



## *Professional Series*

# **Deed of Guarantee (Form G02)**

## **Drafting & Guidance Notes**

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# 1. Introduction

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## Rent Guarantees

Landlords have been using rent guarantees for centuries in order to guarantee that their rent payments would be forthcoming – especially when letting to a person of limited financial means or a poor credit history. The law in this area can be complex and deeply rooted; and one of the key statutory codes relies on some of the earliest known legislation still in force in this country – The Statute of Frauds, 1677.

Increasing protection from eviction and stronger tenant's rights introduced halfway through the 20<sup>th</sup> century dictated that a court order is required to evict a tenant. The bureaucratic and procedural delays of this process significantly extended the popularity of rent guarantees for residential tenancies due to the possibility of rent arrears arising during the court process.

Surprisingly, tenancy deposit protection (TDP) legislation introduced in the UK (starting in 2007) does not seem to have added to the popularity of the rent guarantee although this may be more down to momentum and the custom of landlords taking a rental deposit. The rent guarantee has the potential to replace the complexity and cost of using these TDP schemes – especially if England follows the Scottish restrictions on the charging of tenants fees.

## England and Wales

The Deed of Guarantee (G02) has been designed for use in England and Wales only. We recommend that they should only be used with a guarantor based in England or Wales and the guarantee may be difficult to enforce outside this area.

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## Agreement & Usage

### Deed of Guarantee

The Deed of Guarantee (G02 form) is based on an earlier Guarantor Agreement (G01) which was withdrawn in 2018. The difference between the G01 and G02 agreement is that the G02 is drawn as a deed which makes it safer and more secure.

The Deed of Guarantee is supplied for use by either landlords or property professionals acting in the capacity as agent for the landlord.

The agreement is drafted in the form of a deed and may be used for all types of residential tenancy. A deed is a more formal type of legal agreement that must be described as a deed on its face, and where the signature of the person providing the guarantee is witnessed – as a further safeguard. The witness is required to be present when the document is signed, identify her/himself and also sign the document to attest the signing and the validity of the signature.

The advantage of using a Deed of Guarantee rather than a standard Guarantor agreement is that the legal issue of consideration (see page 5 to these notes) will have no bearing on the validity of the guarantee. This gives greater flexibility as the documents can be drafted and signed in parallel with the tenancy arrangements - it is not strictly necessary to make certain that the guarantee is granted and signed before the tenancy is granted. Furthermore, it also opens up the possibility that a guarantee can also be obtained mid-way through a tenancy – for example because the tenant has encountered financial difficulties.

### Contract of Guarantee

If it is not possible to obtain a witness signature the deed of guarantee can be amended to a contract of guarantee but the document cannot be signed after the tenancy agreement. In order to do this you will need to replace any reference to 'Deed of Guarantee' with 'Guarantee' or 'Guarantor Agreement' and remove the witness signature boxes from the end of the agreement. In law a Deed of Guarantee which is signed and not witnessed will revert to a contract but best practice is to draft the guarantee as a contract as explained above. It is important that any amended documents are legally checked.

### Joint Tenancies

Most guarantors will not be prepared to guarantee the whole rent if there is more than one tenant and will want to limit their liability for rent to one specific tenant. We have drafted a clause for this situation that can be added to the Deed of Guarantee. See page 15 for more information.

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## 2. Contracts of Guarantee

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When a tenancy is drawn up, a contract of guarantee is often used when the tenant's financial situation is weak, or whenever there is doubt regarding the tenant's ability to pay the rent or comply with some of the key terms of the tenancy agreement.

The guarantee is simply a binding contract between the landlord and a third party (the 'guarantor') whereby the guarantor (also referred to as the 'surety') promises the landlord to be responsible for the due performance by the tenant of his obligations under the tenancy agreement (payment of rent etc.) if the tenant fails to perform these obligations.

This initial chapter discusses some of the background and important legal issues regarding the use of a guarantee. It is recommended that practitioners, who are not familiar with this type of contract, take the time to briefly read these sections before proceeding to chapter 2 where we discuss how to set up a guarantee agreement.

### Usage

A surety or rent guarantee is generally used whenever the tenant's ability to pay the rent is in question. Typical cases will be where the tenant is:

- **a company.** In this case, the director or, if the company is a subsidiary of a large and financially sound company, the parent company should be required to act as surety. N.B Where the tenant is a private company a surety should be sought.
- **a student or unemployed person.** Such persons have no current earnings and often little in the way of previous earnings history to rely upon, or previous references (in the case of their first tenancy). Often they generally have a poor financial status and this is a classic situation where a surety would be appropriate.
- **a divorced or separated spouse.** Where the separated person is solely dependent on maintenance payments for income, the 'paying' spouse or ex-spouse should be required to act as a surety.
- **a self-employed person.** Self-employed persons can represent a higher risk for the landlord for two reasons. Firstly, their earnings, by definition, often fluctuate from month to month and may be difficult to verify or predict accurately. Secondly, attachment of earnings orders, which can be applied by the courts, to debts owed by persons in employment, cannot be used where a person is not employed.
- **foreign nationals.** As with self-employed persons, it may be difficult to obtain satisfactory references on people who arrive from overseas.
- **a bankrupt,** or other situations where financial references are unsatisfactory (e.g. County court judgements - CCJ registered against them). A guarantee will avert risk where, despite previous financial problems, the landlord or agent considers the prospective tenant to be bona fide, thus allowing the tenant to be accepted.
- **Deposits.** It is increasingly common for a guarantee to be used in place of a tenancy deposit.

## The Law of Guarantees

A guarantee is a secondary contract in which one person, X (the guarantor) promises to repay to another, Y (the creditor), a debt or perform the obligations given by a third person, Z (the principal, and in this case, the tenant) who is the principal debtor and the person primarily liable for the debt.

