Altered states

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Vivien King considers the implications for re-instatementclauses of lease renewal in demised premises that have been altered by tenants

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Many commercial leases enable a tenant to conduct physicalalterations to the premises demised: some works require landlord?s consent, somedo not. Certain leases, or licences to conduct alterations, require the tenantto remove some or all alterations at the lease end and restore the premises to thephysical state at commencement.

This article is not concerned with the meaning and effect ofthose covenants, neither with when nor how the landlord should make theirrequest to restore the premises to their original condition. Instead, it focuseson the problems that can arise if and when the tenant remains in occupation ofits altered premises pursuant to a new lease.

The new lease may follow a tenant?s request for one underPart II of the Landlord and Tenant Act 1954 , but does not always do so. The landlord and tenant maysimply agree, outside the provisions of the act, that a new lease should be grantedafter expiry of the old, or that the old lease may be surrendered by the tenantto enable the parties to enter a restructured agreement.

Protracted negotiations

Whatever the reason and procedure, negotiations will almostcertainly have been protracted, usually in relation to rental levels, andlittle thought will have been given to the premises to be demised. The tenantwas, after all, in occupation and knew the premises well, and the landlord willhave made sure that the tenant continues to keep and yield up the premises inrepair with alterations removed at the lease end. What would the parties say,however, if reminded that the premises demised pursuant to the new lease will bethose premises as they exist at the commencement of the new term?

Let us look at an example. A certain premises originallyconsisted of 4 floors of open office space constructed around a central corethat contained lifts, stairs and toilets. The tenant took up occupation of thepremises pursuant to a 5-year lease granted in 2005. They installed throughoutthe building raised floors and suspended ceilings that contained a new heatingand air conditioning system, modern lighting and communication systems.

They also installed a large reception desk on the groundfloor with partitioned meeting rooms, service rooms ? including a small kitchenenabling reception staff to offer refreshments to visitors ? and wardrobes forvisitors? outdoor clothes, bags and so on. The remaining floors werepartitioned to give small, individual offices on floor 1 and open space on floors2 and 3, each containing work space, staff eating facilities, internal meetingrooms and break-out areas.

This fit-out suited the particular tenant, but the landlordwas anxious that the premises be restored to open office space at the leaseend. They therefore imposed a re-instatement clause

requiring the tenant toremove their alterations at the lease end and to conduct all necessary repairs.

New tenancy

In 2010, the tenant requested a new tenancy and negotiationsensued. The new lease was granted in 2011, on the same terms and conditions asthe original lease excepting as to rental level, and expired in 2016. At leaseend, the landlord?s building surveyor served a schedule of dilapidationsrequiring the tenant to remove the totality of its 2005 fit-out. The tenantrefused. While they recognised that they must yield up the premises in repair,they did not, they claimed, have to remove their alterations: none had beenmade since 2011.

The identity of the property demised by a lease depends onthe way the documentation is constructed but, as Nicholas Dowding and KirkReynolds point out in Dilapidations:The Modern Law and Practice , ?The description of the demised premises inthe lease must also be read in the light of the objective facts reasonablyavailable to the parties at the date of the lease.? Unless the lease statesotherwise, the facts will dictate that the demise is as it existed at the dateof the new lease ? that is, in our example, with the tenant?s alterations inplace.

The parties could, of course, agree otherwise: it will be amatter of negotiation between them. Equally, the parties? building surveyorscould bring this matter to their respective clients? attention, for instanceagreeing works to be conducted pursuant to the old lease and advising that aschedule of works to be conducted at the lease expiry be annexed to the newlease. So: be alert, warn and advise.

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Further information

- Relatedcompetencies include Legal/regulatory compliance .
- This feature is taken from the RICS *Building surveying journal* (December 2016/January 2017).