

Protecting the right to pursue former tenants – a warning for landlords

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A recent decision of the Court of Appeal confirms the steps that a landlord must take in order to preserve the right to pursue former tenants and their guarantors for rent unpaid by the current tenant, where these relate to outstanding rent reviews.

“New” and “old” leases – former tenants’ liability

The extent of the continued liability of a tenant who has taken a lease, and subsequently sold it, depends on whether that lease is a “new” lease or an “old” lease for the purposes of the Landlord and Tenant (Covenants) Act 1995 (**the 1995 Act**). Broadly, a new lease is one that was entered into after 1 January 1996 (unless it was entered into following an agreement, option or court order pre-dating 1 January 1996). Tenants under old leases remain liable for the rent for the whole term of the lease, even if they sell their interest during the term. Under a new lease, if a tenant sells their lease, they remain liable only to the extent that they have entered into an authorised guarantee agreement in which they guarantee the performance of the tenant covenants by their assignee, for as long as that party remains the tenant.

One of the protections introduced by the 1995 Act is a requirement for a landlord who wishes to recover arrears from a former tenant or their guarantor, to serve a notice (referred to as a “section 17 notice”) on that party setting out details of the amount claimed. If this notice is not served within 6 months of the date that the amount became due, the right to pursue that party for the arrears is lost. This protection applies to both new and old leases.

Section 17 notices and rent reviews

The recent Court of Appeal decision concerned a hotel business that had run into difficulty. The original tenant, Scottish & Newcastle, had sold the property to Mr Raguz some years before. The hotel was then sold again before it became vested in the current, defaulting tenant. The landlord sought payment of the arrears from Scottish & Newcastle, who paid nearly £600,000 to the landlord, and assisted the administrative receiver in finding a buyer for the business. Some of the arrears related to rent reviews which were settled during the administrative receivership.

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Scottish & Newcastle sought to recover the sums it had paid to the landlord from Mr Raguz, under an implied indemnity in the transfer by which it had sold the hotel to him. Mr Raguz challenged Scottish & Newcastle's claim against him on several grounds. One of the issues considered by the Court was how the section 17 notice procedure should apply to the uplift in rent which became payable by the tenant once the reviews were settled.

The Court held that in the event that a rent review is outstanding, where a lease has been assigned, **the landlord needs to serve a section 17 notice on any former tenant, or their guarantor, within six months of each rent payment date**, in order to preserve the right to claim any arrears relating to the uplift in rent at a later date, from that party. This is so even though the lease will provide that the uplift is only payable once the review been settled. The Court acknowledged that landlords would be serving notices even though the amount which may eventually be claimed is unknown, and there may be no arrears at all at the date of the notice. It indicated that the notice should state that the amount claimed is "nil".

Implications for landlords and managing agents

The decision will clearly increase the administrative burden on landlords and managing agents. Section 17 notices contain a statement referring to the fact that the sum claimed may increase at a later date. This statement should be left in, and a further section 17 notice should then be served within 3 months of the review being settled. Landlords also need to bear in mind that any former tenant or guarantor of a former tenant who pays arrears to a landlord following service of a section 17 notice is entitled to call for a lease of the premises (referred to as an "overriding lease"). This is to enable them to either take the benefit of the lease, or to find a new occupier for the premises and assign the lease. This may influence the choice of which parties to serve with a section 17 notice.



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