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Summer 2005

Dilapidations : A game of cat and mouse

Introduction

Dilapidations claims are particularly prevalent at present due to the state of the property market. Many tenants are vacating premises which they have occupied for some time and which are in considerable disrepair. Because of the lack of new tenants, landlords are not carrying out repairs whilst they wait to see if they can find a tenant or consider alternative uses for, or redevelopment of, the premises. This makes claims harder to establish and quantify.

When a lease comes to an end, a tenant who is vacating can have a very substantial liability to the landlord for "terminal dilapidations" if it does not deliver up the premises in repair. The longer the lease, the larger the liability is likely to be. A tenant who has sub-let will try to pass on to the sub-tenant its liability for dilapidations so various parties can be involved. A tenant or sub-tenant may have successfully limited its liability for dilapidations by providing in the lease that it is under no obligation to put the premises into any better repair than it was at the time of the letting or sub-letting. Otherwise, a tenant is normally obliged to leave the premises in full repair.

When deciding whether premises are in repair or not, regard is had to the age, condition and nature of the building at the time of the letting and the length of the lease. Premises should be left in a standard fit for occupation by a reasonably-minded tenant of the class who would be likely to occupy the premises. A tenant is not normally liable to improve the premises although, sometimes, improvement is unavoidable when an item is beyond repair.

At the end of a long lease, premises and their plant and machinery may be very out-dated. However, a tenant is not normally obliged to modernise the premises or equipment unless it is necessary to do so in order to comply with statutory requirements or suchlike.

Pursuant to s 18 of the Landlord and Tenant Act 1927, a landlord's claim for damages for a failure to repair cannot exceed the actual diminution in value of the premises resulting from the disrepair. For example, if the premises and services are outdated and in need of substantial improvement and/or refurbishment, rather than repair, before they can be re-let, the landlord will not be able to recover the cost of repairing those defects in the premises which will be superseded by the improvements required to the premises.

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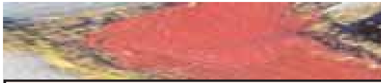

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If, as is currently often the case, office premises would be more valuable if converted to residential accommodation, a tenant can argue that disrepair is irrelevant as there is no diminution in value. If the landlord has a settled intention to redevelop the premises at the end of the lease, the tenant is entirely freed from any liability for dilapidations.

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As a result of the fact that a tenant may not be liable for the full, or any, cost of repairs and, because it is often impractical or difficult to carry out repairs whilst still in occupation, tenants frequently do no, or very limited, repairs before vacating their premises in the hope they will escape liability. This can be a risky strategy as, if the landlord then proceeds to undertake all the repairs, the tenant will not only be liable for the costs and professional fees incurred (over which it has had no control), but can also be liable for loss of rent suffered due to the delay in the landlord being able to re-let the premises whilst the works were specified and undertaken.

When, however, the landlord does not undertake the repairs, or does so unreasonably, and/or where the landlord has some re-development/re-furbishment ambitions, there will often be a substantial dispute as to whether any damages are payable and, if so, as to their extent.

A landlord may not actually undertake the repairs for various reasons such as:-

- It may wait until it has attracted a new tenant so it can see what a new tenant actually intends for the premises and what repairs are actually required. Frequently, incoming tenants will take on the burden of undertaking repairs in return for a capital contribution from the landlord and/or a rent free period.
- It may wish to explore alternative uses for the premises, such as conversion to residential use.
- It may intend to redevelop.

The Pre-Action Protocol for Dilapidations Claims

Under the Pre-Action Protocol for Dilapidations Claims (which has not yet been approved by the Lord Chancellor's Department but which is generally followed in some fashion), landlords are supposed to:-

- Serve a schedule of dilapidations no later than 2 months after the expiry of the lease. Of course, if a landlord is really keen for the works to be undertaken, it should serve its schedule in good time before the expiry of the lease so the tenant

can, hopefully, undertake the requisite works or, if not, so the landlord can obtain specifications and tenders in anticipation of undertaking the works immediately the lease expires.

- If not yet carried out the works, to state whether they intend to do so and when and what steps have been taken towards getting the works done.

- Serve a s 18 (1) valuation quantifying the claim if the landlord does not intend to do the works or, in some cases, has not yet commenced undertaking them. A s 18 (1) valuation is supposed to confirm what the diminution in value of the premises is so the tenant knows whether the claim is for the cost of the works or some lesser sum.

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In practice, however, landlords are often not open with tenants as to what their intentions are and simply claim the cost of the works regardless as to whether these works will ever be undertaken or are necessary. Sometimes, landlords obtain s 18 (1) valuations from surveyors which are entirely self-serving in that they quantify the claim at the highest (i.e. based on the cost of the works even though these works are not all necessary and will never be done). In particular, some landlords are intent on extracting the maximum cash settlement out of tenants without disclosing that they do have plans for the premises which would significantly reduce the value of the claim for dilapidations. For example, a landlord may act as follows:-

- It may delay making an application for planning permission for redevelopment or conversion until after resolving the dilapidations claim. Sometimes, tenants actually undertake all repairs only to subsequently find these are ripped out or rendered valueless due to redevelopment or refurbishment of the premises.

- It may delay completing a new letting which would undermine the dilapidations claim because the incoming tenant would clearly have other uses or requirements for the premises or would re-fit to its own taste or needs.

- It may agree a substantial rent free period for the new letting, or make a capital payment, on the basis this reflects the state and condition of the premises (i.e. the dilapidations liability) when, in fact, it is simply an inducement to the tenant to take the letting.

- It may carry out works which go beyond repair and involve improving the Premises (such as fitting a new roof when the existing roof is adequate although aged (see *Riverside-v-Blackhawk*)) and claim all the costs from the tenant.

- It may refrain from serving a s 25 notice under the Landlord and Tenant Act 1954 to

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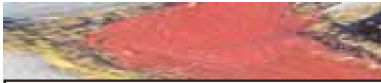

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terminate the tenancy on the ground of redevelopment (even though it does intend to redevelop) so as to avoid disclosing its real intention and extinguishing its dilapidations claim.

Because landlords, and their surveyors/valuers may be less than open about their real intentions, tenants and their surveyors are frequently wary about settling dilapidations claims when the works have not yet been undertaken. In some instances, tenants have adopted a pro-active approach and obtained their own s 18 (1) valuations and/or planning advice to support their contention that the disrepair has minimal or no effect on the value of the premises or that the premises are more valuable if converted to another use.

Dilapidations claims have become a game. Outlandish claims are made which make it very difficult for a tenant to judge what the real value of the claim is. As a consequence, tenants are in difficulty in making settlement offers and tend not to make any offer whilst they wait to see what materialises. Claims can go on for years and substantial costs can be incurred.

The Protocol is often given lip service. What is required, when the tenant is not seeking to renew the tenancy, is a system with some teeth where:-

- A landlord should be obliged to make a statement in writing, supported by a statement of truth, as to its intentions for the premises at least 6 months before the lease is to expire. If it has no redevelopment, refurbishment or conversions proposals, it should also serve a schedule of dilapidations.
- Tenants should then be obliged to state within 1 month whether they intend to carry out any repairs works or not and, if so, should state what works they intend to undertake.
- Where a tenant does not, but the landlord does, intend to carry out works, the landlord should then state when it intends to carry out the works and exactly what works it will carry out.
- When the landlord dos not intend to undertake the works, and neither does the tenant, it should then serve its s 18 (1) valuation.

In essence, landlords and tenants, and their representatives need to be more honest and open with one another. This will lead to earlier resolution of claims and substantial costs savings.

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