

LAW MADE SIMPLE

The Message: In the absence of any special provision, a tenant has no right to pursue its current landlord for damages for any breaches by a previous landlord.

The Case: In Edlington Properties Limited v J H Fenner & Co Limited (22 March 2006) the Court of Appeal dealt with the important issue as to whether a tenant can set off against rent due to its landlord a claim for damages arising from the breach of an Agreement for Lease or a Lease where it was a previous landlord that was responsible for the breach.

In this case, the original landlord, the Welsh Development Agency, had constructed a factory for the Defendant tenant pursuant to an Agreement for Lease and had then completed the Lease and sold its interest. It subsequently transpired that there were defects in the factory and the tenant is in the course of pursuing proceedings against the original landlord claiming more than £52million in damages. Pending the outcome of those proceedings, it had sought to withhold from the current landlord some instalments of the rent of £581,000 p.a. payable under the Lease

It is clear that, unless a Lease clearly provides otherwise, a tenant does have a right to set off damages due to it for a breach by a landlord of its covenants under the Lease against the rent payable to that landlord. However, the Court of Appeal affirmed that the right of set off can only be pursued against the landlord that was responsible for the breach. Under the relevant legislation, a new landlord has the right to recover rent in its own right and it does not acquire the premises subject to any claims that the tenant might have against the previous landlord. A liability on the part of a landlord to pay damages for breach of covenant simply gave the tenant a personal right to claim damages and any purchaser took free from it. The tenant only has rights against the original landlord who, of course, may not have sufficient resources to meet any claim of any size.

Of particular interest, the Court of Appeal considered whether the landlord's obligations under a Building Agreement or Agreement for Lease are actually binding upon a successor in title to the landlord. Pursuant to S.3 of the Landlord and Tenant (Covenants) Act 1995, the benefit and burden of all covenants of a tenancy, unless they are expressed to be personal to the original parties, pass on any transfer and a covenant is defined to include any term, condition and obligation contained in any agreement collateral to the tenancy.

The Court of Appeal held that the 1995 Act only applies to covenants on the part of the landlord which fall to be complied with in its capacity as a landlord under a tenancy and, as such, they do not include covenants which the prospective landlord enters into before the tenancy is granted. Notwithstanding that any Agreement for Lease is made upon the basis that the owner of the property will become the landlord once the Lease is entered into, the obligations under the Agreement for Lease are entered into at a time where no Lease exists and, accordingly, they are not obligations which are caught by the 1995 Act.

Given that a landlord does not need consent from the tenant to sell its interest in the premises, it is vitally important for any prospective tenant of a building that is to be constructed on its behalf to try to ensure that express provision is made in the Agreement for Lease and the Lease itself that will entitle it to pursue any claim for damages against not only the original landlord but all successive landlords. Whether landlords would actually agree to such a provision is another matter entirely.

Jonathan Ross
Head of Property Litigation
Forsters LLP