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If a landlord and a tenant enter into a lease, the lease should reflect the final terms agreed between them. It is not usually open to either party to argue that the terms of the lease should be varied by a previous agreement. However, there are certain restricted circumstances in which a party can argue that they have the benefit of some other agreement, sometimes referred to as a "collateral contract" which is outside the lease, and varies its terms. A collateral contract might take the form of a written agreement, or it may be implied by assurances made to one of the parties before the main contract was completed.

## Side letters

Concessions offered to tenants that the landlord would like to keep outside the lease itself are often dealt with by way of a side letter. However, a side letter may also bind future landlords, and this is not always commercially acceptable.

## Recent case law

In *Business Environment Bow Lane Ltd v Deanwater Estates Ltd*, the Court of Appeal considered whether a tenant whose landlord had agreed a significant concession as part of the heads of terms for a lease renewal, which was not then fully reflected in the lease itself, could argue that it had the benefit of a collateral agreement.

## The heads of terms

The tenant had agreed to surrender its lease, which had the benefit of security of tenure under the Landlord and Tenant Act 1954, and to take a shorter lease of part of the property. The new lease was to be contracted out of the Landlord and Tenant Act 1954, and it was agreed that in return for the tenant giving up security of tenure there would be no liability for dilapidations or reinstatement at the end of the term. This was recorded in the heads of terms.

## The negotiations

The landlord's solicitor issued a draft lease, which did not contain any limitation on the tenant's liability for dilapidations. The tenant's solicitor pointed out that this had been agreed in the heads of terms, and extensive negotiation followed over the issue. The landlord's solicitor wrote a letter asking the tenant to rely upon its client's assurance that a terminal schedule of dilapidations would not be served. The letter suggested that this should be sufficient comfort for the tenant.

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The tenant's request for the matter to be dealt with in a side letter was refused. Eventually the lease was completed with an amendment which limited the tenant's liability for dilapidations, but not to the extent agreed in the heads of terms.

When the tenant exercised a break option a new landlord served a terminal schedule of dilapidations on the tenant. When the tenant refused to comply with the schedule, the new landlord issued proceedings. The Court of Appeal considered whether the letter from the landlord's solicitor suggesting that the tenant should rely upon the landlord's assurances about dilapidations constituted a collateral contract, upon which the tenant could rely, notwithstanding the terms of the lease.

### The decision

The Court of Appeal found that the tenant did not have the benefit of a collateral contract (although it did say that the decision was borderline). The factors that weighed particularly against the tenant were that:-

- the solicitor's letter had been followed by further negotiations, from which the Court could infer that the tenant did not accept that it could satisfactorily rely upon the letter; and
- there was quite a time delay between the letter and completion of the lease; and
- the letter referred to future events (i.e. the service of a schedule of dilapidations) in circumstances which could not be known at the time of the letter.

### Achieving certainty

The case shows that the Courts will lean towards certainty, and illustrates the risks of completing a contract which does not properly reflect the agreement reached between the parties.

It is possible for a landlord who wishes to protect itself from the risk of a claim based upon negotiations or correspondence outside the completed lease to include an "entire agreement" clause. Such a provision makes clear that the parties cannot rely on anything outside the lease, such as pre-contract negotiations.

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