Approved Judgment

Neutral Citation Number: [2015] EWHC 53 (Ch)

Case Nos: HC-2014-000959
and HC14A02709

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 16/01/2015

Before :

MR JUSTICE MORGAN

- -

Between :

(1) UK LEASING BRIGHTON LIMITED	**Claimants**
(2) SPLENDID PROPERTY COMPANY LIMITED	
(3) HILTON WORLDWIDE INC	
- and -	
(1) TOPLAND NEPTUNE LIMITED	**Defendants**
(2) LYNN KAREN BUSH	

("The Second Action")

And between :

ZINC COBHAM 1 LIMITED	**Claimants**
AND 21 OTHERS	
- and -	
ADDA HOTELS (an unlimited company)	**Defendants**
AND 11 OTHERS	

("The First Action")

- -
- -

John McGhee QC (instructed by **Paul Hastings (Europe) LLP**) for the **Claimants** in the Second Action and the **Defendants** in the First Action

Approved Judgment

Timothy Fancourt QC (instructed by **Osborne Clarke**) for the **Defendants** in the Second Action
Kirk Reynolds QC and **Julian Greenhill** (instructed by **Berwin Leighton Paisner LLP**) for the **Claimants** in the First Action

Hearing date: 11 December 2014

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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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Mr Justice Morgan:

Introduction

1. For the purpose of identifying and analysing the issues which are now before the court, I will set out a simplified version of the relevant facts. That simplified version will provide all that is necessary for the purpose of resolving those issues. I should however explain that the court is concerned with two actions between various landlords, various tenants and guarantors. Certain issues in the first action to have been brought have already been considered by the Court of Appeal which gave its judgment on 5 September 2014: see Tindall Cobham 1 Ltd v Adda Hotels [2014] EWCA Civ 1215. That decision sets out in more detail the background facts relevant to that first action. Further issues in that action have now come before the court for decision and are the subject of this judgment. Following the ruling of the Court of Appeal in the first action, a second action concerning different parties has been brought. The facts of the second action are essentially the same as in the first action, for all material purposes, and both actions raise the same issues.

2. In the first action, the landlords are represented by Mr Reynolds QC and Mr Greenhill. In the second action, the landlords are represented by Mr Fancourt QC. In both actions, the former tenants, the current tenants and the guarantors are represented by Mr McGhee QC.

The facts as simplified

3. A lease was granted to T1. T1's obligations under the lease were guaranteed by G. The lease was a new tenancy within the Landlord and Tenant (Covenants) Act 1995 ("the 1995 Act"). T1 assigned the term of the lease to T2. The assignment was a breach of a covenant in the lease. The assignment was effective to vest the term of the lease in T2 and T2 became liable under the tenant covenants in the lease. Because the assignment was in breach of covenant, T1 as the original lessee and G as the guarantor were not released under the 1995 Act from their liabilities in relation to the tenant covenants in the lease.

4. Because the assignment by T1 to T2 was a breach of a covenant in the lease, none of the parties is willing to leave the present position as it is. All the parties wish to bring about a result whereby the term of the lease is again vested in T1 and whereby the tenant's obligations under the lease are again guaranteed by G. One would have thought that there should not be the slightest difficulty in bringing about the desired result. Why should not T2 simply re-assign the term of the lease to T1 and G enter into a fresh guarantee of the tenant's obligations under the lease? Unfortunately, the matter may not be as simple as that. Although all parties agree on the result which they want to achieve, they do not agree on the steps which should be taken to achieve that result. There are said to be problems in this regard created by the 1995 Act.

5. The landlords favour the simple and direct course of T2 re-assigning the term of the lease to T1 and G giving a fresh guarantee of the tenant's obligations under the lease. The landlords submit that those steps would not be invalidated by the 1995 Act. The tenants submit otherwise and, in particular, submit that the fresh guarantee by G would be void.

