IS TIME RUNNING OUT TO RECOVER FROM FORMER TENANTS?

It has been well publicised during the pandemic, especially in the commercial sector where large parts of the economy have been shut down for long periods, that many tenants have struggled to meet their rental liability. Within the landlord & tenant economic cycle that, in turn, has put pressure on landlords.

Lockdown began just before the March quarter day and as the six month anniversary of the commencement of lockdown approaches, it is timely to remind ourselves of the basic elements of the procedural requirements contained in s.17 of the Landlord & Tenant (Covenants) Act 1995 ("the 1995 Act") should landlords wish to look beyond the current tenant for payment of unpaid rent, service charge or other liquidated sums which, given present economic circumstances, may well be the first time the landlord has contemplated such action and which landlords may be well advised to consider for protective purposes.

The 1995 Act came into force on 1 January 1996 and, as relevant, made two significant changes to the law. The first was to provide that upon an assignment of a 'new tenancy' the former tenant was to be released from his covenants (unless it is an 'excluded assignment'), whilst the second was to limit the ability of a landlord to recover sums from former tenants and their guarantors, the limitations being procedural in their nature. Tenancies granted on or after 1 January 1996 are for the purposes of the 1995 Act "new tenancies", whilst tenancies granted before that date, of which many still remain, are "old tenancies".

Section 17 of the 1995 Act applies pursuant to subsection (1), where a person, described as 'the former tenant' is, as a result of an assignment, no longer a tenant under the tenancy but nonetheless has a continuing liability under it, either because:

(a) In the case of a 'new tenancy' the former tenant has, under an authorised guarantee agreement, guaranteed the performance by his assignee of a tenant covenant of the tenancy under which any 'fixed charge' is payable; or

(b) In the case of any tenancy, where the former tenant remains bound by such a covenant (including, as will be the case for many 'old tenancies' where the former tenant remains liable as a matter of privity of contract).

Furthermore, pursuant to s.17(3) s.17 also applies to a person ('the guarantor') who agreed to guarantee performance by the former tenant of such a covenant as is mentioned in s.17(1).

The key procedural requirement to highlight and emphasise is that section 17 of the 1995 Act requires a landlord to serve a notice on the 'former tenant' or 'guarantor' **within the period of six months beginning with the date when the 'fixed charge' became due**. Hence the need for landlords and their advisors in the current climate to actively consider whether such a notice should be served and for 'former tenants', 'guarantors' and their advisors to be prepared for the service of such a notice.

A 'fixed charge' is defined in s.17(6) as being rent, any service charge (adapting the definition contained in s.18 of the Landlord & Tenant Act 1985) and certain liquidated sums.

The notice served, whether on a 'former tenant' or 'guarantor' should be in the prescribed form which will include, pursuant to s.17(2), notification to the recipient that the fixed charge is now due and that the landlord intends to recover from the recipient such amount as is specified in the notice and (where payable) interest calculated on such basis as is so specified. Pursuant to s.27 of the 1995 Act, the notice must also includes an explanation of its significance.

Service of the notice should, for the landlord's own protection, be effected in accordance with s.23 of the Landlord & Tenant Act 1927. It is therefore validly served if it is (a) served personally; (b) left for the former tenant or guarantor's at their last known place of abode in England or Wales; (c) sent through the post in a registered letter addressed to the former tenant or guarantor at their last known place of abode; or (d) in the case of a local or public authority or a statutory or public utility company, is sent through the post in a registered letter addressed to the secretary or other proper officer at the principal office of such authority or company. The risk of non-service is placed on the 'former tenant' or 'guarantor' (as appropriate) as even if the 'former tenant' or 'guarantor' does not receive the notice, if the landlord can evidence service in compliance with the requirements of s.23, then service will be good. If, however, a landlord elects to serve by another method, then the risk of non-service falls on the landlord.

If the required s.17 notice is not served within the six-month time limit, the landlord is simply not able to recover the relevant 'fixed charge', but good service of a timeous notice means the former tenant or guarantor (as appropriate) is liable (exclusive of interest) to pay a sum not exceeding the sum specified in the notice, unless 3 conditions provided by s.17(4) of the 1995 Act are satisfied, namely: (1) his liability is subsequently determined to be for a greater amount; (2) the notice informed him of the possibility that that liability would be so determined; and (3) within the period of 3 months from the date of determination, the landlord serves a further notice informing the former tenant or guarantor (as appropriate) that the landlord intends to recover the greater amount from him (plus interest, where payable).

However, this second notice procedure provided for in s.17(4), which is a sub-section that sits uneasily with s.17(2), will only rarely be used. That is as a consequence of the House of Lords decision in *Scottish & Newcastle v Raguz* [2008] UKHL 65, a case in which I appeared for Scottish & Newcastle, where it was held that for the purposes of s.17(2) the additional rent pursuant to the long outstanding rent review in that case was to be treated as only becoming 'due' when the increase was finally determined, not from the review date, with such additional rent being a separate fixed charge from the fixed charges arising when each quarter's unreviewed rent fell 'due' on the quarter days between the review date and the final determination of the review.

This avoided a construction of s.17 which avoided the nonsensical prospect of 'nil notices' being served where the current tenant has paid the unreviewed rent but the landlord wishes to cover a scenario in which that tenant cannot then pay the additional rent when the review is finally determined.

Ultimately the second notice procedure may be appropriate, depending upon the proper construction of the terms of the lease, in the rare event of those terms not admitting the *Raguz* analysis.

Another important consequence of service of a s.17 notice arises when the former tenant or guarantor (as appropriate) makes full payment of the sums the landlord has claimed in the notice. That consequence is a statutory entitlement within 12 months of that payment, pursuant to s.19 of the 1995 Act, to seek an overriding lease, which effectively makes them the direct tenant of the landlord and the landlord for the current tenant.

All in all, plenty for landlords to contemplate, but not much time in which to do it.

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