In the context of residential lettings, the primary contract will, of course, be the tenancy agreement. The guarantee may work in a number of different ways; one guarantor may offer to provide a guarantee for several tenants. Equally, there may be one or more guarantors for each tenant, which, as we shall see, adds some complication in the case of joint tenancies.

### Legal requirements

Contracts of guarantee are required to be in writing (Statute of Frauds, 1677). Thus a verbal agreement to provide a guarantee will be unenforceable. The words of the guarantee should be unambiguous, and make it clear exactly what payments and obligations are being guaranteed.

Another common mistake is that the guarantee simply undertakes only to meet any shortfall in the rent payments. Ideally, the guarantor agreement should also be drafted so as to cover not just the obligation to pay rent, but all the tenant's covenants and obligations under the tenancy agreement.

### Primary Contract

The effect of the guarantor agreement will be to bind the guarantor to underwrite the debt and obligations of the principal (the tenant) in the primary contract – i.e. the tenancy agreement. It is a sound legal principle that people cannot be bound by contractual terms they have had no opportunity to see, understand or seek advice. It is therefore essential that the guarantor is given a copy of the tenancy agreement that the landlord proposes to grant to the tenant in advance of signing the guarantor agreement.

### Expiry

A guarantee will *prima facie* be construed as continuing only for as long as the obligation being guaranteed subsists. This means that, unless the guarantee agreement provides otherwise, the guarantor's liability will normally only apply specifically to the (contractual) fixed term and not to any statutory extension, or to any period where the tenant simply holds over paying rent. Thus where it is unclear, the court will lean in favour of construing the guarantee as a specific rather than a continuing one.

It should also be remembered that any action to recover monies recoverable under the guarantee should be taken within 6 years of the rent default, or the claimant will become time-barred from bringing a legally valid claim under the provisions of the Limitation Act 1980.

### Legal Jurisdiction and Choice of Guarantor

The Deed of Guarantee (G02) is designed for use in England, and therefore it **is strongly advised that the Guarantor is also resident in England**. The use of a guarantee of this type with a guarantor based overseas would incur the usual risks of enforcement outside the home jurisdiction – the risk that the agreement would be interpreted under foreign law, and the legal outcome would be uncertain. In addition, legal enforcement against a foreign guarantor can be significantly more expensive and problematic.



## Effect of variations

Where the terms of the primary contract are subject to variation, the basic rule is that a guarantor is released from liability by any change in the principal contract between the landlord and the tenant, unless the guarantor expressly agrees to the variation. The courts have ruled that the operation of this rule may be excluded by agreement but it is uncertain whether this ruling would hold water under the Consumer Rights Act 2015 (CRA) - a consumer would be expected to be given reasonable notice of any significant variation.

However, if the original lease includes a rent review provision whereby the amount of increase is defined such that the new rent may be calculable with degree of certainty, then the guarantor is liable to pay the increased rent, following the review in accordance with the review provision. Where the level of increase is not defined, the guarantor should be joined as a party in the review process.

An alternative approach might be to include a provision in the guarantee which requires the landlord to give notice of the proposed variation to the guarantor and provides the option that the guarantor can withdraw his guarantee upon giving reasonable written notice (thus also allowing the tenancy to be brought to an end or another guarantor found).

**BEST PRACTICE.** Best advice suggests that the landlord should obtain the consent of the guarantor before making any substantial variation to the terms of the tenancy. This can be done by drafting a new tenancy agreement which includes the new variations, and attaching this together with a new guarantor agreement for the guarantor's approval and signature.

## Advice to guarantor

It is important that the guarantor enters into the obligation freely and with knowledge of the true facts. It is now considered to be good practice to ensure that a warning notice is printed prominently on the front of the guarantor agreement, advising the guarantor of the potential liability created by signing the agreement and advising the person to take independent advice. We have adopted this approach for the Letting Centre's standard agreements.

Similarly, the CRA adds further safety nets to the signing of such instruments. When assessing the fairness of a contract, it is likely that the court will not only scrutinise the contract but also the circumstances in which the guarantor came to sign the guarantee.

Practitioners may, as a result, consider that it is a wise precaution to ensure that the consumer guarantor (i.e. an individual as opposed to a company who is acting as a guarantor) is provided with a copy of the guarantor agreement well in advance of the proposed date of signature, together with the underlying tenancy agreement.

## Consideration

In law, a contract of guarantee should be supported by a consideration (i.e. an act, promise or other form of payment) unless it is drafted as a deed. In context of lettings, there is generally no monetary consideration; the consideration will consist entirely of the advantage conferred on the tenant by the landlord agreeing to grant the tenancy which is the subject of the guarantee. If, for some reason, the consideration is not given (perhaps by the tenant entering the property prior to signing the tenancy agreement), then it is possible that a guarantee granted without monetary consideration will be unenforceable. The Letting Centre guarantee is drafted as a deed meaning that no consideration is necessary. The Deed uses a more formal structure and it is essential that the signature of the guarantor is witnessed if it is to operate without consideration – see Chapter 2. By using a deed there is no requirement for the document to be signed prior to the tenancy agreement.

## Time to pay

An agreement between the landlord and tenant to give the tenant time to pay can relieve the guarantor from liability, but this agreement (to delay payment) must be legally binding and go beyond mere delay by the landlord in enforcing his rights. Thus the landlord or his agent should be wary of making any arrangements with the defaulting tenant to waive rent, or agreements to delay rent payments.

Alternatively, this right can be excluded by agreement. A clause can be included within the guarantor agreement which permits the landlord to release or give time to the tenant without affecting the liability of the guarantor.

## Revocation

A contract of guarantee or indemnity may expressly state that it may be terminated by the guarantor on the giving of notice, (normally expressed to be in writing). What happens, though, should a guarantor request that his guarantee be revoked? This point has been tested in the courts on a number of occasions.

Generally, the law considers that the right of cancellation is an inherent characteristic of a continuing guarantee (on giving reasonable notice) – for example under a periodic tenancy.