6. The tenants favour the adoption of the following steps. First, T2 assigns the term of the lease to a particular associated company which has been identified ("Newco"). Then (a day or so later), Newco assigns the term of the lease to T1 and G enters into a fresh guarantee of the obligations of the tenant under the lease. The parties appear to agree that that sequence of steps would not necessarily be invalidated by the 1995 Act. However, the landlords express the concern that the tenants' side might not carry through all the steps. The landlords would not wish the term to be assigned in the first instance to Newco unless the landlords could be certain that thereafter the term would be assigned by Newco to T1 and G would enter into a fresh guarantee. A possible solution is an agreement binding all relevant parties, prior to the assignment by T2 to Newco, obliging the parties to follow through all the steps needed to re-vest the term in T1, with the benefit to the landlord of G's guarantee. However, this proposal gives rise to a suggested difficulty: would such an agreement itself be invalidated by the 1995 Act?

7. The parties have brought these proceedings to obtain the decision of the court on the points which are in dispute as to the efficacy of the possible ways forward. The parties have sought declaratory relief in relation to the two possible ways forward identified above. Mr Fancourt QC told me that other possible ways forward have been considered and rejected. Thus, there was no examination at the trial of the possibility of rescinding the unlawful assignment to T2 nor of the possibility of a surrender of the lease by T2 followed by the grant of a fresh lease to T1, with the tenant obligations being guaranteed by G. Furthermore, I have referred to the possibility of all parties making an agreement to carry through the two assignments route (an assignment to Newco followed by an assignment to T1 with a guarantee by G). At the hearing, reference was made to alternatives to such an agreement, namely: (1) an order of the court that T1, T2 and G should take those steps; or (2) all relevant parties giving an undertaking to the court to take those steps. However, it was not submitted by anyone that these alternatives would produce a different legal result from the agreement which was contemplated. Accordingly, there was no investigation as to whether: (1) the court had power to make an order of the court against G as well as against T1 and T2; nor (2) as to whether it would be appropriate for the court to accept an undertaking to do something which would be avoided by the 1995 Act.

The 1995 Act

8. In order to explain the problems which are said to arise in these cases, it is necessary to refer to some of the provisions of the 1995 Act. The principal provisions are those contained in sections 3, 5, 11, 16, 24 and 25, together with some of the definitions in section 28. I will quote only the most material provisions.

9. The provisions referred to below apply to "new tenancies" as defined in the 1995 Act. All of the leases in these cases created new tenancies within that definition.

10. Section 3 provides (so far as relevant in relation to an assignment by a tenant):

> "3 Transmission of benefit and burden of covenants.
>
> (1) The benefit and burden of all landlord and tenant covenants of a tenancy—

> (a) shall be annexed and incident to the whole, and to each and every part, of the premises demised by the tenancy and of the reversion in them, and
>
> (b) shall in accordance with this section pass on an assignment of the whole or any part of those premises or of the reversion in them.
>
> (2) Where the assignment is by the tenant under the tenancy, then as from the assignment the assignee—
>
> (a) becomes bound by the tenant covenants of the tenancy except to the extent that—
>
> (i) immediately before the assignment they did not bind the assignor, or
>
> (ii) they fall to be complied with in relation to any demised premises not comprised in the assignment; and
>
> (b) becomes entitled to the benefit of the landlord covenants of the tenancy except to the extent that they fall to be complied with in relation to any such premises.
>
> (3) …
>
> (4) …
>
> (5) …
>
> (6) Nothing in this section shall operate—
>
> (a) in the case of a covenant which (in whatever terms) is expressed to be personal to any person, to make the covenant enforceable by or (as the case may be) against any other person; or
>
> (b) to make a covenant enforceable against any person if, apart from this section, it would not be enforceable against him by reason of its not having been registered under the Land Registration Act 1925 or the Land Charges Act 1972.
>
> (7) … ”

11. Section 5 provides, so far as relevant:

> “5 Tenant released from covenants on assignment of tenancy.
>
> (1) This section applies where a tenant assigns premises demised to him under a tenancy.

