

## Example B

(See p.84)

### Original

The Guarantor in consideration of the Vendor making the foregoing assignment at the request of the Guarantor hereby covenants with the Vendor that the Purchaser will at all times hereafter duly pay the rent reserved by the Lease the service charges (if any) and all other payments and costs thereby provided for and will duly observe and perform all the covenants on the part of the Lessee and conditions therein contained and that the Guarantor will at all times hereafter duly observe and perform all covenants on the part of the Guarantor with the Landlord of the property and will at all times hereafter pay and make good to the Vendor on demand all losses costs damages and expenses occasioned to the Vendor by the non-payment of the said rents service charges or other payments or the breach non-observance or non-performance of any of the said covenants and conditions or any breach of the Purchaser's covenants as to payments observance and performance and for indemnity expressed in this assignment and notwithstanding any termination of the obligations of the Purchaser or any successors in title of the Purchaser by reason of disclaimer by any Trustee in bankruptcy or liquidator or the winding-up of the Purchaser or any successor in title of the Purchaser being a Corporation IT IS HEREBY AGREED AND DECLARED that any neglect forbearance or indulgence of the Vendor in enforcing or giving time to the Purchaser (or any Trustee in bankruptcy receiver or liquidator of the Purchaser) for any payments or observance or performance of any obligation shall not in any way release the Guarantor in respect of the Guarantor's liability under this present clause

### Revision

- 1 In consideration for this assignment by the seller, the guarantor must:
  - a. Fulfil any positive covenant the tenant has broken.
  - b. Indemnify the landlord and the seller against the consequences of the tenant's breach of any covenant.
- 2 The guarantor's liability continues despite:
  - a. Lenience by the landlord to the tenant.
  - b. Disclaimer in the bankruptcy or liquidation of the tenant.

### Notes

It is not necessary to say that a party covenants if this is a deed. A covenant is an agreement by deed.

Fry J said in *Evans v. Davis* (1878) that *observe* refers to negative covenants and *perform* to positive ones. On the other hand, *Harman v. Ainslie* (1904) and *Ayling v. Wade* (1961) applied *perform* to negative covenants. Where, as here, no distinction is needed between positive and negative, it is useful to have a single expression to cover both; if *observe* is still in doubt, *comply with* will do (and sounds more appropriate to modern ears: *observation*

suggests watching rather than doing). But we have used *fulfil* in clause 1a and have expressly restricted it to positive covenants: there is no sense in asking the guarantor (for example) *not to make a noise at night* as a remedy for the tenant's disruption.

We have used a full stop at the end of each subclause (a) instead of a semi-colon followed by *and* or *or*. This avoids any argument, especially in clause 2, over whether *and* means that both limbs must be satisfied or that *or* suggests a choice; each subclause is independent of the other so neither conjunction is appropriate.