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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**

The equitable remedy of specific performance has been available for decades as a solution to many legal disputes but its availability to landlords as a remedy has not. It is only in the past thirteen years following the case of *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64 that landlords have been able to consider specific performance to compel tenants to fulfil their obligation under their repairing covenant. Despite this development it is still not commonly used.

Until then the law was to be found in *Hill v Barclay* (1810) 16 Vesey Junior 402 which had ruled against specific performance on the grounds it had "no mutuality." The judges held that "tenant[s] cannot be compelled to repair." *Hill's* rationale for this was on the basis that as tenants were not entitled to relief from forfeiture, landlords should not be entitled to specific performance. To do so would place the parties in an unequal position and in conflict with general equitable principles.

Equal footing

The *Tokenhold* case reversed this position. The High Court ruled that the mutuality argument could no longer be sustained given legislative changes in favour of tenants. Such changes included relief from forfeiture and protection under section 1 of the Leasehold Property (Repairs) Act 1938. Additionally specific performance had been made available to tenants in relation to a landlord's repairing covenant (see section 17 of the Landlord and Tenant Act 1985). This statutory ability to use specific performance by tenants reinforced the case law position in *Jeune v Queen's Cross Properties Ltd* [1974] Ch 97 which had allowed specific performance against a landlord's repairing obligation, compelling him to carry out "specific work." *Tokenhold* redressed the balance for landlords in accordance with general equitable principles.

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.