> (2) 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.
>
> (3) …
>
> (4) … "

12. Section 11 provides (so far as relevant in relation to an assignment by a tenant):

> "11 Assignments in breach of covenant or by operation of law.
>
> (1) This section provides for the operation of sections 5 to 10 in relation to assignments in breach of a covenant of a tenancy or assignments by operation of law ("excluded assignments").
>
> (2) In the case of an excluded assignment subsection (2) or (3) of section 5—
>
> (a) shall not have the effect mentioned in that subsection in relation to the tenant as from that assignment, but
>
> (b) shall have that effect as from the next assignment (if any) of the premises assigned by him which is not an excluded assignment.
>
> (3) – (7) … "

13. Section 16 provides for the circumstances in which an assignor tenant may be called on to give an authorised guarantee agreement ("an AGA") in relation to the obligations of its assignee, even though the assignor tenant is otherwise released from its obligations under the tenant covenants of the tenancy. Section 16 has been considered in earlier cases to throw significant light on the operation of the 1995 Act. However, I will not set out the text of section 16 but I will later refer to a decision of the Court of Appeal where section 16 was fully considered.

14. Section 24 provides:

> "24 Effects of release from liability under, or loss of benefit of, covenant.
>
> (1) Any release of a person from a covenant by virtue of this Act does not affect any liability of his arising from a breach of the covenant occurring before the release.
>
> (2) 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.
>
> (3) Where a person bound by a landlord or tenant covenant of a tenancy—
>
> (a) assigns the whole or part of his interest in the premises demised by the tenancy, but
>
> (b) is not released by virtue of this Act from the covenant (with the result that subsection (1) does not apply),
>
> the assignment does not affect any liability of his arising from a breach of the covenant occurring before the assignment.
>
> (4) Where by virtue of this Act a person ceases to be entitled to the benefit of a covenant, this does not affect any rights of his arising from a breach of the covenant occurring before he ceases to be so entitled."

15. Section 25 provides:

> "25 Agreement void if it restricts operation of the Act.
>
> (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."

16. Section 28 contains a number of definitions. "Assignment" is defined to include an "equitable assignment and … (subject to section 11) assignment in breach of a covenant of a tenancy or by operation of law". References to "a covenant … of a tenancy" were defined to include a "covenant … contained in a collateral agreement". A "tenant covenant" was defined to mean, in relation to a tenancy, "a covenant falling to be complied with by the tenant of premises demised by the tenancy".

The application of the 1995 Act to the facts to date

17. There is no dispute about the application of the 1995 Act to the facts to date. Even though an assignment of the term of the lease by T1 to T2 constituted a breach by T1 of the terms of the lease, the parties accept that the assignment was effective to transfer the term of the lease to T2. Under section 3(2)(a), T2 became bound by the tenant covenants in the lease. Being in breach of covenant, the assignment was an "excluded assignment" within section 11 of the 1995 Act. Accordingly, under section 11(2)(a), T1 was not released from the tenant covenants pursuant to section 5(2)(a). Because T1 was not released, G could not assert that it was released under section 24(2) in relation to the tenant covenants in the lease.

The decision in Victoria Street

18. The operation of the relevant provisions of the 1995 Act has been considered and explained in the decision of the Court of Appeal in K/S Victoria Street v House of Fraser [2012] Ch 497 ("Victoria Street"), which considered in detail the earlier decision of Newey J in Good Harvest Partnership LLP v Centaur Services Ltd [2010] Ch 426 ("Good Harvest").

19. It is not necessary to refer to the detailed facts of Victoria Street, save to say that it concerned the operation of the 1995 Act in relation to an agreement that an existing guarantor of the tenant's obligations should enter into a further guarantee in relation to an assignee of the tenancy. The reasoning of the Court of Appeal is fairly intricate and I will attempt to extract the relevant propositions established by that case, as follows:

    (1) a term of the lease, or of an agreement relating to the lease, which stipulates in advance that a tenant's guarantor must re-assume the liability of a guarantor in relation to the assignee, as a term of an assignment by the tenant, would "frustrate" the operation of the statutory provision (section 24(2)) which would otherwise serve to release the guarantor and is therefore void under section 25(1)(a): [20] – [24] and [34];

