



PainSmith Solicitors Legal Update

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Duty of Landlords to Mitigate Loss

It is a widely accepted principle of contract law that a party to a contract should seek to mitigate losses brought about by another party's failure to fulfil their contract adequately (*British Westinghouse Electric Coy v Underground Electric Railways Coy* [1912] AC 673). It is usually assumed that this principle applies equally to landlords faced with a tenant who wishes to surrender his tenancy during the contractual term.

However, the Court of Appeal has recently decided that this is not the case. In the case of *Reichman & Anor v Beveridge & Anor* [2006] EWCA Civ 1659 the Court of Appeal held that a landlord had a choice whether to accept a tenant's surrender during the fixed term of the tenancy and then to re-let the property or whether to simply refuse the surrender and sue the tenant for each instalment of rent as it became due.

In *Reichman* the Defendants were a firm of solicitors and held a 5 year tenancy of a suite of offices in Hampshire beginning in 2000. In early 2003 they had ceased trading and therefore no longer needed the office space. They vacated the premises and ceased to pay the rent. The landlords claimed for the outstanding rent payments and the Defendants contested this on the basis that the landlords had failed to instruct agents to remarket the premises and had further failed to accept an offer from one of the Defendants to surrender the lease with a payment to the landlords. The preliminary issue of whether a landlord had a general duty to mitigate losses when seeking to recover arrears of rent was submitted to a District Judge. The Judge held that no such duty existed and it was an appeal of this issue that was brought before the Court of Appeal.

The Court of Appeal considered the question of damages and concerned itself as to whether it would be wholly unreasonable for the landlord to continue the tenancy and whether they should not in fact accept the surrender, mitigate their losses, and then sue the tenant for damages. Ultimately, the Court found that this was not an appropriate form of action as there is case law to suggest that a landlord cannot recover damages in respect of future rent.

The upshot of this is that landlords and agents should think twice before accepting a surrender during the fixed term of the tenancy. The landlord is fully entitled to sit back and demand the rent from the tenant until such time as the tenant is able to find a suitable assignee for the tenancy. Of course this may not always be the most practical course of action and many landlords may wish to accept a surrender on terms and then re-let themselves. However, in some cases, particularly at

quieter times of the year it may be more appropriate for the landlord to continue to demand the rent be paid until such time as it suits him to remarket the property.

It is important to understand that this ability to avoid mitigation applies only to fixed term tenancies where no break clause is available to the tenant and only to rental arrears. As this case relates to a commercial tenancy it is also not clear that the principle will apply to a residential tenancy although it would be a reasonable assumption that it should.

The full judgement can be found at <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1659.html> or a (rather misleading) summary is available at <http://www.timesonline.co.uk/article/0,,30589-2530902,00.html>.

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