CP Commercial Property Solutions CP

Practical And Professional Commercial Property Comment
From The Culshaw Partnership

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Wishing You All

A Merry Christmas &

A Happy New Year

Contents

Debt Recovery

Before taking any steps to recover arrears owed, landlords should bear in mind some important issues.
First, they should always check whether the debtor is insolvent because - depending on the type of insolvency - this may prevent the landlord from pursuing certain courses of action. Subject to this, a landlord should consider whether there would be any advantage in recovering possession of the premises by forfeiting the lease.
These points being considered if the landlord still wants to pursue the tenant for arrears, the next consideration is how best to do this.

Court proceedings

Issuing court proceedings is often the primary route considered by a landlord when faced with a tenant owing arrears.
Ideally, the issue of a court claim should be a last resort in many case because the process is generally slower and more costly than some of the alternative methods of debt recovery. Since the introduction of the Jackson reforms, significant costs can now be incurred simply by complying with the rules for providing information to the court about the appropriate case management route.
Of course, obtaining judgment is not the end of the story; landlords often need to take steps to enforce a judgement, and this increases costs.

Rent deposits

One direct method of recovery is withdrawing money from a rent deposit to settle arrears, although landlords need to check certain points and procedures before this step is taken.
Landlords are usually required simply to give notice to the tenant of any withdrawal from a rent deposit and the relevant rules concerning the service of notices must be complied with.
Before using a rent deposit, a landlord should assess whether it is preferable to keep it to use towards the tenant's future liabilities, particularly those that may be more difficult to pursue than rent arrears such as damages for dilapidations.

Serving a statutory demand

The service of a statutory demand does not, by itself, constitute a method of debt recovery; it is a preliminary step to pursuing bankruptcy or winding-up proceedings.
However, it can be a very effective indirect method of debt recovery because it puts pressure on tenants or other debtors by raising the real possibility that they will be declared bankrupt (in the case of an individual) or put into liquidation (in the case of a company).
Once a statutory demand is served, the debtor has 21 days in which to settle the sum demanded. After this period has passed, the landlord can present a bankruptcy or winding-up petition to the court.
However, depending on the debtor's financial position, this option may not always be worth pursuing because the landlord will only rank as an unsecured creditor in any bankruptcy or liquidation.
Despite this, the service of statutory demands remains a popular option with many landlords. This is because a statutory demand can be served relatively quickly and can put the debtor under significant pressure to settle the debt.

Estates Gazette - 25 October 2014

C.P. Comment :

I have never had recourse to serve a Statutory Demand, however, given the new Commercial Rent Arrears Recovery rules cover only principle rent this does appear to offer a less time consuming and costly way of exerting pressure on a tenant who owes other monies for example insurance premiums.

John Tookey

Dilapidations - Limiting Liabilities

Dilapidations surveyors are often asked to provide an opinion on the wording of a "no dilapidations" agreement as the concept of excluding, or limiting, liability for dilapidations is not straightforward in practice as might be expected.

When leasing buildings that are not in perfect condition, parties will often agree conceptually, in the heads of terms, to reduce the contractual liability on the tenant in relation to repairing and maintaining the building. Often this is dealt with by way of a schedule of condition, but during the past few years tenants have had a good negotiating position and have pushed for something further - such as the right to simply vacate the premises and leave them "broom swept" clean or stipulating there will be no terminal dilapidations liability at all.

When landlords get into the detailed drafting of contracts common questions arise such as:

* What happens if the tenant causes damage beyond normal wear and tear?
* Will the tenant agree not to commit waste ?
* What happens if there is wilful damage or the premises are vandalised ?
* What happens if the premises are damaged via an uninsured risk?
* If the tenant alters the property, do they need to reinstate?
* Who bears any liability to third parties if the tenant doesn't repair?

In practice, there are various ways of achieving reduced liability.