    (2) the first instance decision in Good Harvest was correct;

    (3) the correct interpretation of the Good Harvest decision was (subject to a later qualification) that section 25(1) invalidated any agreement which involved a guarantor of the assignor guaranteeing the assignor's assignee: [34] and [44];

    (4) this interpretation gave the 1995 Act an unattractively limiting and commercially unrealistic effect but was nonetheless the law: [36];

    (5) there was no distinction between a guarantee freely offered by the guarantor and a guarantee insisted upon by the landlord: [40] – [43];

    (6) there was no distinction as to the effect of the 1995 Act on an agreement to give a guarantee and a guarantee actually given: [43];

    (7) the qualification referred to in (3) above was that if the assignor gave an AGA in relation to the assignee, the guarantor of the assignor (whilst it was the tenant) could also give a guarantee in relation to the assignor's liability under that AGA: [46] – [48];

    (8) if a tenant assigns and the tenant and the tenant's guarantor are thereupon released, there is nothing to stop that guarantor becoming a guarantor again on a subsequent assignment: [51];

    (9) the proposition in (8) above applies not only where the subsequent assignee is a new party but also where the subsequent assignee is an earlier tenant whose liabilities were guaranteed by that guarantor: [51].

The effect of a direct re-assignment by T2 to T1 followed by a new guarantee by G

20. I have already referred to the simple steps which are envisaged in relation to this proposal. T2 will assign the term of the lease to T1 and G will enter into a fresh

guarantee of the tenant covenants in the lease. These steps will be taken with the consent of the landlord.

21. I consider that the way in which the 1995 Act would operate in relation to these steps is, prima facie, as follows:

    (1) T2 will be released from the tenant covenants: section 5(2)(a);

    (2) T1 will be released from the tenant covenants entered into at the time the lease was granted to T1: section 11(2)(b);

    (3) G will be released from the earlier guarantee which it gave: section 24(2);

    (4) On the re-assignment to T1, T1 again becomes bound by the tenant covenants: section 3(2)(a).

22. If this is right so far, the problem then would be: if G is released under section 24(2) from the earlier guarantee which it gave, can it effectively be bound by a fresh guarantee entered into on the re-assignment to T1? The concern is that the decision in Victoria Street would produce the result that the re-imposition of such a liability on G would frustrate the operation of a provision of the 1995 Act (i.e. section 24(2)) and would therefore be invalid.

23. Mr Fancourt put forward a radical argument as to why the above analysis did not correctly describe the effect of the 1995 Act. He points to the fact that under the reasoning I have set out above, T1 is released from the tenant covenants under section 11(2)(b) and at the same time becomes bound by the tenant covenants under section 3(2)(a). He suggests that a more sensible reading of the 1995 Act would be to hold that T1 is not released under section 11(2)(b) on the re-assignment to T1 and T1 therefore simply continues to be liable on the tenant covenants. If that were right, then G would not be released under section 24(2).

24. Mr Fancourt contended that the right way to read section 11(2)(b) is as if it expressly provided:

> "(b) shall have that effect as from the next assignment (if any) of the premises assigned by him *to a person other than the tenant* which is not an excluded assignment." [The italicised words are suggested by Mr Fancourt]

25. I am not persuaded by this submission. It involves reading words into section 11(2)(b). Those words cut down the general wording of the provision. I do not consider that it is necessary to read in the additional wording to make the 1995 Act work. The effect of section 3(2)(a) is that the 1995 Act, as regards an assignee such as T1, works perfectly well without reading in these words. Mr Fancourt suggested that his argument was also supported by a consideration of sections 11(3) and 11(5) but I did not find that such consideration provided any real support to this submission.

26. In any event, Mr Fancourt's submission does not solve the problem in this case. That is because G is released by reason of section 24(2) where:

> "(a) by virtue of this Act a tenant is released from a tenant covenant of a tenancy, …"

27. Even if I were persuaded to read down the operation of section 11(2)(b) so that T1 was not released on the re-assignment from T2 to T1, the fact remains that T2, which was bound by the tenant covenants following the assignment to it, is released from the tenant covenants on the re-assignment to T1. Therefore, section 24(2)(a) is satisfied by reason of that fact. The consequence of section 24(2)(a) being satisfied is that "another person", in this case G, is also released.

