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Briefing Note Real Estate

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Personal Break Rights

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Personal break rights – lost on assignment?

The case of *Norwich Union Life & Pensions Ltd v Linpac Mouldings Ltd* (2009) dealt with the issue on whether personal break rights can be assigned. The Court of Appeal upheld a High Court decision and ruled that **this is not possible**.

The Facts

In this case the lease contained a break clause that was expressed to be personal to Linpac Mouldings Ltd (“Linpac”). The lease was assigned to a group company called Ecomold. Ecomold went into administration and applied for landlord’s consent to re-assign the lease to Linpac.

Consent was refused on the ground that the assignment would create a risk that Linpac would terminate the lease to the landlord’s disadvantage for loss of rent. Ecomold assigned the lease to Linpac without landlord’s consent and Linpac attempted to exercise its break right.

The Decision

The High Court had to decide three issues:

- 1) Could Linpac have operated the break clause after the assignment to Ecomold but before it re-assigned the lease back to itself;
- 2) Could Linpac exercise the break clause after the lease had been re-vested in it; and
- 3) Did the landlord unreasonably withhold consent to the assignment.

The High Court ruled:

- 1) It made no commercial common sense for a lease to be terminated by someone who was no longer a party to it. To allow former tenants to terminate a lease enjoyed by current tenants is an odd argument and one which the High Court ruled against Linpac.
- 2) It also made no commercial sense that a break right should revive if Linpac re-acquired the lease. Express provision should have been made for this and further Linpac could have initially underlet the lease rather than assigned it thus preserving its break right in the lease.
- 3) The High Court ruled that a refusal of consent in order to avoid the operation of a break clause which would lead to a loss of rent is a reasonable refusal.

The Court of Appeal re-affirmed the High Court’s decision. It stated that for a former tenant to bring a lease to an end ‘would be extraordinary, even if technically possible’. Extraordinary, as most break clauses are subject to a number of conditions, namely vacant possession and complying with tenant covenants. This would require the cooperation of the current tenant which may not always be possible.

Conclusion

The case is important as it shows that a personal break clause can be lost on assignment. Once lost, the right cannot be resurrected for use by the original tenant.

It is important that in a long lease the parties ensure that the tenant's break right remains following assignment. Careful drafting is required to ensure that the right is not lost. Commercial landlords will welcome the decision as it is a setback for tenants who seek early exit opportunities.

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