

Time to assign

Tenants generally need the consent of their landlord to assign their lease and such consent cannot be unreasonably withheld. However, delays in responding to tenants' requests can be deemed to be unreasonable refusal even though the landlord has given no formal response. Peter McHugh, a solicitor in our Property team, discusses.

Letters of intent – use with caution!

Letters of intent can be a useful tool for contractors and other professionals in the construction industry to allow site access before formal contracts have been drawn up. However, a recent case illustrates the dangers of proceeding on the basis of these letters. David Tabinor, a partner in our Property team, considers.

Chasing the arrears

When can landlords claim rent arrears from former tenants? In light of the long running case of **Scottish & Newcastle Plc v Raguz**, Karen Neald, a solicitor in our Property Litigation team, reviews.



Take a break

Read the lease carefully before you embark on a tenancy break

Break clauses have become very important in the current economic climate and tenants need to be aware that time limits to break the lease may be strict. This means that the operation of a tenancy break will require careful reading of the lease.

The recent case of **Orchard (Developments) Holdings PLC v Reuters** (2009) shows the problems that can happen when service of a notice is left to the last minute by fax.

The tenants in this case had left the service of the break clause until the last minute and it needed to be served by the Saturday. A process server delivered the letter on the Friday and copies were faxed on both the Friday and the Saturday. It turned out that the letter had been posted to the wrong mailbox. The issue then was whether the fax had amounted to service. The lease stated that “all applications, notifications, consents and approvals must be in writing unless the receiving party or its authorised agent acknowledged receipt; a notice is valid only if it is given by hand or sent by registered post or recorded delivery.”

The letter had not been served correctly, so the argument was whether the faxes were valid service (which were not a valid method of service unless acknowledged). The landlord’s solicitor refused to acknowledge receipt and it was only 16 months later once proceedings had been issued that the landlord’s solicitor acknowledged that the faxes had been received. The tenants argued that this acknowledgement had retrospectively validated the faxes and notices to break had now been served. On appeal the court found that this notice had not been validly served as the acknowledgment had happened some time well after the break point and the consensus of the Judges views were that the lease did not oblige the landlord to acknowledge. The court found it was impossible to acknowledge receipt some months after the break point. The moral of the tale is that service of a break notice must follow the terms of the lease and any time limits must be strictly complied with.

This article first appeared in the Daily Post Viewpoint, published on 13 May 2009.

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The Holy Land

I am in the process of buying a property and have discovered that it may be subject to chancel repair liability. What does this mean and is there anything I can do about it?

Chancel repair liability is an ancient interest benefiting some 5,200 pre-Reformation churches in England and Wales. The rector received "tithes" from his rectorial land and used the income to discharge his liability to repair the chancel being the east end of the church (usually containing choir and nave). By the sixteenth century the monasteries had acquired most rectorships together with their attendant property and liabilities.

When Henry VIII dissolved the monasteries the property, and the liability, was dispersed. If the property of an individual rectory was sold to more than one person then the liability was divided between.

Until 2013 the liability will bind all owners of former rectorial land whether they are aware of the land's former status or not. Thereafter the liability will only bind new owners of registered land if the interest is protected by a Land Registry entry. The onus is therefore placed upon Parochial Church Councils to identify affected land and to register their interests.

Currently there is no single register which can be used to identify land subject to chancel repair liability although it may be disclosed by an inspection of old title deeds or entries at the National Archive or even suggested by the name of the land if such name has an ecclesiastical connection.

Liability is not unlimited. It extends to meeting the cost of keeping the chancel wind and watertight and maintaining essential features. Nevertheless the House of Lords recently held an unsuspecting Warwickshire couple liable to pay a bill of more than £185,000 to maintain their local parish church's chancel.

As part of the conveyancing process a search using one of the, often web based, specialist agents should be undertaken. Modern addresses are searched against ancient parish boundaries to establish whether there is potential liability and enquiries made at the National Archive to identify specific liability.

If potential liability is identified relatively cheap insurance to meet the potential cost is available for one off premium.

Chancel liability may be an ancient interest but it may continue to haunt landowners well into the 21st century. With the trustees of Parochial Church Councils under a fiduciary duty to pursue claims it really is a case of buyer be aware.

You have identified your potential risk so you should now consider insuring against it.

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Time to assign

Landlord's consent to assign

In the current climate, the residential market is seeing a growing frequency of applications from tenants to their landlords for consent to assign their leases to third parties. The current financial pressures on both landlords and tenants mean this is now an area where disputes are increasing.

From a landlord's perspective, granting consent for the tenant to assign is undesirable where that tenant is already abiding by its covenants and paying the rent as it could potentially disrupt the existing agreement. For those whose tenants are finding it difficult to keep up with the rent payments and so wishing to escape from their rental liability, it may be a better prospect to consent rather than having an unhappy tenant who is struggling to abide by their lease covenants.

