Recovery of fees

Rosalind Cullis assesses in what circumstances third party professional fees are recoverable

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Particularly in the current economic climate, dilapidations claims can become costly affairs as both landlords and tenants, with an eye on tight budgets, fight to protect their respective positions. In contentious cases, where legal arguments can be complex, attention inevitably focuses on the disrepair issues forming the basis of the dispute and/or the interpretation of relevant lease covenants.

However, claims for damages in dilapidations cases are rarely based just on disrepair and extend to other heads of claim such as loss of rent, VAT and third party professional fees. The latter includes the inevitable fees of building surveyors and lawyers, but experts of differing disciplines may also need to be brought on board.

Here, we consider the position specifically with regard to the payment/recovery of third party professional fees. These can be significant in amount but, despite this, are not always given proper consideration by the parties involved, with tenants settling fees for which they are not liable, or landlords expending fees that they expect to be able to recover from the tenant only to be disappointed when they are challenged. As the issue is not always straightforward, both parties should be aware of what factors to take into account when considering their position in relation to such fees.

Some of the more frequently encountered examples of where professional fees may be incurred, and the points to note, are set out below.

Preparation and service of the schedule of dilapidations

The preparation and service of a schedule of dilapidations is a prerequisite for any dilapidations claim but, unless the lease expressly provides for the recovery of the fees in connection with this work, there is no automatic right to recover them as part of the overall damages claim. For this reason, most modern leases do make express provision for their recovery but, in the absence of such provision, attempts are often made to recoup these fees pursuant to other clauses in the lease. The wording of such clauses needs to be considered carefully.

For example, a tenant may covenant to:

> pay the costs and expenses incurred by the landlord in or in contemplation of any proceedings under Section 146 of the Law of Property Act 1925.

Could a landlord rely on this to seek recovery of the costs of preparation and service of a dilapidations schedule? Section 146 of the Law of Property Act 1925 governs the forfeiture procedure where a tenant is in breach of the terms of the lease. While disrepair may amount to a breach of the lease, a dilapidations claim is a claim for damages and, as such, would not constitute 'proceedings under Section 146' and, therefore, the costs of preparing and serving the schedule would not be recoverable. To get around this, shortly before lease expiry a landlord may seek to serve a terminal dilapidations schedule under cover of a s146 notice; but this tactic, if challenged, is likely to receive short shrift from the court, which would view it as a 'back door' approach to recovery of fees.

While not a terminal dilapidations claim, *Agricullo Ltd v Yorkshire Housing Ltd* [2010], concerned a similarly worded covenant, which provided as follows:

> The Tenant shall pay to the Landlord, on demand, and on an indemnity basis, the fees, costs and expenses charged, incurred or payable by the Landlord, and its advisors or bailiffs in connection with any steps taken in or in contemplation of, or in relation to, any proceedings under section 146 or section 147 of the Law of Property Act 1925 or the Leasehold Property (Repairs) Act 1938 including the preparation and service of all notices and even if forfeiture is avoided (unless it is avoided by relief granted by the court).

It is an example of the court's strict interpretation of such covenants. The landlord sought to recover various costs it had incurred following service of a s146 notice regarding the tenant's breaches of the repairing covenants in the lease. The tenant was entitled to claim the benefit of s1(3) of the Leasehold Property (Repairs) Act 1938, which provides that no forfeiture proceedings or claim for damages can be brought without the leave of the court. The landlord never sought the leave of the court, choosing instead to negotiate with the tenant and use the threat of forfeiture to secure the tenant's compliance with the repairing obligations. In so doing, it incurred costs of some £30,000. The landlord claimed that the phrase 'proceedings under Section 146' was wide enough to refer to the s146 notice and the subsequent attempts to secure compliance. However, the tenant successfully argued (both at first instance and on appeal) that the costs were not recoverable because, as no application for leave was made, there were never, nor could there ever be, any 'proceedings' under s146. Furthermore, from the facts of the case no such proceedings were ever contemplated.

Professional fees in connection with testing, investigative and exploratory works

Landlords are often required to undertake further investigative works in support of claims, for example in relation to M&E equipment, particularly if there is a lack of data evidencing maintenance that has been undertaken. In large buildings, these investigative works can easily run into tens of thousands of pounds. Landlords assume that recovery of these fees from tenants necessarily follows but, once again, in the absence of any express covenant in the lease, fees incurred in connection with this sort of work will only be recoverable if they are in consequence of the tenant's breach, for example, to establish the *extent* of the work required. They will not be recoverable if they relate to *ascertaining* whether there is a breach and, if so, to what extent. Differentiating between the two is not always straightforward but, where the investigative fees are a sizeable amount, it can be worthwhile double checking if there is a distinction to be made either, in the case of landlords, before embarking on such investigations or, in the case of tenants, so as to challenge any claim in this regard.