If the guarantor enters into a continuing guarantee, the question whether he may revoke it depends on the nature of the contract. In the case of a guarantee for rent, if the tenancy is for a fixed period of a number of months or years, then *prima facie* the guarantee may not be revoked. On the other hand, a guarantor of rent payable from week to week may give notice of revocation.

### *Example Case:*

In *Wingfield v De St Croix*, 1919, the principal was a gardener working for the guarantor, who entered into occupation of a cottage belonging to the creditor. The surety guaranteed the rent for three months and from week to week thereafter. Four months after the tenancy began, the gardener left the service of the guarantor, and the guarantor gave the creditor a week's notice of termination of the guarantee. It was held, by the court, that the guarantee was continuous but could be terminated by notice.

It appears that the general rule is that, in the case of a tenancy guarantee, the guarantor will be bound for as long as the landlord remains bound to the tenancy which it supports since the guarantee was 'given' in consideration of granting the tenancy - i.e. the landlord relied on that willingness of the guarantor to provide the guarantee when granting the tenancy. Thus, if a landlord is bound to a specific tenancy to the end of the fixed term, but is permitted to a right to possession of the property at the end of this term (upon giving proper notice), then the guarantor would be bound until a similar time.

Where the tenancy is periodic, and the guarantee contained no provisions for termination, then a guarantor would be expected to give the landlord sufficient and reasonable notice so that the landlord had the chance to end the tenancy or find another guarantor. Where a landlord opted to end the tenancy it is reasonable to suppose that the guarantee might be expected to continue at least for as long as the shortest notice period required to terminate the tenancy, plus the time required to obtain a physical possession order if the tenant did not agree to leave voluntarily.

## Fixed vs periodic tenancies

Because of the issues concerning revocation of the guarantee (discussed above), it is strongly advised that, when using rent guarantees, fixed term tenancies and guarantees are used throughout the tenancy. Using fixed term tenancies and guarantees, the landlord would need to renew both the tenancy and the corresponding guarantee agreement at the end of each fixed term (rather than let the tenancy carry on as a periodic tenancy).

Periodic tenancies or roll-on using statutory periodic tenancies are best avoided due to the uncertainty as to whether, and for how long, a guarantor can be bound to the continuous guarantee. In the case of the Letting Centre Guarantor Agreement, we have included a safety provision in the agreement that will provide a degree of protection where a tenancy extends into a statutory periodic tenancy but this may not prevent a guarantor from exercising his right to revoke the guarantee.

The rollover provision allows the guarantor to terminate his guarantee (on giving sufficient reasonable notice) once a tenancy becomes periodic and the guarantee becomes continuous. In the absence of such a provision, it is likely that the court would imply a right into the agreement for the Guarantor to give reasonable notice.

### Extension or renewal of the tenancy

The effect of a renewal for a fixed term is to bind the guarantor to an additional term – perhaps for a much longer term than the one that was in the original tenancy. Such extensions, because they effectively extend the guarantor’s liability without his knowledge or permission, could fall foul of the Consumer Rights Act 2015. For this reason, it is essential that either the written permission of the guarantor is sought before granting any contractual extension or, alternatively, that a new guarantee agreement is signed (in conjunction with the new tenancy agreement).

As discussed in the section above, the Letting Centre Guarantor Agreement does contain a safety clause which suggests that the guarantee will automatically continue following any extension or renewal. However, the main purpose of the clause is to simply provide some protection under the original guarantee where the tenancy extends into a periodic tenancy due to a delay in agreeing or signing the renewal or extended tenancy or the guarantee relating to the same. Again, a new guarantee agreement should be sought when undertaking a formal renewal of tenancy.

The risk exists that a Guarantor gives notice that he is unwilling to extend the Guarantee beyond the initial fixed term – perhaps because of an accumulated liability up to that point. Like the tenant who wishes to leave at the end of the fixed term tenancy, we believe that under the rights to revoke a continuing guarantee (above), a guarantor cannot be bound into an indefinite continuation but there is little case law to clarify this grey area. We believe that a Court could rule that the guarantee can be terminated at this point.

### Joint tenancies

When setting up a guarantee for a joint tenancy, it will be normal to expect that the obligations of more than one of the tenants will need to be guaranteed and, in this case, there may be multiple guarantors, and therefore multiple guarantor agreements to be completed. See chapter 3 ‘Joint tenancies’ for more details on setting up the guarantee in such cases.

Guarantors are generally cautious when asked to sign a guarantee for a joint tenancy due to the problem that the obligations of joint tenants are normally deemed to be joint and several yet the Guarantor only wishes to guarantee part of any debt or claim for damages that applies to his/her principal (i.e. one of the specific individual tenants) under the joint tenancy.

This means that, under a general guarantee agreement, the guarantor could become liable not only for the subject tenant, but for any default of any of the other joint tenants in the property. The prudent guarantor will not normally wish to extend his liability beyond the specified individual tenant. The landlord, in turn, will wish to obtain a surety for each individual tenant.

How then can the guarantor provide a surety for an individual tenant in a joint tenancy? Commonly adopted solutions are for the guarantor to restrict the guarantee to a pre-agreed limit, or to a set proportion of the total rent arrears but these still do not totally preclude the guarantor being made liable for damage caused by other tenants. An elegant solution, recently encountered by the writer, aimed to limit the guarantor’s liability to a particular individual’s share of any rent arrears plus an equitable share of any other claim arising from the tenancy i.e. those damages, losses, or expenses attributable to the specified individual. See Chapter 3 for more information.

## Covering the Landlord's Risk

In the renting of residential property, the two main financial risks faced by the landlord are losses due to dilapidation or losses by rent arrears. The contents and fabric of the dwelling are usually covered by insurance. Arrears of rent, however, can often amount to a higher potential liability to the landlord (especially if possession via the courts is sought) and few insurance companies are prepared to cover this risk in full. A survey by the Letting Centre revealed that court cases for repossession of land can typically take between 4 and 6 months on average. Quantifying this liability for an average property at a monthly rent of £1000, this equates to a rent shortfall to the landlord of £4000 to £6000.

