the lease at the time that the alterations to the premises were permitted.

Taken from: <http://www.excellolaw.co.uk>





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