28. Another argument was that it was not possible under the 1995 Act to assign the term of the lease back to T1 because to re-impose liability on T1 would be contrary to a release of T1 under section 11(2)(b). This somewhat improbable argument was said to be supported by a statement in Victoria Street as to the position of a guarantor. In that case, Lord Neuberger said at [37]:

> It would also appear to mean that the lease could not be assigned to the guarantor, even where both the tenant and the guarantor wanted it."

29. What Lord Neuberger was referring to in this statement was the possible conflict between a release of a guarantor under section 24 and the re-imposition of liability on the former guarantor as assignee. The statement is obiter and somewhat tentative. For present purposes, I do not need to consider whether I should follow that statement in a case to which it applies. In the present case, there is no suggestion of an assignment to G so the statement is not directly applicable. I am not prepared to extrapolate from that statement about a guarantor so as to reach the result that it is not possible in the present case for T2 to reassign to T1. As explained in paragraph 21 above, the position of T1 is governed by two provisions, first section 11(2)(b) and, secondly, section 3(2)(a). I am not prepared to hold that the release under section 11(2)(b) means that section 3(2)(a) cannot take effect. I consider that both provisions take effect. Accordingly, I will adopt the analysis set out in paragraph 21 above.

30. I return to consider the position of G. I referred above to the concern that the decision in Victoria Street would produce the result that the re-imposition on G of a fresh guarantee would frustrate the operation of section 24(2) of the 1995 Act. There is much in that decision which points to that conclusion. Although I would find such a result somewhat surprising and uncommercial, I recognise that the Court of Appeal in that case selected an interpretation of the 1995 Act which they acknowledged was unattractive and commercially unrealistic: see at paragraph [36] of that decision. Nonetheless, there is one part of the reasoning in that decision which might be applied by analogy to avoid the result that G is disabled from entering into a fresh guarantee of the tenant's obligations.

31. In paragraph 19(7) above, I referred to a qualification on the general reasoning of the Court of Appeal. The qualification applies in a case where the tenant, say X, is guaranteed by G and assigns to Y and where X enters into an AGA in relation to Y. In such a case, although X is released from its obligations as assignor tenant by reason of section 5(2)(a), it takes on new obligations under the AGA in accordance with section 16. The Court of Appeal held that in such a case, although G would be released from its original guarantee in relation to X by reason of section 24(2), G could enter into a

fresh guarantee in relation to X's obligations under the AGA. The Court of Appeal felt able to reach this conclusion by drawing attention to the words "to the same extent as the tenant is released from that tenant covenant" in section 24(2), in circumstances where it considered that the qualification produced a sensible commercial result.

32. After some hesitation, I have reached the conclusion that it is open to me to apply this qualification by analogy to the circumstances of this case. On my analysis of the position of T1, when the lease is assigned by T2 to T1, T1 is released from its original obligations by reason of section 11(2)(b) but becomes bound by the tenant covenants under section 3(2)(a). If G is released from its original obligations under its original guarantee but enters into a fresh guarantee in relation to the tenant covenants, then G is released to the same extent as T1 is released. Section 24(2) takes effect in accordance with its terms and is not frustrated for the purposes of section 25.

33. Accordingly, I conclude that it is open to the parties to proceed with a direct assignment by T2 to T1 with T1's obligations being guaranteed by G.

The effect of an assignment by T2 to Newco followed by an assignment by Newco to T1 and a fresh guarantee by G

34. In view of my conclusion in paragraph 33 above, it is not strictly necessary to consider the alternative route of an assignment by T2 to Newco followed by an assignment by Newco to T1, with a fresh guarantee by G. However, for the sake of completeness, I will discuss this alternative on the assumption that my reasoning in paragraph 32 above and my conclusion in paragraph 33 above involves an unjustified extension of the qualification in Victoria Street and is not open to me.