The law states that landlords are obliged to respond to a tenant's written request to assign their lease to a third party within a reasonable time and provide either an unqualified approval, approval subject to conditions or refusal with reasons.

Invariably, speed is paramount to tenants wishing to assign their interest and complete a deal quickly, especially when so many transactions are presently failing to reach the finishing post. In respect of speed, the law is firmly on the side of tenants, and landlords are ordinarily required to make a decision within weeks.

Failure to act within such a timescale puts landlords in breach of their statutory duties and can mean that tenants are permitted to assign the lease irrespective of the landlord's wishes. More commonly, tenants will make an application to Court for a declaration to this effect with an award for legal costs and compensation. Accordingly, landlords who have reasonable grounds for refusal should notify their tenants of that decision within a reasonable time to avoid losing the right to do so. Landlords need to be ready to immediately decide upon issues of consent, taking into account the financial strength of prospective tenants.

There are two types of covenant relating to assignment applicable to all leases; first, an absolute covenant which prohibits assignment absolutely and second a qualified covenant where the tenant may not assign without the consent or licence of the landlord. The absolute covenant is rare and the tenant will be able to assign only if the landlord is prepared to waive the clause altogether. The qualified covenant means that assignment may only take place with the landlord's consent which must not be unreasonably withheld.

Landlords must begin making their decision as soon as an application is received and not wait for receipt of an appropriate undertaking for costs from the tenant's solicitors. On a positive note for landlords, they are entitled to base their decision only upon information provided. Accordingly, unless an application contains all the relevant financial and covenant strength information together with any offers of collateral security if reasonably required, landlords may refuse consent.

This will effectively stop the clock which will not re-start until the outstanding information is provided. It is the tenant's duty to provide any such additional information and make further offers of collateral security in order to persuade the landlord to give consent. Landlords do not have a positive obligation to tease out information nor state what they require before they can properly consider a tenant's application.

In summary, the points to note for landlords are:

1. Clauses in leases for the licence or consent of the landlord to be obtained prior to assignment automatically have a proviso added that such consent shall not be unreasonably withheld.



2. The clock begins to tick with regard to reasonable time as soon as an application is received, whether this application contains all necessary information or not.
3. They are entitled to reach a decision based upon the information they have been provided with and do need to tease out further information from the tenant.

It is best practice for a landlord to make it clear that consent cannot be provided until a tenant has made a written application, setting out the details of the assignee and providing supporting documentation, including evidence of financial standing, covenant strength and the case for the assignment. The majority of tenants invariably fail to do this as they are anxious to set the wheels in motion. In such cases, landlords may lawfully refuse consent on the basis of the information in front of them.

The reality is that tenants must have a strong case to take on landlords, as applying to Court is ordinarily time consuming, expensive and not without its risks. However, those landlords acting unreasonably will potentially be faced with significant damages claims being brought against them. The overriding message to landlords is to act swiftly and reasonably to avoid potential litigation and further costs.

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Letters of intent – use with caution!

The case

The court's decision in **Diamond Build Ltd v Clapham Park Homes Ltd** delivered in June 2008 made it clear that letters of intent, often used as a pre-cursor to a formal construction contract, can be legally binding in themselves.

In the case, the developer accepted a tender from the contractor for a refurbishment and regeneration contract relating to a number of houses and flats on the Clapham Park Estate in South London. The tender document enclosed a specification for the works and various requirements for the project.

The developer issued a letter of intent to the contractor instructing them to start work and setting out the intention to enter into a JCT Intermediate Building Contract 2005, with Contractor's Design, once the parties were in a position to do so.

The letter provided a commencement date, a completion date and an overall contract sum. It also contained the usual repayment clause whereby the developer agreed to underwrite the contractor's costs for providing various services and materials to the project up to a specified maximum.

Later, due to delays in the work and some concerns over the project, the developer wrote to the contractor terminating the appointment.

The contractor had exceeded the repayment cap in the letter of intent and therefore sought to recover all of its wasted costs on the grounds that the letter of intent, and therefore the cap, was not legally binding.

The court held that as the letter of intent was sufficiently certain as to the rights and obligations of the parties; it was clear enough to constitute a simple binding contract.

The developer was accordingly entitled to rely on the repayment cap leaving the contractor unable to recover the whole of its wasted costs.

Commentary

Whilst letters of intent can be a useful tool for contractors and other professionals to get on site and commence work, the case illustrates the dangers of proceeding on this basis.

Contractors are often required to start on site immediately. Letters of intent allow this to be achieved but leaving the parties free to negotiate a formal construction contract.

This could be because a part of the specification has not been finalised, or documents such as performance bonds or warranties to end users are yet to be agreed. Contractors are often instructed to commence preliminary site works such as ground remediation while those other aspects are progressing.

