



NO COMPLETE DISREGARD FOR A TENANT

A recent case in professional negligence (*Funnell & anor v Adams & Remer* [2007] EWHC 2166 (QB)) shows how a slip of the draftsman's pen, or the incorrect positioning of a clause in a document, can have an impact on the financial viability of a client's business venture. And although the client's reaction to the error might be considered extreme, or might appear in part to be motivated by some other, greater financial difficulties, if the consequences flowing from the client's reaction are reasonably foreseeable, then loss sustained as a result is, in principle, recoverable in negligence.

The case itself is concerned with the effect a particular erroneous amendment to a draft lease had upon the operation of a rent review clause. What appeared to be an economic drafting accommodation of an additional request from the tenants turned out instead to have a significant effect on rental value.



Once the error came to light, the tenants chose to relocate to other premises at a considerable loss, and were able to sue their lawyers for the financial consequences of that decision.

The tenants ran a successful landscape gardening and tree surgery business. To accommodate a proposed expansion of the business, they took a 25 year lease of land from British Railways Board. The lease contained a rent review clause running on a 5-yearly basis in fairly standard terms. In particular, the clause included the usual disregard of tenants' voluntary improvements. This would operate so that, if the tenants were to spend money on the property in a way that improved it, any increase

in rental value attributable to the improvements would be disregarded. This is, of course, standard in the drafting of any review clause so that the tenant does not end up paying twice in respect of the improvements – once to carry them out, and once again when they are reflected in an increased rent. Whilst the effect on rent of tenants' voluntary improvements is usually disregarded, if the tenant is instead obliged to carry out improvements as part of the deal it struck with the landlord, it is normally the case that such improvements are brought into account at rent review. Where this is the case, a tenant is normally compensated in the terms of the deal by, for example, paying a lower initial rent.

In this case, the tenants were obliged to carry out various works on the land to make the site usable. First, the tenants agreed to remove a substantial amount of waste from the premises – in respect of which the initial rent reserved by the lease was reduced. Secondly, the tenants were placed under an obligation to carry out other works under clause 4.31 of the lease – in respect of which the tenants were granted a compensatory six month rent-free period. These works included the removal of an earth mound, the replacing of fencing, and the resurfacing of part of the premises. All of these works could be classified as works carried out under an obligation to the landlord so that they would not fall to be disregarded at rent review.

However, during negotiations, the tenants indicated that they wanted to carry out further works. BRB consented, but insisted that the works were to be included within clause 4.31. They were therefore added to the list of works that the tenant covenanted to carry out. Herein lay the mistake. Having allowed the inclusion of the additional voluntary works in the list of compulsory works in clause 4.31, there now existed an obligation on the tenant to do the works rather than a mere permission. Therefore, at rent review, the effect on rental value of the additional works would not fall to be disregarded as

tenants' voluntary improvements, but would amount to improvements carried out pursuant to an obligation to the landlord. On the valuation evidence accepted by the court, the effect of rentalising these additional works at the first rent review date was to increase the rental value by almost 100%. Negligence in this case was admitted. However, the main issue



considered by the court was whether the loss arising out of the tenants' decision to leave the premises and assign the lease once the rent review defect had come to light was directly linked to the negligence of the solicitor in negotiating the lease. The defendants argued that the tenants' business was in any event a failing business, so that, irrespective of negligence, the tenants were liable to sustain a loss. The court acknowledged that not all losses sustained by a client are recoverable where a failed business

venture is embarked upon, in part, on the basis of legal advice provided by a lawyer – some of which is wrong advice. Just because a lease has been negligently negotiated, does not mean that the solicitor is liable for all losses arising out of the collapse of the landscape gardening industry. However, where, following negligent advice, a client decides to extricate itself from its predicament by taking reasonable steps, the lawyer's responsibility will extend to the reasonably foreseeable consequences of the course of action followed.

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