

K&LNG Alert

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Keeping former tenants on the hook: Not as easy as it used to be?

At common law, the former tenants and guarantors of an old lease (a lease granted before 1 January 1996) remain liable to the landlord for performance of the lease covenants. The Landlord and Tenant (Covenants) Act 1995 (the "Act") ate away at this liability, and the recent case of *Scottish & Newcastle plc v Raguz* [2006] demonstrates one of the potential obstacles for landlords in the recovery of rent from former tenants and guarantors.

FACTS

Scottish & Newcastle plc ("S&N") were the original tenant of hotel premises under two underleases dating from the 1960s. In 1982 the leases were assigned by S&N to Mr Raguz. The transfer contained an implied indemnity in favour of S&N. By 1992 both leases had been transferred to another company which later suffered financial difficulties and went into administrative receivership. Rent reviews had become due under the leases in 1995 and 1996. In 2001 the landlord served S&N with statutory notices demanding the rent arrears payable following completion of the rent reviews. S&N paid the arrears and then sought to recover the arrears from Mr Raguz (under the implied indemnity).

The court held that S&N could recover the arrears from Mr Raguz under the implied indemnity. However, the statutory notices served by the landlord were ineffective to render S&N liable for those sums. This was due to the provisions of section 17(2) of the Act.

IMPLICATIONS FOR LANDLORDS

Section 17(2) of the Act provides that a former tenant shall not be liable to pay any "fixed charge" (which includes rent) unless, within six months of the date that the charge becomes due, the landlord serves him with a notice stating that the charge is due and that the landlord intends to recover it from him. The idea is for a former tenant to be given prompt warning that a claim might be made against him. The court here

decided that "due" meant the time when the increased rent became payable, which was from the first rent payment date following the review date irrespective of whether the review has actually been settled by that date.

Therefore, where a rent review has not been settled by the first rent payment date after the relevant review date, in order to maintain the liability of a former tenant/guarantor for rent arrears a landlord should:

- Serve a section 17 notice on all former tenants/guarantors;
- For so long as the rent review is outstanding, serve further section 17 notices on those tenants/guarantors within six months of each rent payment date; and
- Once the review has been settled, serve a further notice on the former tenants/guarantors specifying the amount due (unless the current tenant has paid).

APPEAL

The case is under appeal and may be reversed. Certainly the decision creates an odd situation in that it constrains a prudent landlord to serve notices on previous tenants even when it has no reason to suppose that the existing tenant might default, and, as the judge in the case said, the notice would have to say that the amount claimed was either "nil" or "nothing at the moment, but wait and see"!

Note: A person who pays the outstanding arrears pursuant to a section 17 notice will be entitled to call for an over-riding lease of the premises. A landlord should bear this in mind when deciding whether or not to serve a section 17 notice on a former tenant/guarantor.

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