

Commercial real estate - Former Tenant Liability

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It's possibly a tenant's worst nightmare. Several years, may be tens' of years, after assigning a lease, a letter arrives from your previous landlord demanding payment for dilapidations.

A lease which had long ago been assigned to a new tenant and forgotten about, has come back to haunt you.

How can this happen?

An old lease is a lease which pre-dates the Landlord and Tenant (Covenants) Act 1995. In other words, it's a lease that is dated before 1 January 1996.

Knowingly or otherwise, the original tenant will remain liable for the duration of the original lease term for the tenant's obligations in the lease.

Also, when a lease is assigned to a new tenant, the outgoing tenant (the assignor) will usually promise (covenant) with the landlord that the new tenant will observe and perform all the obligations in the lease on the part of the tenant - including repairs. If the new tenant does not do so, then the landlord can require a former tenant to remedy a breach - including, in the case of dilapidations, pay for repairs.

What can a former tenant do?

There are very few arguments which a former tenant can seek to rely on to escape liability.

A full (or largely partial) escape may depend on the following:

- Has there been any variation to the lease without the former tenant's knowledge or consent?
- Has the new tenant been allowed to carried out works/alterations to the premises without the former tenant's knowledge or consent?

If so, the landlord may have inadvertently released the former tenant from some or all of its liability.

- Review the lease and examine your actual liability. The most obvious starting place might be to look at the lease against the items claimed and assess whether the heads of claim listed in the schedule of dilapidations are actually the responsibility of the tenant in the lease.

If a former tenant is liable, what can it do to reduce it's liability?

A former tenant may have a number of options at its disposal to counter a claim for dilapidations from its previous landlord.

These include:

- Limiting the scope of the cost of dilapidations under section 18 Landlord and Tenant Act 1927.

Section 18 states that a landlord cannot: (1) recover damages where the value of its reversionary interest has not diminished (2) recover the cost of dilapidations where the landlord would in any case not make use of the repairs (e.g. where the landlord would demolish the premises to rebuild/renovate). S.18 applies only to works of repair (not, for example, decoration).

- Rely on an implied or express indemnity from an assignee.

When an 'old' lease is assigned, in the same way that an assignor covenants with the landlord, the new tenant (assignee) promises to the assignor that it will observe and perform all the tenant cove-



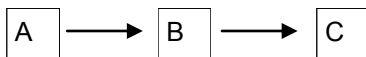
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nants in the lease and will indemnify the assignor against any failure to do so (usually there is an express indemnity given but there is also an implied indemnity given under Statute law).

If the landlord is claiming against an immediate assignee (the person or company that you assigned to) but now looking to you, an indemnity is likely to be of little use otherwise the landlord would not be bringing a claim against you instead of the immediate assignee!

However, if there are a chain of assignees, you may be able to claim under an indemnity from the assignee in that chain.

Example:



A is the original tenant (you);
B is the first assignee; and

C is the current tenant/second assignee (in breach of its repairing obligations).

A is being sued because, say, the Landlord has not traced the whereabouts of B and C is insolvent (a landlord can however choose who it sues in the chain of former tenants).

If A can locate B (and assuming B is solvent), it can rely on the implied indemnity given on assignment and join B in the proceedings.

More often than not, B will simply take over the negotiations/claim in A's place.

- Challenge the value of the Claim

Assuming you have explored all other options available (outlined above), you should challenge the value of the claim by instructing your own surveyor who specializes in dilapidations claims. It is not unheard of that landlords sometimes seek to recover more than they are entitled to.

Leeds Day has a depth of experience acting for both landlords and tenants in dilapidations claims - ranging from a few thousand pounds to hundreds of thousands of pounds.

If we can assist you in anyway, please do not hesitate to contact us.

Contacts

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