
The Landlord & Tenant (Covenants) Act 1995

This Act came into force on 1 January 1996. This has very far-reaching effects on landlords and tenants. The most important changes are:

- The principle of privity of contract has been abolished. This is the most dramatic change.
- To lessen the effect of the abolition of the rule of privity of contract so far as the landlords are concerned, in certain cases landlords are able to impose conditions when granting licences to assign.
- Landlords have the right to apply to be released from liability under covenants binding on them on assignment of the freehold reversion of properties.
- New rules have been introduced regarding the collection of rent arrears.
- All covenants in a lease will now be binding on successors in title.

1. Privity Of Contract

This is the rule whereby one contracting party can always enforce the terms of a document against the other contracting party, even if that party no longer has any interest in the property which is the subject matter of the relevant document. During the recession this rule had become particularly advantageous to landlords who are able to sue original tenants under leases if subsequent assignees failed to observe the terms of the Lease, e.g. did not pay the rent or keep the premises in repair.

This rule will no longer apply in leases completed after 1 January 1996 unless they were:

- (a) granted pursuant to a pre-1996 agreement, including an option or right of first refusal; or
- (b) authorised by a Court Order made in 1995.

Since this Act came into force a tenant who lawfully assigns a lease can automatically be released on assignment from any further liability under the Lease. If a tenant assigns part of premises comprised within a lease, the tenant can have no further responsibility for the covenants relating to that part. The Act also contains provisions in assignments of part dealing with the apportionments of liability on

covenants between the two parties. However, there is no automatic release if the assignment is in breach of covenant. If a lease passes by way of operation of law (e.g. on death of the tenant) the release is not effective until the next formal assignment made in accordance with the provisions of the lease.

2. Possible Conditions In Licences To Assign

If:

- (a) it is reasonable, or
- (b) there is contractual authority to impose a condition, or
- (c) there is an absolute bar on assignment,

a landlord can require any business tenant who assigns (not just the original tenant) to underwrite the assignee's compliance with all or some of the tenant's covenants. This is important, as without this provision a tenant could assign to a man of straw leaving the landlord unprotected. This makes a tenant responsible for his assignee, whom of course he selects. It is therefore now possible in certain circumstances to specify in advance the circumstances in which the landlord may withhold consent to assignment, or which conditions he may impose on his consent. If he withholds consent on those grounds or imposes such conditions, he does not have to act reasonably in doing so.

3. Landlord's Release

This is *not* automatic on an assignment of the freehold reversion. To obtain such release a landlord must serve notice in the prescribed form on the tenant before the assignment, or within four weeks of such assignment. The release is then effective if:

- (a) the tenant consents or withdraws his objection, or
- (b) the tenant does not within the prescribed period of four weeks serve a notice objecting, or
- (c) following receipt of a notice of objection from the tenant within the prescribed timescale, the landlord makes a successful application to the County Court for a

declaration that a release would be reasonable.

If a landlord is not released on an assignment the next time the freehold reversion is assigned he can apply for release. The practical difficulty here is that it is unlikely a landlord will know when his successor transfers the freehold reversion. It is therefore important that the application for release is made when he transfers the freehold reversion.

4. Collection Of Rent Arrears

These rules under the 1995 Act will apply to both new *and existing* leases. If there are:

- (a) arrears of rent or other payments reserved as "rent", e.g. insurance premiums,
- (b) arrears of service charge,
- (c) liquidated damages specified by the lease for a breach of covenant,

a landlord must serve notice in the prescribed form on a predecessor of the current tenant or guarantor within six months of the money falling due before seeking to recover the arrears from that person. Separate notices must be served on every former tenant or guarantor to whom any claim for the arrears is to be made. If a tenant has guaranteed the covenants of his assignee on a assignment, notice must be served on that previous tenant.

Care must also be taken in any variation of the terms of a lease, as this could affect the liability of former tenants and guarantors.

If a former tenant pays sums demanded by a notice of arrears he can in certain circumstances claim an overriding lease and thereby regain possession of the premises. Such right must be exercised by notice given to the landlord within 12 months of the payment having been made.

5. Distinction between certain types of Covenants in Leases Abolished under the new Legislation

Since this Act, all provisions in a lease are binding on successors in title. Previously, it was necessary to establish that a covenant touched and concerned the land in order to bind successors, e.g. covenants to pay rent or to repair the premises: other covenants did not bind successors, e.g. a covenant to repay a deposit when the lease ends.

Therefore, the current landlord will be responsible for performing all the landlord's covenants in the lease and has the benefit of the tenant's covenants and in default, the benefit of any right of re-entry. Conversely, the tenant in occupation of the premises must perform the tenant's covenants in the lease and

can enforce the landlord's covenants. If there is a third party (e.g. management company) who enters into covenants in the lease, covenants are enforceable by an assignee of the landlord or the tenant against such third party.

For further information please contact the Commercial Property Department on 01892 510000.