Dilapidations: two years ago a subtenant’s business lease expired, and its immediate landlord (itself a tenant under a headlease) served a terminal schedule of dilapidations (in accordance with the PLA pre-action protocol). In fact the head tenant’s lease only had a further year to run and no steps were taken by the headtenant to claim damages under the schedule. Now (two years after the sublease expired, and one year after the head lease had expired), the freeholder serves a schedule of dilapidations on the headtenant claiming damages for the condition of the premises, including loss of rent because the property could not be leased because of its condition. The headtenant passes it on to the subtenant on the basis that their repairing obligations under their respective leases were identical. On what heads of damage is the subtenant likely to be liable, and for what periods? What factors should the subtenant consider when deciding whether or not to co-operate with the headtenant?

The statement that “..their repairing obligations under their respective leases were identical…” is deceptively simple. On the face of it, it seems that the subtenant’s liability is likely to be coextensive with that of the headtenant. Assuming that the freeholder’s schedule of dilapidations is well founded, the inquiry ends there. The subtenant pays, and the headtenant is out of the loop. However, as is so often the case, things may not be as simple as they seem.

In drafting the sublease, the draftsman is seeking to ensure that the headtenant is not exposed to a greater liability in terms of dilapidations than is the subtenant. The headtenant does not want to be left at that end of his term picking up the bill for matters which could have been made the responsibility of the subtenant. The only way in which this can really be achieved is by inserting an express covenant in the sublease which makes it clear that that the liability of the subtenant to the headtenant is intended to be exactly the same as that which the headtenant has towards the freeholder.

There are, however, a number of common drafting solutions which fall short of this. (i) the draftsman of the sublease has simply parroted the words of the headlease (in relation to dilapidations) in the sublease (ii) the draftsman has used some sort of device such as “the subtenant will observe the covenants contained in the headlease and keep the headtenant indemnified in respect to the same” (iii) the subtenant has been required to covenant directly with the freeholder, as a condition of consent being given for the sublease.

(i) Identical wording. Just because similar, or indeed identical, words are used in the lease and the sublease, it does not mean necessarily that the headtenant’s obligations to the freeholder will be the same as the subtenant’s obligations to the headtenant. Repairing obligations must be construed in the context of the whole lease, including when it was granted, and for how long. The subtenant will only be liable if the condition of the premises falls below the standard required by the covenants. But this standard will in turn rest, amongst other things, on the condition of the premises at the start of the sublease, which may be rather different from the condition at the start of the headlease.
Factors such as the nature and length of the head tenant’s interest compared with that of the subtenant, as well as the length of the unexpired portion of the headlease (after expiry of the sublease) will all affect the construction of what is meant by a “repair”.

For example, the headtenant may have covenanted to repair the lift. Let us say that it needs total renewal at great expense. Whilst this might be a legitimate “repair” in the context of the lease between the freeholder and the headtenant, it might be too extensive to be considered a “repair” as between the headtenant and the subtenant in the context of a much shorter sub-tenancy. Thus, the subtenant’s liability towards the headtenant is not the same as the headtenant’s liability to the freeholder.

It may be that there were defects present at the commencement of the sublease which were not present at the commencement of the headlease, and for which the freeholder is now claiming. These would be matters for which the tenant is likely to be liable to the freeholder, but which the subtenant may argue are not its responsibility (subject to the rule that a covenant to keep in good repair imports an obligation to put into good repair).

It will be important further to identify those defects which were present at the termination of the sublease, and those which have occurred afterwards. Clearly, this can be done by comparing the freeholder’s schedule and the headtenant’s schedule. On the face of it, the subtenant should not be liable for the freeholder’s loss of rent, not least because the headtenant apparently had a year in which to carry out any works, but apparently failed to do so. Equally, there is no suggestion that the headtenant failed to sublet the premises because of its condition. It seems that the headtenant therefore has no claim for loss of rent against the subtenant.

At common law, the measure of damages for a tenant’s failure to repair is the cost to the reversioner of carrying out the works which the tenant has failed to carry out (plus loss of rent for the period whilst the works are carried out). (Joyner v. Weeks [1891] 2QB 31). However, this is subject to a statutory cap imposed by s.18(1) of the Landlord and Tenant Act 1927 which provides that these damages cannot exceed the diminution in value to the reversioner’s interest. This diminution in value is to be calculated at the date of termination of the lease. In this case, that means that the subtenant’s liability must be calculated as at the date of termination of the sublease, not at the date of termination of the headlease.

In a situation where a landlord has done, or clearly intends to do, the works then it is usual to argue that the cost of the works (the common law measure of damage) in fact represents the true diminution in value to the reversion. In the present case the headtenant did not do any works on determination of the sublease. However, that does not mean that he has suffered no loss (see Joyner supra.). The presence of the disrepair would almost certainly have had an impact on the value of the headtenant’s reversion. It may even be that he would have had to pay an assignee to take the headlease. It may be that the only sensible way of valuing that diminution in value is in relation to the cost of the works that the incoming assignee would have to carry out to bring the premises to the standard contemplated by the repairing obligations. This would be the measure of the
subtenant’s liability to the headtenant, but would clearly be a different figure from the headtenant’s liability to the freeholder, calculated at the termination of the headlease.

(ii) Use of a device. Subleases are frequently drafted with express terms that the subtenant will perform all the (tenant’s) covenants to repair contained in the headlease. Once again, the impact of such a clause will depend on its proper construction. It may be that that the clause can be construed not so much as imposing a direct obligation on the subtenant to perform the repairing obligations, but rather as an indemnity against any costs the headtenant might incur in dealing with the subtenant’s failures to repair. In such circumstances the subtenant might, in principle, be liable for any costs which the headtenant incurred in fighting a claim brought by the freeholder, as well as for an indemnity in respect of the sums actually recovered by the landlord.

Once again, it is questionable whether the subtenant would be due to indemnify the headtenant for the freeholder’s loss of rent claim, as this was an expense which the headtenant could have avoided by carrying out the works (and seeking an indemnity and/or damages from the subtenant). Clearly also any indemnity should be restricted to matters which arose before termination of the subtenancy, and not after.

Where the covenant is not one of indemnity, but clearly one of repair, then the subtenant will be liable to repair in accordance with the terms of the head lease. The importance of this will be that the standard of repair (and therefore the cost of repair) will be assessed on the appropriate standard under the headlease. This may well turn out to be more extensive (and expensive) than compliance with the same term under the sublease (see the situation at (i) above).

(iii) Direct covenant with the freeholder. Once again, such a covenant might take the form of a direct obligation on the subtenant to repair; as an obligation to carry out the repairs in the headlease or as an indemnity to the freeholder for breaches of the repairing obligation. Depending on the exact nature of the clause, the factors set out at (i) and (ii) will apply.

As can be seen, it will not necessarily be the case that the subtenant’s liability to the headtenant, and the headtenant’s liability to the freeholder will be coextensive. Indeed, it is more likely than not they will not be, particularly in relation to the freeholder’s loss of rent claim. It is very likely therefore that there will be a dispute between the headtenant and the subtenant and any “cooperation” with the headtenant should be viewed in this light.

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