Judgment day

In the second part of his article on dilapidations, **Jonathan Ross** looks at three cases heard in 2013 and how it was the judges themselves who often decided the cost of the relevant works

Having examined why terminal dilapidation claims are so common and why they are proving difficult to settle, this article deals with three cases and the implications for future claims.

Sunlife Properties Europe Ltd v Tiger Aspect Holdings Ltd & Anor [7 March 2013]

Some 15,300sq ft of offices in Soho were let in 1973 for 35 years to a leading advertising company and they were delivered up in 2008 in considerable disrepair with, in particular, a substantial amount of the original heating, ventilation and air conditioning system non-operational. Sunlife claimed a total sum of £1,573,894 in relation to the costs of works that it had undertaken together with loss of rent and fees of £37,000 for having had to obtain validation reports in relation to the mechanical and electrical (M&E) before determining the extent of repairs necessary. Sunlife made no claim for some £300,000 of other works that it conceded constituted alterations and/or improvements.

Tiger defended the claim on the basis that a large element of the alleged repair works involved complete replacement of what was there originally (such as the air conditioning and heating systems) and were improvements to meet modern demands and/or went beyond the extent of its liability under the lease. They also involved alterations to the premises that Tiger could never have been liable to undertake because of the prohibition in the lease. In addition, Tiger claimed it had a much more limited liability for repairs because the covenant should be based on repairing what was there originally in 1973 rather than on the actual works required in 2008-09 to repair the premises in their then condition.

The judgment deals with a large variety of items and fees and perfectly illustrates how judges in the Technology and Construction Court often apply their own particular expertise or judgment in determining whether items are in or out of repair, the extent of works required and the costs actually recoverable in relation to repairing the same. For example, the judge disallowed the claim for a new roof and instead calculated damages on the basis of what he considered patch repairs would have cost. He did the same in relation to the toilets and various M&E works. In relation to the lighting, he held that certain of the old fittings could have been re-used and discounted the damages in relation to this item by 20%. Because the experts often do not prepare costings to cover the actual finding of the court, the judge often has to find his own figure.

This case also illustrates the enormous importance of obtaining in-depth expert evidence at the time of lease expiry, as well as detailed costings through tendering the works. The experts for Tiger only became involved at a later stage and were at a disadvantage in dealing with both liability and quantum as a result.

The judge found that this was essentially a cost of works claim because there was little or no supersession so the diminution in value exceeded the cost of the works. He awarded £1,312,076 for the costs of works together with the full sum claimed for the validation reports. Interest was awarded at 3% on the damages from the date of lease expiry. The claim for loss of rent was not pursued. Professional fees for supervising the works were agreed at 4.88% and preliminaries at 8.42% and overheads and profits at 9%. The cost of the Schedule of Dilapidations was allowed at £3,515.

As for other lessons to be learned from the case, it was of considerable assistance to Sunlife that it was able to locate the original building plans to show what was there to begin with (such as carpets, trunking and suspended ceilings) and what had been removed. The fact that Tiger had so little by way of maintenance records or wiring details also assisted the case that items could not be repaired but needed to be replaced. In some cases, the actual cost of replacing an item with its modern equivalent was cheaper than the repairs that would have been required and, accordingly, the judge was prepared to allow such costs. The liability to remove partitioning led to substantial consequential liabilities for Tiger in relation to works required to the ceilings and lighting following its removal.

Tiger appealed against the judgment on the basis that the judge's findings that the claim was not being capped by Section 18(1) of the Law of Property Act 1927 and the appeal was due to be heard in early November.

Twinmar Holdings Ltd v Klarius UK Ltd [19 April 2013]

This case was decided by the same judge as in the *Sunlife* case. It related to a lease of a warehouse building in Hemel Hempstead that had been let in 1993 for a term of 25 years but was terminated in 2008. The case focused on the class of tenant who would have been interested in taking a lease of that type of building at the time it was granted and the appropriate standard of repair that such a tenant would have required. The judgment

makes clear that the required condition of premises, in terms of their fitness for occupation by that particular class of tenant has to be measured as at the commencement of the lease and not on its expiry.