### References

One way that a landlord aims to reduce the risks of letting his property to a new tenant is by making careful checks on the individual(s) prior to granting the tenancy, by way of obtaining references. It is critical for the landlord or his agent to take steps to verify the tenant's ability to pay the rent and this is the usual function of the bank and employer references.

These may take different forms (often depending on individual circumstances):

- bank reference / credit check
- employment reference
- character reference
- previous landlord reference

Care should, however, be taken in situations where poor credit ratings are supplied for a particular tenant or replies are not received from a bank or building society.

Poor credit ratings or other references are, of course, all indications that a rent guarantee may be needed for a particular tenancy. It is important that as much care is taken to verify the credit-worthiness of the guarantor, as it taken to reference or credit-check the tenant initially. This is described in more detail in Chapter 2.

### Rent arrears and repossession issues

If a tenant falls into arrears, then the debt can be legally demanded via court action but obviously this is a fruitless and costly process where the tenant has no means to pay off the debt. There are certainly a small minority of 'professional tenants' who exploit their statutory protection from eviction and the difficulty of collecting such debts in order to burden unsuspecting landlords and live largely rent-free for significant periods.

A basic understanding of the legal procedures involved with recovering such debts is, therefore, useful in helping to understand and quantify the risk; especially since different categories of tenant pose different risks in this respect. For example, an unemployed person with no savings represents a high risk to a landlord; the tenant may be able to pay all or some of the rent using housing benefit assistance but the tenant will have no way of paying the rent if the benefit payment is delayed or refused. Equally, it will be pointless for the landlord to sue the tenant for recovery of the unpaid rent – if the person has no money or realisable assets, then, in practice, the debt is probably uncollectable. This is a classic situation where the landlord could request the tenant to provide a guarantor.

Where a tenant falls into significant rent arrears, the landlord will generally invoke a clause in the tenancy agreement (the 'forfeiture' clause) which allows him to terminate the tenancy as a result of the tenant defaulting on the agreement. (N.B. *In the case of assured and assured shorthold tenancies under the Housing Act 1988, the landlord will have a mandatory right to possession if there is two months' or more rent owing both at the time of serving notice of proceedings and at the time of the hearing - Ground 8, as amended*).

If the tenant continues to live in the property, the landlord would need to bring possession proceedings in court in order to force the tenant to leave. A demand for repayment of the rent arrears could be made within the possession application, or as a separate action. Provided that the arrears can be proved, the court would make a possession order (the ‘judgement’) which would normally include an order to pay any unpaid rent to the landlord.

### Financial Enforcement

If, following a default under the tenancy agreement, a guarantor does not comply and honour the guarantor agreement or deed, then the landlord may need to start legal action against the guarantor to enforce the agreement through the courts. Generally, the claimant landlord will be required to commence proceedings through the county court most local to the guarantor. In the case of an overseas guarantor, this is likely to be both problematic and expensive – which is why it is always advisable for a landlord based in England and Wales to seek his guarantee from a person situated in this same country.

Despite an order from the court to pay the rent arrears or debt, it can still be difficult to enforce payment. If the money is not paid within the stated time, a claimant can apply to the court to enforce the judgement. This process is described in detail in chapter 3 (Collecting the Money) and can involve seizure of the debtor’s goods, bank accounts (garnishee) or other assets.

Where the individual is employed and the employer’s details are known. The court can instruct the employer to deduct the debt from the person’s earnings – an **attachment of earnings order**. The effectiveness of this method, and the resulting stigma makes the risks of renting to employed persons generally lower.

### Self-Employed

Self-employed persons are also a category to be approached with more care. Firstly, their income stream is less easy to verify and may fluctuate from month to month depending on commissions etc. Secondly, any individual pursuing a financial redress through the courts will not have access to the powerful attachment of earnings provisions (described briefly above) available against employed people. Accountants’ references are often of little value and a guarantor should be requested if there is any doubt as to their financial means.

### Insurance terms

Finally, any insurer providing cover for legal expenses, buildings or contents for letting purposes may, in specified circumstances, demand that a guarantor be obtained in order to reduce its own risks.

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## Agency Issues – informing the principal

In an agency situation, where poor credit references suggest the use of a guarantee agreement, it would be advisable, under the agent's duty of care, for the agent to discuss the specific circumstances of the letting with the landlord, warn of any potential problems.

Unless it is the agent's standard policy, it would be prudent to gain the landlord's agreement to proceed with the letting, and if necessary, and discuss the nature of the personal guarantee being provided.

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## Company as guarantor

In the case of a company acting as guarantor, the person signing a contract of guarantee will be one or more of its directors (or Company Secretary, if authorised) – if only one director is signing, then it is important that the signature is witnessed. See 'Setting up a Guarantee Agreement' in Chapter 3 overleaf. In such cases, it will be prudent to check that the articles of association allow the company to enter into such contracts, and that the signatory has the authority to sign.

However, a guarantee provided on behalf of a partnership should be signed by all partners of the firm.

## 3. Setting up the Agreement

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A guarantee can be provided by inclusion of relevant clauses within the tenancy agreement, or alternatively, drafted by way of a separate written agreement or deed of guarantee.

Both methods are equally valid, although the use of a separate agreement is generally considered preferable, reflecting the fact that the guarantee is a separate agreement in its own right, and continues to exist (if appropriately drafted) even though the initial tenancy agreement has come to an end, or been replaced or extended by a new tenancy.

### Choice of guarantor

Where the tenant is not able to provide satisfactory credit references, it should be possible to find a friend or relative who is willing to act as a guarantor. Clearly, this should be a person who is of sound financial standing with a good credit history.

