



Pay your rent on time

Avocet Industrial Estates LLP V Merol Ltd (1) Tudor Rose International Ltd (2) [2011] EWHC 3422 (Ch)

With the economic climate remaining icy and the high street reporting another disappointing Christmas, many retailers will be looking to streamline their property portfolios in 2012. Landlords, facing a difficult environment with an oversupply of property, are becoming increasingly rigorous in enforcing the terms of break options. Last month's judgment in the case of *Avocet Industrial Estates LLP V Merol Ltd and Another* provides a worrying example for tenants of how strictly break clauses are being interpreted.

What happened?

The tenant's lease of commercial premises included a break option exercisable on conditions, one of which provided that a break notice would be of no effect if at the break date any payments due under the Lease had not been made.

The tenant served a break notice. The day before the break date, when returning the keys, it confirmed that it had paid all outstanding charges.

After the break date the landlord claimed the break option had not been successfully exercised because default interest, chargeable upon late payment of rent or other charges due under the Lease, had not been paid. The landlord had never actually demanded any interest from the tenant in respect of various late payments during the term.

The Court's decision

Under the wording of the penalty interest clause it was not a pre-condition of liability that the landlord needed formally to demand interest - liability arose when a payment became overdue not when a demand was made. By not having paid the default interest the tenant had not complied with the terms of the break clause and had not validly exercised the break option.

Lessons to be learned?

Retailers must take care when looking to exercise break clauses to ensure that if rent or any other sums due under the Lease have been paid late at any point during the term, interest is calculated for the periods between the date the sum became due and the date on which it was paid. The accrued interest must be paid to the landlord prior to the break date.

Where tenants have occupied for the whole of the Lease term, it is unlikely there will be any real practical difficulty in the tenant being able to calculate the interest payable on late rent. The real difficulty will arise where default interest accrues on sums payable "on demand" such as service charges - careful consideration will be needed when service charges are due for payment and when they become overdue - the answer may lie in the Lease itself, but legal advice may well be needed on the common law position.

For further information please get in touch with:



Sarah Moreton
+(44) (0)1865 813743
sarah.moreton@manches.com

or



Rachael Parman
+(44) (0)1865 813606
rachael.parman@manches.com

or your usual Manches retail contact

This briefing note is intended merely to provide a summary of the law in this area and is not a comprehensive guide. It is not intended to provide legal advice for specific cases. The law and practice in this note is stated as at January 2012.