35. I would analyse the effect of the 1995 Act on this series of transactions, as follows:

    (1) on the assignment to Newco, T2 is released under section 5(2)(a);

    (2) on the assignment to Newco, T1 is released under section 11(2)(b);

    (3) on the assignment to Newco, G is released under section 24(2);

    (4) on the assignment to Newco, Newco becomes bound by the tenant covenants under section 3(2)(a);

    (5) on the assignment to T1, Newco is released under section 5(2)(a);

    (6) on the assignment to T1, T1 becomes bound by the tenant covenants under section 3(2)(a).

36. The question then is as to the effect of G entering into a fresh guarantee on the assignment to T1. On the authority of Victoria Street, at [51] in particular, the position is as follows. G is effectively released on the assignment to Newco. G may thereafter, on the subsequent assignment by Newco to T1 (just like any other assignee), enter into a guarantee in relation to that assignee.

37. However, this conclusion does not provide a complete answer in the present case. The landlord is not willing to consent to an assignment by T2 to Newco unless the

landlord can be certain that Newco and T1 and G will take the subsequent steps of an assignment by Newco to T1, with the tenant's obligations being guaranteed by G. Therefore, the landlord requires there to be a binding commitment from Newco, T1 and G, prior to or as part of the landlord giving consent to the assignment to Newco, that those parties will take the further step of assigning to T1, with a fresh guarantee being given by G. This requirement raises the further question: would such an agreement be binding on G?

38. I recognise that it could be said that the agreement on the part of G is to have effect after G is released (on the assignment to Newco) and, further, that the agreement is to enter into steps which will not themselves be invalidated by the operation of the 1995 Act. In that way, it could be said that the agreement is to operate the 1995 Act and not to frustrate the operation of the 1995 Act. If my conclusion in paragraph 33 were not open to me, I would not have been persuaded by these arguments. The problem arises because, before G is released on the assignment to Newco, it is being required to agree that it will commit itself again as a guarantor, admittedly not immediately on the assignment to Newco but shortly thereafter on the assignment by Newco to T1, which Newco and T1 will contract to effect. In view of the meaning given in Victoria Street to the phrase "otherwise frustrate the operation of any provision of this Act", I consider that the suggested agreement would frustrate the operation of section 24(2) of the 1995 Act.

39. It was also suggested that even if this route were not invalidated by section 25 of the 1995 Act, the court should regard the series of transactions as a sham which the court should hold to be ineffective. If I had held that this route was not invalidated by section 25 of the 1995 Act, I would not have held that this route involved a sham. All the parties to the series of transactions would intend all of the steps in the transaction to have legal effect. The fact that they wished to structure their transaction to have a particular legal effect rather than choosing a different structure with a different legal effect would not have been sufficient to make the transaction (or any part of it) a sham without legal effect.

Any other way forward

40. I have now discussed the two routes put forward by the parties. For the sake of completeness I wish to comment (albeit inconclusively) on another possibility.

41. The other possibility is an assignment by T2 to G followed by an assignment by G to T1, guaranteed by a fresh guarantee from G, but without any commitment prior to the assignment to G that the assignment to T1 (and the fresh guarantee by G) would be entered into. Would these steps be effective under the 1995 Act? I do not think that a problem would arise in relation to the fresh guarantee given by G on the assignment by G to T1. The fresh guarantee could be an AGA within section 16, which would therefore be effective under the 1995 Act. However, a problem could arise in relation to the earlier assignment, or purported assignment, from T2 to G in view of the statement at [37] in Victoria Street, which I have quoted at paragraph 28 above. This statement is obiter and somewhat tentative. A question was raised in the course of argument as to whether this statement was really correct. However, I was not asked to rule on that point. If I had been asked to hold that the statement was incorrect, I would have required further argument before being persuaded not to follow this dictum of

the Court of Appeal. In these circumstances, it would not be right for me to consider the matter further in this judgment.

The result

42. I will grant declaratory relief to give effect to my conclusion in relation to the proposal that there be a re-assignment by T2 to T1 supported by a fresh guarantee from G.