Checks need to be made that any potential guarantor has the means to cover the monthly rental payment if the tenant defaults, whether out of his or her current income, or by drawing upon savings or other assets. For example, In the case of a retired person, it is more likely that assets or savings rather than income would provide the required security. Ideally, the assets should be sufficient to cover any likely claim under the guarantee (i.e. a claim for up to five months' rent arrears – the typical time taken to recover possession through the courts). An appropriate form can be drafted, asking the guarantor to provide any relevant financial details such as property assets (net of mortgage debt), savings, and regular sources of income.

Enforcement issues also apply to the choice of guarantor. Bear in mind that it may be necessary to bring court proceedings against the guarantor in order to force payment. A self-employed person with few significant assets can more easily evade his debts than an employed person (a debtor may ask the court to make an attachment of earnings order on the person's employer) and a house-owner (against whom a person can ask the court to put a legal charge against the property).

**Guarantors based overseas should be strongly avoided** (due to the difficulties and expense of enforcement) without taking further advice.

### Timing

As with other types of contract, a legally binding contract of guarantee requires that some form of consideration is present in the arrangement (see page 5 earlier). For a rent guarantee, the granting of the tenancy will be sufficient consideration, but for this to occur it is important that any rent guarantee is signed and agreed before the tenancy is granted. A rent guarantee signed after the tenancy has been granted runs the risk that it may not be enforceable unless the rent guarantee is granted by deed (a more formal type of legal document).

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## Setting up a Guarantee Agreement

Setting up a guarantee agreement is straightforward if the following steps are observed:

### 1. References

It is important to make similar checks of the guarantor as for the tenant in terms of ability to pay - the requirement for good financial references should not be overlooked for the guarantor. It is equally fruitless to pursue a guarantor who has no assets or substantial income.

The Guarantor should be asked to provide contact details (name, address, telephone number etc) their date of birth, employment details, annual income, bank details, house ownership status and identification. A driving licence or passport can be obtained as proof of identification and a copy utility bill as proof of address. A guarantor should also be asked to provide copy payslips or proof of income if self employed. It would be prudent to obtain the last three months' bank statements for the Guarantor to ensure that the Guarantor can cover the cost of the rent over and above his own expenses. Where the guarantor is self employed more detailed checks are necessary such as obtaining business accounts or an accountant's reference.

A landlord should also carry out a credit check to ensure there are no CCJs or that the Guarantor has not been made bankrupt. Enquiries should also be made as to whether the Guarantor is a home owner. You can check the ownership of a property online at the Land Registry for a small fee.

In order to obtain the above information consent must be obtained from the guarantor in order to comply with data protection regulations. This can be done by asking the guarantor to complete a form with his details which also asks for their consent to share the information with third parties.

### 2. Send Guarantor Copies of Tenancy Agreement and Guarantor Form

It is good practice to send the guarantor copies of the relevant tenancy and guarantor agreement prior to signing along with a letter confirming that he/she has been asked to stand as guarantor for a specified tenant and an explanation of the financial implications of providing such a guarantee. If there are several guarantors (for example in a joint tenancy) then it will be necessary to prepare several guarantor agreements (see section on 'joint tenancies' later in this chapter)

In fairness to the guarantor, he/she should be given some time to consider the decision to act as guarantor, peruse the document and take independent advice. Where guarantors have been able to show that he/she was put under undue pressure through lack of time or otherwise, a court has in the past looked on the enforcement of the guarantor agreement less favourably. It should be remembered that their signature could commit them to an outlay of several thousands of pounds; and so the extent of this liability should be made clear to any guarantor prior to signing.

### 3. Signing the Guarantor Agreement

Two copies of the documents should be prepared. Each copy should include the guarantor agreement with a copy of the tenancy agreement (with the new tenant) attached so that the guarantor is aware of the obligations that he is guaranteeing. Both copies of the guarantor agreement are to be signed by the guarantor. There is no strict requirement that the agreement be signed by the landlord or the agent. One copy is then kept by the guarantor, the other copy retained by the landlord or agent. Where the guarantee is not drafted as a deed it should be



signed either prior or at the same time as the tenancy agreement, but preferably not after - for reasons explained in the previous section. See Consideration.

It is always good to meet the guarantor in person wherever possible and insist that the guarantor is present when he signs the agreement. The guarantor should be asked to bring sufficient proof of identity with him (e.g. driving licence or passport) so that the landlord may verify the guarantor. See 'Safeguards' below. When using a Deed of Guarantee you must ensure that the signature of the guarantor is also witnessed and that the appropriate witness details are fully completed.

### ***Electronic Signing***

A guarantor contract agreement can be signed using an electronic signature. The Electronic Communications Act 2000 came into force in 2002 to give legal certainty to electronic signatures, and web-based services such as Adobe Sign, DocuSign and RightSignature now provide the technology to support this process. If you decide to use electronic signatures for your agreements, then you should still ensure that you store a copy of the signed agreement in a safe place either on your computer server or in your paper files. Any system will need to be able to satisfy the court that there is a valid signature, in order to create a binding agreement.

**Deed of Guarantee.** Electronic signing for deeds is not entirely clear. The Law Society recognise that a deed signed by a company can be executed electronically where the witness is physically present when the electronic signature is applied and the witness applies their own signature to the document. However, for individuals it is difficult to confirm that electronically signing a deed with a witness would be valid due to different forms of electronic signing and how the witness signature would work in practice. Our view is that if the document is signed electronically and the witness is physically present and attests the same by providing their own signature either by electronic signing or wet ink then the deed should be valid but until a case is tested it is not certain.

### ***'Distance' Agreements***

Extreme care should be taken where it is not possible to meet the guarantor in person (perhaps because the guarantor does not live in the local area). The opportunity for fraud is substantial, and the practitioner should take great care to verify that the person is who he says he is. Ideally, the landlord or agent should arrange to carry out all correspondence regarding the guarantee directly with the guarantor rather than asking the tenant to relay the documents.