This case provides a warning to contractors and other professionals involved in construction projects to closely examine the terms of any letter of intent they are given.

The costs of works carried out beyond the precise terms of the letter of intent may not be recoverable. In the case, the court effectively described the letter of consent as an instruction to provide services in return for payment. It was not a pre-cursor to a formal contract specifying those terms or a basis for negotiations going forward. It was an instruction in itself and had the capacity to create legal relations as on the face of it



that's what the parties intended. The court rejected the contractor's argument that a legally binding contract would only come into existence if a later contract such as a JCT Building Contract was concluded.

As such, letters of intent should no longer be regarded as "letters of comfort" or non-legally binding "heads of terms" as was often previously thought to be the case. They can create binding rights and obligations. They should be clear as to what works are to be done and give precise details of the payment terms.

Contractors in particular should ensure that letters of intent are drafted with far more certainty as to what works and services are included and what goods and materials should be paid for by the developer in the event that the project fails. Once materials have been ordered or works commissioned by a sub-contractor, the contractor is primarily liable for payment of them and if a formal contract is not entered into his only recourse to the developer is under the letter of intent.

To avoid these risks, contractors should ensure a formal contract is agreed and signed as quickly as possible after a letter of intent has been issued. They should keep within any repayment cap prescribed in the letter of intent until that time.

Developers will inevitably wish to keep the repayment clause as wide as possible, to enable the cap to apply to payment for different or extra works commissioned by them after the letter of intent. Contractors should be wary of this and document any changes accordingly. Otherwise the developer may not be required to repay any sums to the construction team that are outside the letter of intent or above the cap.

Contractors and other professionals should ensure no onerous obligations are contained in letters of intent that they would not usually agree in a formal JCT contract, since they may not get the chance to remove them later.

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Chasing the arrears

Recovering rent arrears from former tenants and Section 17 notices

Since 2003 the case of **Scottish & Newcastle Plc v Raguz** has been rambling through the courts and here we give an outline of the history of this case, the position as it is now and how it benefits landlords.

The statutory requirement for notice to be given

Pursuant to S17 (2) of the Landlord and Tenant (Covenants) Act 1995 (“the Act”) a Landlord can require a former tenant to pay rent and any other fixed charge provided notice is served on the former tenant within six months of these sums becoming due. Pursuant to S17 (4) of the Act a Landlord can even serve notice on the former tenant if the amount is unknown, for example pending the outcome of a rent review, provided the notice states that the former tenant’s liability could be greater than that outlined in the notice served. A further notice must then be served, within three months after the actual amount claimed has been established, setting out the amount due.

Brief background to the case

The case involved two Underleases and Scottish & Newcastle were the original tenants. There had been a number of assignments following the commencement of the lease. One such assignment was to Mr Raguz under an indemnity agreement which was made pursuant to S24 (1) of the Land Registration Act 1925. Another of the assignees had run into financial problems racking up rent arrears and an administrator was appointed. A rent review had been due in or about 1995 but the new rent had not been fixed until the end of 2000. Once the rent had been established the Landlord served Section 17 notices on Scottish & Newcastle for the recovery of the arrears of rent and a considerable amount of back rent. Scottish & Newcastle paid the sums requested. They went on to demand recovery of the payments made from Mr Raguz as assignee under the indemnity agreement outlined above. Mr Raguz believed Scottish & Newcastle should not have been liable to the landlord for the rent review amounts. His argument was that the landlord had not given the correct information in the Section 17 notices served on them as the landlord had omitted to reserve the right to claim the unknown sums in the notices, these being the amounts established as being due following the rent reviews.

It was initially held by the court that the date upon which the amounts became due was the rent review date but this was dismissed on appeal. The court stated that the due date is the date when liability occurs not when the exact amount of liability is established. The top and bottom of this decision was that landlords were left in a difficult position when rent review processes were delayed entailing them having to serve S17 notices every six months whilst the rent review was being considered so as to protect their position enabling them to recover the backdated increases from a former tenant.

The case then went to the House of Lords to interpret Section 17 (2) of the Act and they interpreted it differently. They stated that when a rent review has not been completed then any rent that is due on each payment day will be the pre-rent review rent. The rent then only becomes due when the actual amount due is established. The majority held that upon drafting Section 17 (2) of the Act it was Parliament’s intention **not** to require landlords to serve Section 17 notices of protection every six months if the rent review had been delayed.

Decision benefits landlords

Therefore landlords are only required to serve a Section 17 notice on a former tenant if the current tenant has failed to pay the established sum due. Although the court’s decision in this case appears to be beneficial to landlords this may have an adverse effect on former tenants and guarantors as landlords can recover rent

arrears from them ore easily. Landlords will need to ensure that all the correct steps are taken to make certain they have a right to recover the amounts due pursuant to Section 17 of the Act.

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