

Commercial Property

NEWS

FIRM'S LOGO

Winter 09

procedure – the devil is in the detail



'The devil is in the detail' is an expression often used in the professions – and with good reason.

Take, for example, a case involving something as simple as a tenant's notice to terminate a lease at the

break date. How could something that simple go wrong?

A recent case is an example of how it can. Two companies, Tibbett & Britten Ltd. (TB) and Tibbett & Britten Consumer Group Ltd. (TBCG), together leased premises. TB changed its name to Exel UK Ltd. and in that name a break notice was given by the company's solicitors to the landlord. TBCG was not named in the body of the notice, although its name was contained within the description of the tenants. It was accepted that the solicitors had the authority to act for both companies.

The landlord claimed the notice was invalid because it had not been given by both companies.

The court considered what a reasonable person would have understood the notice to mean.

With the economy as it is, many tenants wish to serve break notices and many landlords are looking to find fault with the notices given, so that they can be invalidated.

Bearing in mind that there had been considerable correspondence and there was no doubt that the lease documents had been carefully considered on both sides, the court ruled that it was reasonable to conclude that the notice would have generated 'real doubt' in the mind of a reasonable person as to whether it was sent on behalf of both companies. The notice was drafted as it was because the tenants' solicitors had incorrectly believed that Exel was the sole tenant. The break notice was therefore invalid.

With the economy as it is, many tenants wish to serve break notices and many landlords are looking to find fault with the notices given, so that they can be invalidated.

We can help you make sure your property transactions of all types proceed without upset.

guarantee clause not linked to assignee

With times being tough, unexpected traps in agreements are coming to light with greater regularity. A recent landlord and tenant case shows the sort of thing that can happen if insufficient attention is paid in negotiation to clauses that might seem unimportant at the time.

It is usual for a commercial lease to contain a clause which will bind the tenant to guarantee the payment of the rent and performance of covenants under the lease should it be assigned. In a recent case, a lease was assigned and the new tenant later became insolvent and went into liquidation.

The relevant lease agreement bound the original tenant to guarantee performance during the period the assignee was 'bound by the tenant covenants of the lease'. The liquidators disclaimed the lease, making no payments, and the landlord sued the tenant under the guarantee.

The tenant claimed that it was not liable for the assignee's rent etc. after the liquidator had disclaimed the lease, the argument being that the assignee was no longer bound by the covenants in the lease and the original tenant could not therefore be bound by them after the lease was disclaimed.

The Court of Appeal did not accept this argument. The original tenant was liable under the guarantee. The liability of the original tenant as guarantor was separate from that of the assignee.

Your potential responsibilities under a guarantee if you assign a lease may not be uppermost in your mind when you are negotiating to take on new rented premises.

However, attention to detail pays dividends and, in the present environment, landlords may agree to limit or remove guarantee clauses if pressed. Please contact us for advice.

subcontractor fails to avoid liability

When a contractor and an employer are in dispute over something which has been done by a subcontractor, it is quite common for the contractor to try to 'keep the peace' by settling the claim with the employer and to then seek recompense from the subcontractor.

In a recent case, a defect in the sprinkler system in an office block caused damage which led to a claim for over £5 million against the contractor who had the contract for installation of the system.

The sprinklers were installed by a subcontractor. The contractor settled the claim for £2.72 million and claimed that sum from the subcontractor.

The subcontractor disputed the claim, arguing that there were good defences against it and that the settlement reached was unreasonable.

The court rejected the subcontractor's argument, holding that the defect was the fault of the subcontractor and the contractor had reached a reasonable settlement with the

claimant and was therefore entitled to seek restitution from the subcontractor.

Subcontractors who are on notice that their work could give rise to a 'second-hand' liability may wish to consider at an early stage their strategy with regard to the proceedings, especially if they have a good defence against any claim and/or they think the contractor will be a weak negotiator.

Please contact us for advice on any construction law matter.

liability remains where not excluded



the andlord. It is therefore common for such leases to contain a 'keep open' clause, which provides for the payment of damages to the landlord if a retailer closes a store in breach of its lease.

The Scottish court recently had to consider such a circumstance. The damages due because a tenant had vacated its premises had been calculated and paid to the landlord. The unit had been closed for several years when the landlord served a schedule of dilapidations on the former tenant, requiring com-

Having deserted units in a retail complex can have negative effects on the other tenants and

pensation of more than £600,000, in accordance with the dilapidations clause in the lease.

The tenant refused to pay, arguing that payment of damages under the keep open clause meant that its responsibility was reduced to keeping the premises wind and watertight.

The court ruled that, in the absence of a clause which acted to cancel the tenant's liability for dilapidations in the event that the keep open clause was triggered, the tenant was liable for the dilapidations.

The law will enforce a contract which is not on the face of it unfair. It is important to make sure that the implications of any lease agreement or other contractual arrangement you want to undertake are fully understood before you sign on the dotted line.

Not all potential pitfalls are clear at the outset. We can help you avoid costly mistakes.

tenant cannot force council to do repairs

The Court of Appeal has recently ruled that a tenant who wishes to purchase his or her property under the 'right to buy' legislation cannot require the landlord to carry out remedial works to the property as a precondition of complying with a notice to complete.

Emma Ryan had sought to force Islington Borough Council to make repairs to her flat, arguing that her request for the repairs to be made was a 'relevant outstanding matter', which had to be dealt with before she could complete the purchase of the flat.

The Court ruled that it was not a natural use of language to include repairs in relevant outstanding matters, which are those which have yet to be determined or agreed.

CONTACT DETAILS & LOGO HERE