As well as carrying out the checks referred to above, asking the guarantor to send a certified copy of his driving licence and passport is a prudent measure - a modern driving licence contains the signature of the bearer and can be used to validate the signature supplied on the guarantee. A certified document confirms that the document is a true copy of the original and can be obtained from a professional person such as a solicitor. It could also be wise to obtain more than one item of identification for proof of address for distance guarantors.

Another safety measure may be to arrange a skype call or video call (where available) with the Guarantor to verify that the person in the photo is the person in the video call. Where the guarantor confirms that he owns a property in the UK you can carry out a Land Registry search as mentioned above.

### ***Company as Guarantor***

Occasionally, a company will offer to act as a guarantor. The legal requirements for a company signing a contract are different from a contract undertaken by an individual. At the time of writing, a document is validly executed by a company if it is signed on behalf of the company:

- (a) by two authorised signatories, or
- (b) by a director of the company in the presence of a witness who attests the signature  
(section 44 Companies Act 2006)

Unless the company or directors are well-known to the agent or landlord, then it would be prudent to ask for some form of authority on company letterhead which authorises the signatories to sign on behalf of the company, or making enquiries of Companies House (this is public information available via the Companies House website) of the identity of the registered directors of the company. It will also be necessary to make some form of id check to verify the identity of the person signing.

### *Safeguards*

Again, loose procedures can be fatal to the validity of the document. The writer was involved with one case where the guarantee, properly signed by all appearances, turned out to be void and unenforceable. The guarantee agreement had ostensibly been signed by the tenant's father but in reality, the tenant who had offered to 'pop the agreement over to his parents for signing' had in fact simply forged the signature on the form. The father, of course, denied signing the agreement and agent and landlord were left arguing as to who was going to foot the substantial bill for rent arrears.

The guarantor **MUST** sign the guarantee and it is important to check the identity of the guarantor (just the same as for tenant). A modern driving licence contains the signature of the bearer and can be used to validate a person's signature. The Deed of Guarantee (form G02) contains the additional safeguard that the guarantor's signature is witnessed.

Finally, avoid using guarantors who are based overseas as it will generally be difficult and expensive to enforce the guarantee should the need arise. Scottish and NI-based guarantors will generally require enforcement through the Scottish or Northern-Irish court system.

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## Rent Guarantee as a deed

Because, in contract law, there is a general requirement for a consideration (i.e. payment or a benefit) in return for granting the contract, the timing of the guarantor agreement can be important. The granting of the tenancy is usually deemed to be a sufficient consideration with respect to rent guarantees, and so this principle of contract law does not typically pose a problem in situations where the rent guarantee is signed and agreed in advance of completing and signing the tenancy agreement.

However, it has been argued that the guarantee might be considered invalid in situations where the tenancy has already been granted before the guarantee has been signed – as there is technically then no consideration. To avoid the need for a consideration, the contract may be executed as a deed (see Form G02). A deed is a formal legal document, where it is clear 'on its face' that it is intended to be and delivered as a deed and, in the case of an individual, signed in the presence of a witness who attests to the signature.

There are therefore two alternatives where the tenancy has already been granted before agreeing the guarantee:

- grant a new replacement and extended tenancy after the guarantee has been signed
- retain the original tenancy as agreed, but draft the guarantor agreement as a deed.

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## Information required from Guarantor

The guarantor should be required to complete a standard form so that sufficient information is held on file both in order to check the guarantor's financial credentials and also to assist with enforcement if the guarantee needs to be called upon. Information might include:

- Contact details (name, address, telephone, mobile, email address)
- Details of all regular income, and current employer (if any)
- Details of all savings accounts and other significant assets

- Property Ownership (whether held individually or jointly) and mortgage details
- Bank account details
- Copies of passport details, domestic bills and recent bank account statements will be useful to verify the above and guard against identity fraud (see Safeguards above).

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## Consumer protection and fair play

The law requires, for the guarantee to be enforceable, that the consumer has clearly understood what s/he is signing, and that there has been no coercion into signing. It is important that the person enters into the obligation freely and with knowledge of the true facts.

Good practice suggests that the irrevocable legal nature of the guarantee should be explained to the guarantor before signing, and that they should be advised to take independent advice.

The guarantor should be given the opportunity to ask any questions and sufficient time to take further advice. See 'Advice to Guarantor' on page 5.

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## Renewals

It is strongly advised that, when using rent guarantees, fixed term tenancies and guarantees are used throughout the tenancy rather than allowing tenancies to continue on a statutory periodic basis (see section entitled 'Fixed vs periodic tenancies' in Chapter 1 above for more details). Using fixed term tenancies and guarantees, the landlord (or agent) needs to renew both the tenancy and the corresponding guarantee agreement at the end of each fixed term.

Periodic tenancies or roll-on using statutory periodic tenancies are best avoided due to the uncertainty as to whether, and for how long, a guarantor can be bound to the continuous guarantee.

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## Joint tenancies

When setting up a guarantee for a joint tenancy, there may be several tenants on the tenancy agreement whose obligations under the tenancy need to be guaranteed independently – typically each tenant will have his or her own separate guarantor.

In such cases, it will be necessary to prepare multiple guarantor agreements, one for each guarantor. Multiple guarantors under the same tenancy will be affected by the 'joint and several liability' rule and it is likely that the guarantor will ask you to insert an additional clause into the guarantee which limits their liability – explained further below.

### *Joint and Several Liability*

It is important that guarantors understand the extent of their liability under the agreement, particularly with regard to joint tenancies and the Letting Centre agreement includes a warning note on the first page of the agreement.

