Indemnity clauses… tenants beware!

Leases containing indemnity clauses that give landlords a remedy for breach of tenant covenants are commonplace. However, this does not mean that they are reasonable or should be accepted without question.

Rebecca Rider outlines the position for tenants

It is standard practice for tenants to be bound by covenants in a lease. Under contract law a landlord can take action against a tenant for breach of covenant, which, if proved to be reasonable, may give rise to a claim for damages.

In the vast majority of leases landlords also include an indemnity clause, for example:

The Tenant shall keep the Landlord indemnified against all expenses, costs, claims, damage and loss (including any diminution in the value of the Landlord’s interest in the Building and loss of amenity of the Building) arising from any breach of any Tenant covenants in this lease, or any act or omission of the Tenant, any undertenant or their respective workers, contractors or agents or any other person on the Property or any other part of the Building with the actual or implied authority of any of them.

Under an indemnity clause a landlord may seek to be fully compensated by the tenant by claiming any losses suffered as a debt (including losses resulting from breach of covenant).

Arguably, therefore, an indemnity clause gives a landlord an additional opportunity to take action against a tenant for breach of covenant without the common law burden of proving that such a remedy is reasonable. This gives a landlord an unfair advantage and must be avoided by tenants wherever possible.

Damages v debt

In a claim for damages, the damages awarded are limited to what was in the reasonable contemplation of the parties. The innocent party is also under an obligation to mitigate his loss by taking reasonable steps to avoid it.

A debt claim on the other hand is for a definite sum of money payable under the terms of the contract. Common law rules of remoteness of damage and duty to mitigate do not apply. A landlord may, therefore, be able to recover considerably more under an indemnity clause than it might by way of damages.

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Tenants must negotiate

While tenants in a strong bargaining position may be able to resist an indemnity clause altogether, those who cannot must be aware of the potential liability that indemnity clauses carry.

Tenants should not accept an indemnity against general breach that covers all conceivable losses. Tenant breach of covenant is sufficiently remedied in contract law. An indemnity should only provide a remedy against third-party liability of which the tenant is aware.

Find out more

For any advice relating to indemnity clauses or other covenants within a lease, please contact a member of the Property team – http://www.bwbllp.com/services/property/