No dilapidations

For this to be effective, the lease should exclude all the usual obligations that give rise to dilapidations claims. This includes obligations relating to decoration, reinstatement of alterations, yielding up at the end of the term, compliance with statute and meeting landlords costs, not just repair obligations. The most effective is a simple statement that there will be no further liabilities at the termination date provided the tenant has ceased occupation and paid its rent. This approach deals with a terminal dilapidations situation but not issues arising during the term of the lease. It is very difficult to persuade landlords that a tenant should not at least have a covenant not to commit waste or indemnify the landlord against any third-party liabilities as a result of disrepair.

Schedule of condition

This the most commonly used but arguably one of the least effective solutions. The cost of preparing a document sufficiently detailed to protect a tenant fully is often prohibitive. In particular, the condition of mechanical and electrical services is difficult to document and yet they are often a significant part of dilapidations claims. Many schedules of condition do not document these services, as the schedules are often just a brief description and mainly photographic record. The dilapidations negotiation then becomes a subjective matter, which leads to dispute. Schedules of condition are often used to limit repairing liability only, so the tenant receives an unexpected claim for decoration and reinstatement of alterations anyway.

Fair wear and tear

Fair wear and tear is a useful limitation but it doesn't go very far and is open to interpretation. It also usually does not cover reinstatement of alterations.

Pre-agreed sum

This can be an effective solution where the tenant agrees to pay a fixed sum at the end of the lease or spread over the term in place of a terminal liability. The landlord may still wish to enforce obligations during the term, but at least the tenant has certainty at the end of the lease. The cap needs to apply to all the usual clauses and cover any consequential losses. The alterations clause and reinstatement obligations need to be tied in; usually the easiest way is to restrict the tenant's rights to alter to minor alterations only, such as partitioning. Prohibiting alterations entirely is usually counterproductive for a tenant; most will want the right to alter even if they don't think they will actually carry out any alterations.

Dilapidations cap

This operates in a similar way to a capped service charge. It gives the landlord the potential for recovery if there are breaches of covenant but at the same time gives the tenant certainty of a maximum exposure. Again, it is important to capture all relevant lease clauses under the cap. This is a more workable solution but of course it depends on the parties being able to agree an acceptable cap level.

Overage agreement

An overage agreement excludes liability for terminal dilapidations up to a certain level, with the tenant bearing any cost above it. This is usually linked to the landlord undertaking dilapidations works at the end of the lease and the cost exceeding an agreed budget. This is a useful mechanism for a landlord to protect their downside while having a simple mechanism to limit the tenant's liability. What is covered by the overage arrangement needs to be clearly documented.

Agreed maintenance regime

Under this arrangement, the tenant undertakes an agreed maintenance plan to a set standard and in doing so meets its obligation during the lease with no terminal liability at the end. Again, this allows the landlord a simple way to mitigate a risk of the tenant causing damage beyond what is expected.

The most common (schedule of condition) method of limiting liability is often the least effective and parties should consider some

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Commercial Rent Arrears Recovery - "CRAR"

Six months ago CRAR came into force amid heated debate as to its potential effectiveness.

The ancient remedy of distress for rent arrears was abolished on 6 April 2014 and replaced with commercial rent arrears recovery ("CRAR").
If a tenant of commercial premises is behind on the rent, CRAR allows a landlord to instruct an enforcement agent to enter the premises, take control of the tenant's goods and sell them in order to recover an equivalent value to the rent arrears.
However, unlike distress, the new CRAR regime is a lengthy series of notices, time limits and procedures.

Prior notice required
This was one of the most controversial points of the new regime. An enforcement agent is required to serve an entry notice on the tenant, giving at least seven clear days' advance warning that he intends to enter the premises to exercise CRAR. Landlords were concerned that less-scrupulous tenants would use the opportunity to remove their goods from the premises, leaving nothing behind when the enforcement agent arrived. In practice, landlords have reported that tenants generally settle up once an entry notice is served.
Perhaps tenants are persuaded to settle rather than face the potentially hefty fees that the enforcement agent is entitled to collect if he has to enter the property at the end of the notice period. These fees, which are set by the CRAR legislation, have to be specified on the entry notice so that tenants see what additional costs they will incur if they don't pay the arrears.
The good news is that, more often than not, there is no need to pursue the arrears beyond the entry notice as the tenant settles its account at this early stage. From this point of view, CRAR has not yet proved to be the disaster that many feared.