The guarantor may not be prepared to sign an agreement that makes him jointly and severally liable in cases where the property is shared by multiple tenants. In these cases and providing that satisfactory references or guarantors can be obtained for the other occupants, it is perfectly acceptable to allow the guarantor to act as guarantor for one tenant's share of the

rent. In such a case it is permissible to revise clause 1 using the following wording making the situation clear:

*“The Guarantor agrees to act for the Tenant should the Tenant fail, for any reason, to meet the financial commitments arising from the Tenancy Agreement entered into in respect of the Property. This Guarantee is provided subject to the proviso that the Guarantor will only be responsible for < Jane Holland’s > share of the Rent (i.e. £400 per calendar month being 25% of the gross monthly rent). The Guarantor will not be liable for any rent shortfall which is attributable to any of the other joint tenants in this tenancy.”*

Clause 3 should also refer to the specific share of the rent and can be revised as follows:

*“The Guarantor undertakes to pay to the Landlord from the date of this Deed of Guarantee from time to time < Jane Holland’s > share of the Rent within 10 days of receipt of a written demand from the Landlord or his Agent addressed to the Guarantor if < Jane Holland > following demand has not paid the amount being demanded when it was due under the Tenancy Agreement.”*

Where the guarantor’s rent liability is limited to a specific tenant it will be even more important to keep accurate records of rent payments so that the landlord can provide evidence to the guarantor if the tenant they are guaranteeing has not paid their share of the rent.

It is more difficult to limit the guarantor’s liability for default of other terms of the joint tenancy agreement as there may be situations where damage has occurred to common areas but all tenants are claiming not to be responsible. The Landlord would be out of pocket if it could not be proved who had caused the damage and the guarantor agreements limit the guarantee for default of other terms to only one tenant. In practice the guarantor will normally pay the cost of the specified tenant’s share of the damage and the other tenants or their guarantors would pay their share as this would be considered reasonable.

Where the tenancy agreement is amended in this way you will need to make sure that the important notes on page 1 and the Explanatory Guidance Notes on page 3 are amended as follows:

**Insert a bullet point 2 into important notes on page 1 to say:** This Deed of Guarantee limits the Guarantor’s rent liability to a specified tenant.

**Remove bullet point 6** (starting ‘For joint tenancies...’) **from important notes on page 1.**

**Remove bullet point 2 on page 3.** (starting ‘Where the tenancy is a joint tenancy ....’)

**Remove bullet point 4 on page 3.** (starting ‘You will be responsible for ....’)

### ***Separate Tenancies***

An alternative solution which avoids the ‘joint and several’ problem is to divide the joint tenancy up into separate tenancies. Thus the tenancy of a student house occupied by three joint tenants could be split up into three separate tenancies whereby each student then has a tenancy of their own room, and a licence and responsibility over the shared common areas. The guarantor is then able to restrict his guarantee to the rent liability of the individual tenancy and the specified tenant, with any shared liability only occurring through the occupation and use of the common areas.

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## 4. Recovery and Enforcement

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Sooner or later, it will be necessary to call on a guarantor to make good a debt incurred by a tenant under a tenancy. This section explores how this process should proceed, and any rules that need to be followed.

### Time to pay

Some care should be taken before making any agreements to waive or delay recovery of the debt. Under the common law, an agreement between the landlord and tenant to give the tenant time to pay can relieve the guarantor from liability. However, this right can be excluded by agreement (*Trade Indemnity Co v Workington Harbour* [1937] AC 1, 21). An appropriate clause has therefore been included in the Letting Centre Guarantor Agreement (G01) and Deed (G02) which permits the landlord to release or give time to the tenant without affecting the liability of the guarantor.

Notwithstanding this clause, the landlord or his agent should be wary of making any formal arrangements with the defaulting tenant to waive rent, or agreements to delay rent payments (written or oral) since it could dilute or invalidate the guarantee.

### Limitation Act

It should also be remembered that any action to recover monies recoverable under the guarantee should be taken within 6 years of the rent default, or the claimant will become time-barred from bringing a legally valid claim under the provisions of the Limitation Act 1980.

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## Steps to Recovery

Should the tenant default in payment of the rent, the following escalation procedure can be observed in the recovery of the monies from the guarantor:

### 1. Reminders to tenant and guarantor

Correspond with the tenant regularly. If the rent becomes significantly in arrears, a letter of reminder should be written to the tenant(s) advising that action will be taken to recover the rent from the guarantor. Often the potential embarrassment of starting formal recovery action against the relative or friend is sufficient to obtain payment.

At the same time, it will be important to notify the guarantor within 14 days of arrears taking effect, or of any other breaches of the tenancy which may give rise to a future claim. Even a simple phone call or email to a parent guarantor can be sufficient to remedy the breach or encourage the late payment.

Any correspondence can be worded as a polite notice to keep the guarantor informed and should be mindful of data protection principles (i.e. keep the contents of the letter strictly relevant to the guarantee and not share any information that has no direct relevance to the guarantee itself). Putting the guarantor on notice of a potential or pending claim will generally result in the rent being paid without further action.

### 2. Issue Demand to Guarantor

If the final reminder addressed to the tenant is not met with payment, then a demand for the same amount can be addressed to the guarantor.

If the demand on the guarantor is not met with payment, then it will be necessary to enforce payment under the guarantee by starting legal proceedings on the guarantor (see below)

### 3. Notice of Proceedings

If the demand on the guarantor is not met with payment within 28 days, then a notice of proceedings should be sent to the guarantor (see example in Appendix). Individuals frequently ignore demands in the hope that proceedings will not be pursued. A reminder that legal proceedings will incur extra costs to the claim often meets with settlement.

### 4. Proceedings – on the tenant

If the previous steps have not been fruitful, then the landlord or his appointed agent will need to start legal proceedings, both to evict the defaulting tenant so regaining possession of the property, and to recover the outstanding debt from the guarantor.

The possession proceedings may be brought solely for possession (e.g. APP process) or for possession and rent arrears (using standard possession procedure). The choice will be largely determined by the timing of any previously served notices, and whether the landlord wishes to attempt to recover the rent arrears from the tenant in the first instance. Send copies of any notices (e.g. section 8 or section 21) to the guarantor for information.

Where there are joint tenants, any action for possession (and rent arrears) will normally need to be brought against **all** the tenants listed on the tenancy agreement.

