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Is specific performance an option for landlords?

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Here leave is not granted unless the landlord can prove that the immediate remedying of the breach is necessary: -

- to prevent substantial diminution in reversionary value;
- to comply with a property owner's legal requirements;
- in the interests of the occupier;
- as the expense is relatively small compared to that of postponing the work;
- and/or due to other special circumstances are just and equitable.

A landlord must therefore justify the need for specific performance on the same basis.

Proportionate use?

While the Law Commission may have supported the use of specific performance, the courts generally are not comfortable in granting it to either party, as the case of *Newman v Framewook Manor Management Co Ltd* [2012] EWCA Civ 159 recently demonstrated. Here the tenant sought specific performance and damages against the landlord in respect of breaches of lease covenants.

The Court of Appeal held the original judge had been right to refuse an award for specific performance. Arden LJ ruled the costs involved in complying with such an order would be "excessive and disproportionate when compared with the loss of amenity" and compared to the alternative remedy of damages. This case relates to a landlord's breach of covenant rather than a tenant's, but Arden LJ's comments are still pertinent.

Clearly landlords not only have to demonstrate other remedies are not available or not appropriate but additionally that the cost of specific performance can be justified in comparison to the loss incurred by the tenant's breach of repairing covenant. The court may feel it more cost effective for the landlord to undertake repairs at the tenant's expense.

Clarity is key

Resistance to the use of specific performance has in part been due to the difficulty in clarifying any order granted. Exactly what is required of the tenant? As orders for the enforcement of building contracts have succeeded where works were sufficiently defined (see *Wolverhampton Corp v Emmons* [1901] 1 K.B. 515 CA) this has allowed for the availability of specific performance to compel landlords to perform "specific

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work" (see *Jeune v Queen's Cross Properties Ltd* [1974] Ch. 97). This in turn led to the *Tokenhold* decision.

Landlords need to ensure they can clearly identify what obligations have been breached and what they are asking the courts to enforce. In turn courts will be more confident in granting specific performance as they will be in a position to produce clear orders, minimising the need for court supervision.

The perception of constant court supervision has previously prevented specific performance. The ruling in *Co-operative Insurance Society v Argyll Stores (Holdings) Ltd* [1998] AC 1 distinguished between orders requiring defendants to carry out an activity, requiring repeated applications for rulings on compliance, and those requiring defendants to achieve a result, such as a building contract or repairing covenants.

In cases of those designed to achieve a result, less court involvement is required and as such costs and delays reduced (see *Co-operative Insurance Society v Argyll Stores (Holdings) Ltd* at 13 and *Rainbow Estates Ltd v Tokenhold Ltd* at 71). *Tokenhold* in particular held such issues could be overcome by "ensuring that there is sufficient definition of what has to be done in order to comply with the order of the court." Certainty and clarity of a court order will in turn result in

the court simply confirming compliance on completion of works rather than continual supervision of it.

Given the combination of circumstances in *Tokenhold* specific performance could be justified. It is unlikely however that many other landlords would have such a combination of factors and limited remedies available to them.

A landlord must assess his position carefully before attempting to obtain specific performance. Are other remedies available? Is it more appropriate to pursue these and are the costs involved in pursuing them more proportionate than the use of specific performance? Is the landlord able to argue one or more of the criteria under section 1(5) of the 1938 Act? Could an order be clearly defined without the need for court supervision?

Even when such a course of action can be justified the landlord must be mindful that specific performance is an equitable remedy. He must come with clean hands and remember the granting of an order is discretionary.

Accordingly the use of specific performance by landlords still remains the exception rather than the rule.

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