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Is specific performance an option for landlords?

The strict conditions set out by the courts for landlords to be able to rely on the equitable remedy shouldn’t discourage potential applicants, says Emma Hatfield

On the surface, the Tokenhold decision appeared to change the position for landlords. Restoring the balance between the landlord and tenant and bringing common sense to this area of law which had previously been criticised for being complex and inconsistent. On closer examination however it is clear this remedy is not widely used by landlords seeking redress for a tenant’s repairing obligation.

Unusual circumstances

Tokenhold had a number of “unusual circumstances” which set it apart from other cases. Firstly, the leases granted to the defendants omitted forfeiture clauses or express rights of re-entry in favour of the landlord. As such, neither forfeiture or self-help remedies were available to the landlord to remedy the breach. While landlords have implied rights to enter property to comply with their own repairing obligations, express provisions are required to enable a landlord to enter to carry out a tenant’s repairing obligations and reclaim the costs from the tenant as a debt due. Given that most well drafted commercial leases contain such clauses in reality very few landlords would be in a similar position.

Secondly, pursuing the remedy of damages was not a realistic option. The defendants’ financial positions were either limited or unknown and repairs had been assessed in the region of £300,000. In the circumstances damages would be worthless with no prospect of the defendants ever paying.

Thirdly, with the landlord’s property in a state of serious dilapidation, action to repair was vital. The situation was compounded by the local authority serving a number of statutory notices pursuant to the Housing Act 1985 and the Environmental Protection Act 1990, including an abatement notice. As non-compliance would result in the council completing repair works and securing a charge over the property until the costs had been recovered, it was imperative that the court made a decision.

Lawrence Collins QC in his judgment however warned of the need for “great caution in granting the remedy against a tenant”, pointing out that it would only be appropriate in rare cases as landlords would “normally have the right to forfeit or to enter and do the repairs at the expense of the tenant.”

Further complications

Tokenhold came at a time when others were reassessing the use and availability of specific performance.

The Law Commission in its report ‘Landlord and Tenant: Responsibility for State and Condition of Property’ (Law Com No 238) believed the remedy should be available to both a landlord and a tenant for a breach of repairing covenant. It did however express concerns that the use of specific performance by landlords left tenants vulnerable as the remedy fell outside of the 1938 Act’s jurisdiction, which aims to protect tenants.

Tokenhold took on board these concerns. It identified the need to ensure tenants were not harassed or pressurised and that any oppression by landlords was prevented. While the court was not in a position to extend the 1938 Act to cover specific performance, Lawrence Collins QC held that courts “may take into account considerations similar to those it must take into account under the 1938 Act to avoid injustice.” Luckily the landlord in Tokenhold satisfied three of the five grounds under section 1(5).

Any landlord considering specific performance must therefore be mindful of the same criteria considered when granting leave to pursue claims for damages or forfeiture against a tenant.