### 5. Proceedings - on the guarantor

The landlord will normally commence legal proceedings against the guarantor once the tenant has left the property (either voluntarily or by a court order) and any arrears and other damages can be accurately quantified. However, there is nothing to prevent the landlord proceeding against a guarantor in the hope that this will put additional pressure on the tenant to vacate.

Where the amount claimed is less than £10,000 then the action should be pursued through the Small Claims Court. This is a relatively simple procedure and the appropriate forms and related information are all available via the local County Court or this may now be done on-line at the Court Service's website at [www.hmcourts-service.gov.uk](http://www.hmcourts-service.gov.uk)

Proceedings will generally be commenced in the local court to the guarantor. If the guarantor is based in Scotland, then enforcement will be via the Scottish Courts system (and operates under Scottish law). It can be difficult and expensive to enforce against a guarantor based outside the UK – special advice should be taken in such cases as it may not be economic to enforce the guarantee.

Court costs and a small amount of costs (typically not more than £100) representing travel and the claimant's time preparing the case and attending court can be added to any claim against the tenant or guarantor.

### 6. Collecting the Money

There are several good incentives for the individual to pay promptly following a court judgement. Firstly, if an amount is still unpaid after 30 days following judgement, the individual's name is entered in the county court records and this will generally affect the individual's credit rating and ability to obtain bank loans or other credit.

Secondly, if the money is not paid within the stated time, a claimant can apply to the court to enforce the judgement. This process can involve seizure of the debtor's goods, bank accounts (garnishee) or other assets, or attachment of earnings orders. For more information on these processes, you should contact your solicitor, or obtain a leaflet on enforcement actions which is available from your local county court or on their website.

One of the most powerful mechanisms available to the landlord to recover rent arrears is the **attachment of earnings order**. This can be used where the individual is employed and the employer's details are known. The court can instruct the employer to deduct the debt from the person's earnings at a specified rate per week or month. The fact that the employer is also drawn into the enforcement process creates an additional stigma which undoubtedly assists in the effectiveness of this method.

For amounts above £750, a statutory demand could be served which could ultimately result in the bankruptcy of the individual, or the winding up of a company.

Alternatively, if the guarantor is a property owner (and there is sufficient equity in the property free of any mortgage borrowings), then it is possible for the claimant to apply for a charging order to be set against the property.

Many enforcement options are available to debtors in order to recover a debt recorded as a result of legal proceedings. The Court will be able to provide further details, and if necessary take legal advice. The choice of enforcement will depend on the individual circumstances of the guarantor and how the funds can be most easily realised in each situation.

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### Common Pitfalls

There are a number of common reasons why rent guarantees fail, and practitioners can learn from these lessons and avoid the obvious pitfalls.

**Landlord fails to renew Guarantee when tenancy is renewed.** Strictly, the guarantor can only be held to guarantee the original tenancy term. Any extension of the tenancy will require a new guarantee to be signed.

**Details of the tenancy have changed.** Significant changes to the nature of the tenancy such as a change to the rent, or the identities of other sharers may affect the guarantee. A new agreement will need to be obtained whenever there is any change to the tenancy that may affect the nature of the guarantor's liability (see Effect of Variations on p3).

**Guarantor says that he did not sign the agreement.** Your checks and procedures should guard against different types of identity fraud that may take place. As a minimum, you should ask the guarantor to provide proof of identity and proof of address (a copy of two bills addressed to the guarantor's home address will usually suffice – ideally one of which is a bank statement). If you do not meet the guarantor in person, take appropriate steps to verify the signature (by comparing, for example, against the guarantor's driving licence or passport) or have the agreement signature witnessed by a solicitor (a small signing fee will be payable).





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# Appendix A

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## *Example Letters*

Form 1: Example Standard Letter to Guarantor:

**Late payment of rent - first letter**

*Landlord or Agent's Name and Address*

Date:

Mr V. Rich  
22 Regal Terrace  
LONDON, SW1

Dear Mr Rich,

**Re: Non receipt of rent - 5 Park Road, Cambridge, Cambs.**

I refer to the guarantor agreement signed by yourself on <date> in respect of the tenancy of <address of tenancy > undertaken by <name(s) of tenant(s)>.  
Rent for the month of <month of rental payment> is now overdue by [15 days].

A total of £ <state amount> is now outstanding.

According to the terms of this agreement, you are required to pay any overdue rent and other obligations falling due. I would be grateful if you could remit to us the above amount within fourteen days.

Yours sincerely,

R. Collector  
(Office Manager)

Form 2: Example Standard Letter to Guarantor:

**Late payment of rent - second letter**

*Landlord or Agent's Name and Address*

Date:

Mr V. Rich  
22 Regal Terrace  
LONDON, SW1

Dear Mr Rich,

**Re: Non payment of rent - 5 Park Road, Cambridge, Cambs.**

I refer to our previous letter of < insert date of first letter> and the guarantor agreement signed by yourself on <date> in respect of the tenancy of <address of tenancy > undertaken by <name(s) of tenant(s)>. Under the terms of this agreement, you are required to pay any overdue rent and other obligations falling due.

According to our records, the rent is in arrears by an amount totalling £ <insert amount here > and the amount remains unpaid despite our previous request.

This letter and accompanying notice are to let you know that due to non-payment of the amounts due, we intend to start immediate proceedings through the County Court for recovery of the monies. Under section 69 of the County Courts Act 1984, we are also entitled to claim for interest on the monies outstanding, and this will be added to the amount claimed.

Should the proceedings continue through the courts, then if judgement is made against you, you may become liable for our full legal costs as well as any rent arrears. Unpaid county court judgements (CCJ) will result on your name being listed with various agencies and this may affect your credit rating and your personal financial transactions.

[The court has further powers to grant an attachment of earnings order which will allow your present or future employer to deduct any money due via payroll deductions.] ☒

We would advise you to seek independent legal advice in order to protect your own position.

Yours sincerely,

R. Collector  
(Office Manager)

☒ Optional clause. Can be included if guarantor is known to have an employer.