Conditions precedent

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In this article Brittany considers conditions precedent, and the contractual and equitable arguments that a landlord might raise in respect of a section 27A challenge when works have not been carried out due to a tenant's failure to pay their service charge contribution.

Brittany recently appeared in front of the LVT on behalf of a landlord who was embroiled in a service charge challenge. The applicant tenant owned one of eight flats, all of which were let on long leases. The building of which they formed part had long required works which had not been carried out. As a result of the delay the anticipated costs now greatly exceeded the initial quotes. The landlord's position was that the works had not been done because he had not received sufficient payments from the tenants. Among other points, the tenant argued that he should be entitled to set-off any liability greater than his share of the initial quote. He submitted that the repair covenant in the lease was not a condition precedent, and therefore the landlord was obliged to get on and do the works, regardless of the tenant's failure to pay. This particular argument was met on two fronts: firstly, that the relevant provision was a condition precedent, and secondly, that in any event set-off is an equitable remedy and the tenant was not entitled to claim its benefit where he did not make the application with 'clean hands'. The tenant's application was successfully rebutted, with wholesale success for the landlord.

Conditions precedent: the contractual argument

Some leases contain service charge clauses that, at first blush, only oblige a landlord to carry out his duties if the service charge has been paid. An example of such a clause is: "*Subject to contribution as hereinbefore provided, the Lessor will maintain repair*

redecorate and renew…". What is the position when a tenant has failed to pay the service charge? Is the landlord still obliged to carry out the service charge works? In *Yorkbrook Investments Ltd v Batten* (1985) 18 HLR 25, the Court of Appeal held that the landlord was so obliged. The door to alternative interpretations was nudged open by the Court of Appeal in *Bluestorm v Portvale Holdings* [2004] 22 EG 142, but the discussion was *obiter* and has not proved a springboard for alternative decisions.

Arnold v Britton [2015] UKSC 36 is the leading authority on the construction of service charges. In *Arnold*, the Supreme Court confirmed that service charge clauses are not subject to special rules of construction and that the normal rules of contractual interpretation apply. As with any other contract, the court is concerned to identify the parties 'intention by reference to the meaning of the relevant words in their documentary, factual and commercial context (see [15]).

In *Yorkbrook*, the Court of Appeal, as part of its construction of the relevant clause, considered the statutory provisions in place at the time of the lease, the deed and the possible consequences of the various interpretations. There was concern (see 40) that a strict interpretation meant that it was conceivable that in the event of a wholly unreasonable action by the landlord, the tenant would still be obliged to pay. The court balanced this against the landlord's remedies of distress, forfeiture or a money claim. There was further discussion about the appropriateness of construing the clause on a *contra preferentum* basis, and the applicability of principles drawn from historic cases.

A similar clause was considered by the Court of Appeal in *Bluestorm*, albeit on an obiter basis. It was, however, a very different fact pattern, with deliberate obstruction by one tenant. The obstructive tenant brought a counterclaim, by way of set-off, for damages for breach of the landlord's repairing covenant. Set-off being an equitable form of relief, the judge at first instance denied the equitable relief, on the grounds of conduct. This was upheld by the Court of Appeal, who went on to consider the matter of conditions precedent. Buxton LJ explained, "*I think that it may well be an acceptable approach to a provision such as that under consideration to say that it deprives the non-payer of the*

right to complain of the landlord's breach when there is a direct connection between the non-payment and the breach. Thus some, but not all, and probably not very many, defaults in payment would disqualify action by the tenant" (at [37]). Earlier in that paragraph, Buxton LJ analysed the approach in *Yorkbrook*, noting "*I doubt whether it is an acceptable alternative…to say at the other extreme that the clause must necessarily therefore have, and be given, no meaning at all"*.

Although they reach differing conclusions, both *Yorkbrook* and *Bluestorm* confirm that it is a matter of construction. However, with the court's opinion in *Bluestorm* being *obiter*, it can be difficult to persuade lower courts, or tribunals, to reach a view different to that reached in *Yorkbrook*. The Court of Appeal's comments, in *Earle v Charalambous* [2007] HLR 8 (CA) (at [10] of the Addendum) and *Manchikalapati v Zurich Insurance* [2019] EWCA Civ 2163 at paragraph 138, further suggest that the door has indeed been nudged open for a more landlord-friendly conclusion to be drawn in the future.

Set-off: the equitable argument

Set-off is an equitable remedy, and therefore one which the court must be persuaded to grant, subject to well-established equitable principles and the circumstances of the case. One such principle is that the applicant must come to the court 'with clean hands'. In both *Bluestorm* and my own case, the tenant's failure to pay was considered to be a substantial factor which explained the delay and increased cost.

Whenever such circumstances arise, it would seem sensible to raise the equitable, as well as the contractual, argument, on the basis that it is the tenant's own default which has caused a breach, and that being the case it would not be appropriate to permit equitable set-off. If a landlord intends to run such an argument, they should ensure that it is supported by the appropriate evidence as to non-payment, conduct, and the landlord's financial (in)ability to carry out the works absent payment.

Summary

Unless and until a different decision is handed down from appellate courts, it is likely to be difficult to persuade courts and tribunals to move away from the *Yorkbrook* conclusion when it comes to the contractual argument as to whether a clause is a condition precedent, notwithstanding the fact that it is a matter of interpretation in each instance. However, given that the remedy typically claimed by tenants in such cases is an equitable one, landlords may have greater success in relying on an argument based on equitable principles in such circumstances, provided they are supported by appropriate evidence.

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