






X firm & Co., Solicitors
Inter Office Memorandum

To: The Partner
From: The Trainee Solicitor
File Number: 123456
File Name: Property Co – Bigtown Shopping Centre
Date: 8 June 2009




Facts

- 1.1 Our client owns the Bigtown shopping centre. The tenant of unit 5 is insolvent, and its liquidator has disclaimed the lease.
- 1.2 Our client served demands for rent and business rates on the tenant's guarantor, but they are refusing to pay. They say that the disclaimer released the tenant from liability and that because their liability is secondary to the tenant's, they were also released.

The Law

- 2.1 A guarantor's liability is secondary. If the person whose liability has been guaranteed is released then that release will also benefit the guarantor. This was established in  [Stacey v Hill \[1901\] 1 KB 660 \[Negative treatment\]](#).
- 2.2 However, there are statutory provisions that preserve the rights and liabilities of third parties where a lease has been disclaimed –  [Insolvency Act 1986, s 178\(4\) \[In force\]](#).
- 2.3 The effect of s 178(4) is that the guarantor remains liable for the rent unless the landlord takes possession of the premises.
- 2.4 The position may be different for business rates. A company in liquidation is exempt from liability for unoccupied rates. Accordingly such rates are not a liquidation expense. This is established in paragraph 2(2)(k) of the  [Non-Domestic Rating \(Unoccupied Property\) Regulations 1989 \[No Longer in force\]](#).
- 2.5 The landlord's ability to recover rent depends on the continued application of s 178(4). If the landlord takes possession of the property he loses the right to claim against the guarantor. This was established in  [London and County \(A & D\) Ltd v Wilfred Sportsman Ltd \[1970\] 3 WLR 418 \[No Lexis Library record of appeals or notable treatment\]](#).
- 2.6 The landlord will not necessarily be taken to have entered into possession if he changes the locks merely to protect the premises against trespass –  [Relvok Properties v Dixon \(1973\) 25 P & CR 1 \[No Lexis Library record of appeals or notable treatment\]](#).

The Rent Deposit

- 3.1 The tenant provided a rent deposit. However, it seems that the charge created over the rent deposit account was not protected at Companies House as required by  [Companies Act 1985, s 395 \[In force\]](#).
- 3.2 This may not matter because certain arrangements are exempt from statutory formalities for the protection of company charges.  [Financial Collateral Arrangements \(No 2\) Regulations 2003 \(SI 2003/3226\) \[In force\]](#).
- 3.3 This point ought to be clarified by new statutory provisions that are due to come into force later this year –  [Companies Act 2006, s 860 \[Partly in force\]](#).



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