In order to fall within the ambit of 'enforcement', any information that is collated must be passed on to the tenant as part of the attempt to secure compliance with the relevant covenant.

As with dilapidations schedules, landlords may seek to rely on more ambiguous clauses in the lease to recover these monies if the position is not clearly spelt out. Consider the covenant that provides that the tenant is to pay:

> all costs and expenses incurred by the Lessor in or in connection with the

> enforcement of any of the Lessee's covenants and conditions...

The point here is that, in order to fall within the ambit of 'enforcement', any information that is collated must be passed on to the tenant as part of the attempt to secure compliance with the relevant covenant (*Riverside Property Investments Ltd v Blackhawk Automotive* [2004]). The cost of any reports or advices that are obtained but are not passed on (which, following on from above, might include a schedule of dilapidations itself) cannot be recovered from the tenant in reliance upon this type of provision. In view of this, tenants should carefully consider the fees claimed and seek breakdowns to ensure that, where relevant:

- They are only paying for work in connection with stablishing the extent of a breach.
- They are only paying for information regarding breaches of which they have been made aware: the cost of some reports, which have been obtained but not divulged, may be absorbed into the general cost of preparing the schedule of dilapidations (which, on the face of it, may be a legitimate sum for a landlord to claim).

It is also worth considering whether the investigative work in question is actually permissible under the lease. One would hope that landlords would do this before embarking on such work, but tenants should consider this as a possible ground to challenge any subsequent costs claimed. In *Heronslea (Mill Hill) Ltd v Kwik-Fit Properties Ltd* [2009], although not a case concerning the recovery of costs, the landlord sought a declaration that it was permitted to enter onto the property for the purpose of carrying out an environmental survey that involved the drilling of 14 boreholes. The case turned on the construction of the lease terms and, ultimately, the court decided that the landlord had no such right.

Costs incurred in complying with the Pre-Action Protocol for Terminal Dilapidations Claims

The protocol is a best practice guide as to how dilapidations claims should be conducted, encouraging the parties to ensure that all evidence is in place and settlement explored before proceedings are issued. While compliance is not mandatory, if proceedings are issued, and ultimately pursued to trial, whether the parties have complied with the protocol may be taken into account when considering the conduct of the parties and an appropriate costs award. Accordingly, compliance can mean that costs are incurred that parties might otherwise have sought to avoid (such as the cost of obtaining of a valuation pursuant to s18(1) of the Landlord and Tenant Act 1927), preferring instead to simply rely on the threat of litigation to try and reach a settlement.

Where costs are incurred and a settlement reached without recourse to court proceedings, unless the parties agree otherwise, or the lease expressly provides for recovery of protocol compliance (which seems to be rare), there is no legal entitlement to recover these costs. This can be very frustrating for landlords who, faced with dilatory tenants, are keen to drive matters forward and have, therefore, followed the protocol to prepare their case for the issue of court proceedings. It leaves them exposed to having to bear these costs.

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However, where the case does proceed to trial, as with any litigation, the costs may be recoverable by the winning party, but consideration will be given to any unreasonable conduct or inflated claims and landlords may not be able to recover pre-action costs relating to items of work that they subsequently decide to abandon as part of their claim.

Are the professional fees reasonable in amount?

A final point to make is that, while a claim for professional fees may be legitimate, the level of such fees may not be. All too often, sums claimed seem to be taken at face value. Even if the lease does not expressly say so, professional fees must be reasonable in amount. This does not mean that they must be the cheapest available but, for example in terms of legal fees, these can be challenged as they would be when settling any litigation by ascertaining the level of solicitor working on the case, their charge-out rate and details of any fee agreements. Fees can often be reduced by 20-25%. With any discipline it is always worthwhile requesting a breakdown of how fees have been incurred so as to be clear as to who has been involved and to what the work actually relates.

Summary

Parties should not forget to consider dilapidations claims in their entirety. Before professional fees are incurred, landlords should be made aware or seek advice as to whether they will be recoverable because if not, or if there is any doubt, they may decide to hold off embarking on, for example, extensive exploratory works that may be unnecessary or premature if a negotiated settlement can be reached without such work being undertaken. Tenants too should be looking to minimise their exposure to such claims and each element of professional cost claimed should be considered in the following terms:

- how and why it has been incurred;
- whether it is reasonable in amount;
- whether it should be paid in its entirety in view of the ultimate settlement reached with regard to the tenants breach; and
- the provisions of the lease. ■

Agricullo Ltd v Yorkshire Housing Ltd [2010] EWCA Civ 229
Riverside Property Investments Ltd v Blackhawk Automotive [2004] EWHC 3052 (TCC)
Heronslea (Mill Hill) Ltd v Kwik-Fit Properties Ltd [2009] EWHC 295 (QB)