

## Lessons on a lease by a litigator

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This is the second installment of [\*'Lessons from a litigator – things I wish I had known before I signed'\*](#).

### **Lesson 2: Ensuring your lease contains the right clauses and wording to enable you to recover costs incurred by you**

Today I am looking at the importance of ensuring that, as a landlord, the lease contains the appropriate clauses and wording to enable you to recover from a tenant any costs incurred by you in ensuring the tenant's compliance with its covenants (promises made by the tenant) under the lease.

#### **Why is it important to include this in my lease?**

Where a tenant is in breach of the covenants in the lease (for example, it has fallen into arrears of rent or because the property is in disrepair), a landlord may need to instruct a solicitor and other professionals, such as a surveyor, to resolve the dispute. This will inevitably result in the landlord incurring legal fees and the fees of other professionals.

Unless the tenant agrees to pay or the lease specifically provides for payment of the landlord's costs by the tenant, the only way a landlord can recover those costs is by issuing Court proceedings which can be an expensive and lengthy process.

In addition, current rules provide that the Court cannot order the tenant to pay the landlord's costs, other than the fixed costs of issuing proceedings, for financial claims which do not exceed £10,000. However, where there is a contractual right under the lease to recover legal and other professional fees from the tenant, the Court of



Appeal held in the 2015 case of *Chaplain Ltd v Kumari* that there would need to be a good reason to deprive a successful landlord of its right to rely on the terms of the lease and to recover its costs from its tenant.

## What should be included in any such provision?

Courts will construe clauses in a professionally drawn up lease narrowly and will assume that the parties would have chosen their words with care. Therefore, if a landlord wishes to be sure it can recover all or any of the costs incurred in securing its tenant's compliance with the covenants in the lease, whether through proceedings, pre-action correspondence or negotiation, the lease must expressly provide for such recovery.

When it comes to proceedings for forfeiture of a lease for breaches other than a failure to pay rent, a well drawn lease will usually provide for the landlord to recover the costs incurred in serving what is known as a Section 146 Notice.

However, landlords do not always wish to remove their tenant because of its breach of covenant and may instead prefer to pursue it for payment of the arrears or the cost of dealing with repairs required to be carried out by the tenant.

In such cases, a provision linking the recovery of costs to service of a Section 146 Notice would not assist the landlord and would give it no contractual right to recover its costs from the tenant.

It is therefore important that the lease also contains a wider provision which allows the landlord to recover its professional costs and expenses incurred in connection with, or in contemplation of, the enforcement of the tenant covenants in the lease.

## Recovery of costs on an indemnity basis

Landlords should also ensure that where their tenant is obliged to pay legal fees or other professional costs, that obligation extends to costs which are to be assessed on a full indemnity basis.

This means that if a Court were ever to be called to assess the amount of costs payable, any doubt as to whether the costs claimed were reasonably incurred or reasonable in amount would be resolved in favour of the landlord. Otherwise, any doubt as to whether an item of cost was reasonably incurred or reasonable in amount would be resolved in the tenant's favour. Further, there would also be no requirement for the costs sought to be proportionate to the amount which was in dispute. As a result, the landlord would be likely to obtain an order for a higher percentage of its costs claimed on assessment than if the costs were simply on the standard basis.

## Consequences of not including these provisions

Unfortunately, if the appropriate provisions are not included within the lease, a landlord could face an uphill battle in attempting to recover any costs it has incurred and quite possibly be in a position where it cannot recover some or all of these costs. To protect a landlord it is imperative that the relevant provisions of the lease dealing with recovery of costs incurred by a landlord are drafted properly so that they are valid and effective.

## Find out more

Our [commercial real estate](#) team has extensive experience in drafting commercial leases.

Alternatively, if you do find yourself in a position where you require advice regarding your current recovery position, then please do not hesitate to get in touch with Gail Morris or Craig Burton or a member of our [property litigation](#) team.



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