Estates Gazette - 4 October 2014

C. P. Comment :

My initial concern on first learning of this revision was that at a stroke it took away the only practical remedy for a landlord to enforce payments under the lease, short of applying to court.
However its not in practice as bad as I thought. The tenant has to be given at least 7 days notice of bailiff action and that notice has to be issued by the bailiff, but the action can be undertaken anytime after the notice period so there is still the necessary degree of 'uncertainty' as to just when the bailiff may turn up to make it difficult for a tenant to avoid.
All in all though its still a retrograde step as far as landlords are concerned because you can only bailiff for principle rent, so no service charge, no insurance, no other sum payable under the lease.

John Tookey

Dilapidations - Limiting Liabilities (cont)

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of the other options more frequently when faced with the task of drafting a limited dilapidations liability.

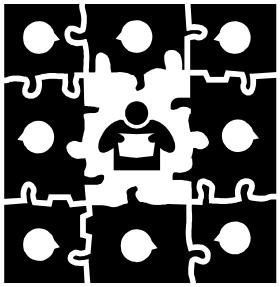
Estates Gazette - 15 November 2014

C.P. Comment:

As said most tenants try to limit repairing liabilities with a schedule of conditions. This is a fairly blunt instrument and often fails its purpose. I am amazed how having negotiated the existence of a schedule often tenants will not bother to pay for a comprehensive schedule to be prepared or indeed rely on the landlord to compile it, and so not get the protection that should be available to them.

Justin Fowler

How We Can Help You



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Landlord & Tenant Disputes

The services we offer are listed here please contact us to see if we can be of assistance with any property issues you may have.
See page 4 for all our contact details .

Alienation Tribulation

The Landlord and Tenant (Covenants) Act 1995 (the "1995 Act") provides that on an assignment of a lease created after 1 January 1996, outgoing tenants and guarantors are released from liability to their landlords. There is no way around these provisions. Section 25 renders agreements void to the extent that they exclude, modify or frustrate the operation of the legislation. However the 1995 Act does authorise outgoing tenants to enter into authorised guarantee agreements ("AGAs") with landlords to guarantee the liabilities of immediate assignees. One question that exercised the property industry was whether outgoing tenants' guarantors can also be required to guarantee AGAs. The Court of Appeal took the view that outgoing tenants' guarantors can guarantee the liabilities of an outgoing tenant under an AGA but cannot give repeat guarantees for liabilities of incoming assignees. Where does this leave provisions designed to facilitate company reorganisations?
Landlords will welcome the Court of Appeal decision in *Tindall Cobham 1 Ltd v Adda Hotels [2014]* EWCA Civ 1215; *[2014]* PLSCS 249, although it turned on the construction of the lease in question. The litigation was triggered by the assignment of leases of 10 hotels that were let to companies in the Hilton group. The tenants went ahead with assignments to new companies in the group without asking for licences to assign or proffering further guarantees and claimed that the assignments had released themselves and their parent company guarantor from liability to the landlords.
The landlords were refinancing their business and were concerned that the value of the properties would be adversely affected by the loss of the parent company guarantees. They claimed that the assignments were unlawful and sought an order requiring the re-assignment of the leases to restore the previous status quo. The High Court agreed that the assignments were unlawful because the tenants should have obtained the landlord's consent before proceeding. Consequently, the assignments were "excluded assignments" for the purpose of section 11 of the 1995 Act and the assigning tenants and their parent company guarantor remained liable under the leases.
The solution left the obligation to obtain landlords' consent to intra-group assignments intact, which ought to enable the landlords to insist on a substantial guarantee in the case of assignments to companies of little worth.

Estates Gazette - 20 September 2014

C.P. Comment :

This only goes to illustrate what a confusing area of law this is and anyone considering a AGA affected assignment where a guarantor is involved should get good legal advice.

Justin Fowler

Market Indicators

While there are a number of uncertainties that will potentially affect our economy negatively over the next 12 months. The demand for commercial investments appears to have strengthened with strong showings at the recent London auctions. We have also noticed a take up in some long term retail vacancies - again indicating a recovery.

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