The major issue in dispute was the condition of the rooflights and whether they were in disrepair because they were now letting in less light. On the basis that the premises had just been constructed at lease commencement, the judge held that the class of tenant to be considered was one interested in taking a lease of a new building and, because there had been a visible and significant reduction in the translucence of the rooflights, they were in significant disrepair since lease commencement. Twinmar was therefore entitled to recover the costs of £46,000 for the repairs that the court found were required to the rooflights.

The defendant argued that the rooflights could have been repaired by using a cherry picker and without the need for perimeter edge scaffolding and the judge agreed in certain respects and reduced the damages by 50% for this item.

The judgment also deals with the appropriate sums to be allowed in relation to preliminaries and professional fees (10.65% and 12% respectively) and for the costs of preparation and service of a Schedule of Dilapidations (the amount being reduced from £5,138 to £4,000 because it included items that were not the tenant's liability). Interest was awarded on the damages at 3% above base rate from the date of expiry of the lease.

Hammersmatch Properties (Welwyn) Ltd v Saint Gobain Ceramics and Plastics Ltd [14 May 2013]

The proceedings related to a lease of a large 1930s industrial office building in Welwyn Garden City. The building had been empty for some time and, although Hammersmatch sought to argue that it had an intention to carry out all repairs at a sum in excess of £5m, the judge held that such intention was not made out and that it would not have been economical or sensible to have carried out all such repairs in relation to such an old building, which had been vacant for a long time and left in disrepair. Saint Gobain contended that it made very little difference whether the building was left in or out of repair because it was obsolete. Their expert assessed the diminution in value at only £100,000.

The judge first had to consider what certain repairs would have cost. There was a dispute as to whether all boilers, the switchgear, and the lifts could be repaired or needed replacing. The judge held that some boilers needed replacing but others could be repaired and that both the switchgear and lifts were capable of repair. He then went on to assess the costs of such repairs.

The judge then had to consider what was the actual diminution in value resulting from all the disrepair and on the basis that the premises would have been converted into 11 small units for office and industrial use. Making many calculations himself based on his findings, he assessed that, left in repair, the premises would have been worth about £3m, but left in disrepair, they were only worth the site value of £2.1m. Accordingly, the judge found that the diminution in value was in the order of £900,000. The judgment is of particular interest in relation to the calculation of the value of the premises if they had been left in repair, because the judge had to factor in the cost of improvements or alterations that would have been worth undertaking, together with financing, void and letting and other costs.

Interest was agreed at 4.5% per annum and, after allowing for interest and the costs of the Schedule of Dilapidations in the sum of £19,320, the total amount awarded came to approximately £1,004,000, just £4,000 more than the Part 36 Offer made by Saint Gobain to settle the matter. However, in an interesting subsequent costs judgment, the judge held that a near miss does not count for anything under the current Civil Procedure Rules and, accordingly, Hammersmatch was entitled to recover its costs of the proceedings save for those costs that it had unreasonably incurred in relation to its claim that it had an intention to carry out all repairs.

This case illustrates the importance of not concentrating on what a landlord may do or not do with premises left in disrepair but on what the landlord would have done with the premises if delivered up in repair. It is the actions a landlord would have taken on the hypothetical basis that the tenant had complied fully with its obligations that are relevant in determining what works of repair would have been worth undertaking by the tenant. A landlord who redevelops a building that is left out of repair will not fall foul of the second limb of Section 18 (1) of the Landlord and Tenant Act 1927 if they would not have redeveloped if the building had been left in repair.

Conclusion

All three judgments illustrate the very hands-on approach of the judges and how hard it is for the parties to predict the result. When deciding on what Part 36 Offer to make, or on what terms to settle, a party has to try to assess in relation to each item what the judge's likely view will be. Obviously, as in any case, no two judges think exactly alike and a judge may, in fact, know the answer better than the expert.

Jonathan Ross is Partner at Forsters LLP
jonathan.ross@forsters.co.uk

Further +info

For detailed information on all dilapidation issues including case law visit **www.isurv.com**

Related competencies include **T050, T048**