

Legal newsletter for SAS members

SDLT - abnormal rent increases from 1 December 2008

By Simon Allum

Introduction

When determining the stamp duty land tax (SDLT) payable in respect of the grant of a lease, increases in the rent payable which take place after the fifth year of the term of the lease are generally not taken into account. However, where there is an "abnormal" rent increase after the end of the fifth year of the term, a further return is required and further SDLT becomes payable.

1 December 2008 marks the fifth anniversary of the introduction of SDLT, such that the rules on abnormal increases become relevant. Any business which holds or acquires a lease granted on or after 1 December 2003 must therefore begin to consider those rules as part of their general tax compliance procedures.

The rules do not apply to leases governed by the old stamp duty regime.

"Abnormal" increases

SDLT is payable by reference to the value of the rent under a lease, calculated in accordance with a formula that takes into account the rent payable under the lease in the first five years. Rent increases after the fifth year are generally not taken into account.

However, where a rent increase after the fifth anniversary of grant is "abnormal" for SDLT purposes, the increase is treated as the grant of a new lease at a rent equal to the rent increase, giving rise to a liability to further SDLT.

For these purposes, an increase is regarded as "abnormal" if, broadly, it exceeds an annual 20% uplift between the date SDLT was last paid in respect of the lease (usually the effective date of grant) and the date of increase.

Although an annual increase of 20% as part of a rent review may generally be considered unlikely in the present economic climate, the rules concerning abnormal increases can clearly be of concern where the rent payable under a lease is geared or turnover-based. They can also create a considerable administrative burden where very long leases are concerned.

HM Revenue & Customs - proposed changes

HM Revenue & Customs have made proposals for several changes to simplify the rules, including the introduction of a 20 year limit for the application of the rules and the possibility of single reviews every 5 years instead of having to assess whether each rent variation amounts to an abnormal increase.

No legislation has yet been published, but any amendments are expected to be included in the Finance Bill 2009.

Conclusion

It is important that businesses put in place the necessary procedures to monitor the SDLT implications of rent increases so that they are able to put in the necessary returns and pay





the SDLT in a timely manner. Businesses paying rent which is geared or turnover-based must be particularly alert to the possibility that fluctuations in the rent they pay could bring them within the provisions.

Scottish & Newcastle v Raguz – Sanity Restored!

By Tim Foley

In the October 2007 Edition of Talking Shop we reported on the Court of Appeal decision in *Scottish & Newcastle v Raguz*. That decision had significant ramifications for Landlords up and down the country and imposed a wholly unexpected management burden viz-a-viz collection of arrears of rent from previous tenants.

Landlords will be pleased to learn, therefore that the House of Lords have now reversed the Court of Appeal's decision. Landlords will no longer have to serve a succession of section 17 notices within six months of each successive quarter day so as to preserve their rights against former tenants in respect of rental uplift achieved on review.

Section 17 Landlord & Tenant (Covenants) Act 1995

Section 17 provides that a former tenant/guarantor is not liable to pay a "fixed charge" under a lease (i.e. ascertained monetary sums due under a lease such as rent, insurance rent, service charges) unless, within 6 months of the date when the charge becomes due, the Landlord serves notice on the former tenant/guarantor stating that he intends to recover the fixed charge from him. In cases where the amount of the fixed charge might subsequently increase (the best example being an unresolved rent review) the section 17 notice must also refer to the possibility of such increase. Failure to do so prevents the increased sum from being collected.

The High Court and Court of Appeal agreed that this procedure applied to outstanding rent reviews and the unascertained (but accrued) rental increase consequent upon review. This meant that where a rent review had not been determined by the relevant rent review date, a landlord had, as a precautionary measure, to serve a section 17 notice on former tenants/guarantors. Such notices were required whether or not the current tenant was in default. The Court suggested, somewhat oddly, that notices be served saying the amount to be recovered was "nil – but wait and see"!! This had to be done within six months of each and every rent payment date until the rent review had been determined.

The House of Lords Judgment

By a majority of 3-2 the House of Lords have overturned the Court of Appeal's decision, which one of the Law Lords remarked produced "remarkably silly consequences". The Law Lords held that the only fixed charge falling due for payment on the quarter day is the passing rent and not the higher reviewed rent. The balance of the reviewed rent over and above the passing rent is a separate fixed charge, falling due on the date of determination of the rent review.

It is fair to say that the Law Lords plainly did not find this an easy decision to reach (as reflected by the fact that it was a majority decision rather than unanimous). Those in the majority took the view however that the construction adopted by the Court of Appeal was not one that Parliament could have possibly intended and that the draftsman of section 17 plainly did not think through the consequences of the drafting which had "misfired".

The purposive rather than literal approach to the construction of Section 17 adopted by the House of Lords is most welcome. Although the decision does not sit precisely with the terms of Section 17, it is likely to give rise to more certainty and fewer cases of injustice in the future. This must be a good thing since it was an unwelcome administrative burden on landlords and an utterly meaningless exercise from the previous tenant's point of view. Good sense has won out and proved that the law is only sometimes, and not always, an ass.

Further information

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