Dilapidations - prepare or despair

Dilapidations claims are a common feature of the lifecycle of the commercial lease. For the landlord, dilapidations claims are often wrongly perceived as providing an opportunity to maximise revenue or upgrade a building before re-letting. From a tenant's perspective, a claim can come as a nasty surprise. The impact of dilapidations on the total cost of accommodation over the life of the lease is often overlooked.

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A lengthy dilapidations campaign is not for the faint hearted. If it goes all the way to trial, it will take at least 12 months and may involve a lengthy hearing with a succession of expert witnesses being paraded before the court. The costs of such an exercise will be substantial, and for modest claims that are not resolved quickly, the costs can rapidly grow out of all proportion to the amounts claimed. The position is exacerbated by the costs budgeting regime now implemented by the courts which, in some cases, has significantly reduced the costs a successful party can recover from the losing party.

The importance of carefully evaluating a claim at an early stage is illustrated by *Business Environment Bow Lane Limited v Deanswater Estates Limited [2008]* where a landlord carried out a wholescale refurbishment of its building (going way beyond any dilapidations claim). It brought a claim for £400,000 against its former tenant, but only recovered £1,000. The judge described the claim as "grossly exaggerated" and indicated that "any proper investigation of the claim would have revealed that it was not genuine". The court showed its disapproval by ordering the landlord to pay the tenant the whole of its costs on an indemnity basis.

The Civil Procedure Rules (CPR) provide that all dilapidations claims should be brought in accordance with the Dilapidations Protocol. A genuine compliance with the Protocol will in most cases ensure the mistakes of *Deanswater* are avoided. Failure to comply with the Protocol are likely to lead to costs sanctions if the matter goes to court.

The key to bringing or defending a successful dilapidations claim is to assemble a good team of professional advisors at an early stage, evaluate the position carefully, and devise a realistic strategy. It is extremely important to instruct a qualified building surveyor who is experienced in dealing with dilapidations claims. It is also important to identify whether the claim is to be co-ordinated by the surveyor or the solicitor to avoid issues 'falling between two stools'.

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There are a number of stages to a claim:

Stage 1 - the tenant's decision

A tenant often waits for its landlord to serve a schedule of dilapidations. However, this can be an expensive mistake if a schedule is not served until after lease expiry. In most cases, substantial savings can be made by a tenant itself carrying out works. This will allow the tenant (guided by its surveyor) to decide what works to carry out, and the costs will invariably be less than if the landlord carries out works and then brings a claim (savings of 35%-45% are not uncommon). This has to be balanced against a careful evaluation of any defences which the tenant may have, particularly if the building is at the end of its life and the only option to the landlord is to substantially refurbish or redevelop the site. The tenant should, therefore, evaluate its position at least six to twelve months before lease expiry.

Stage 2 - Service of a schedule of dilapidations

The landlord serves a schedule of dilapidations with a quantified demand that provides all the information required by the Protocol, and substantiates the damages being claimed. This is usually prepared by solicitors and gives the tenant a reasonable time in which to respond (usually two months).

Stage 3 - Joint inspection

Once the tenant's surveyor has inspected the property, and before the tenant responds, both surveyors usually meet at the premises to discuss the claim on a without prejudice basis. These discussions may lead to a quick settlement. Alternatively, it should reduce the risk of any misunderstandings and provide an opportunity to narrow the issues.

Stage 4 - Tenant's response

This takes the form of an item by item response to the schedule of dilapidations, usually in different columns contained in the same schedule. Any specific defences raised by the tenant should be disclosed at this stage.

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Stage 5 - Settlement

Under the protocol, the parties (or their surveyors) are encouraged to meet within one month of the tenant's response. If fruitless, the courts will now expect the parties to undergo formal mediation, which is successful in over 80% of cases. The costs of mediation are significant, but are considerably less than litigation costs. Before embarking on litigation (and in some cases prior to mediation), a party should give careful consideration to making an offer under CPR Part 36 which, if pitched at a realistic level, will put the other party under real pressure to settle because of the costs risk in not 'beating' the offer at a formal hearing. If settlement is not possible, a party should carry out a careful cost benefit analysis before issuing court proceedings.

After a lease comes to an end, both parties should have a vested interest in bringing issues with a financial implication to a swift conclusion. The Protocol aims to bring the parties together to achieve this in a speedy and cost effective manner. The best way for the parties to assist that process is to take good professional advice to narrow the issues as quickly as possible. If they do not then the courts will increasingly take steps to hurt the parties where it matters most, in the pocket.

The content of this article is for general information only. For further information on this topic, please contact Simon Woodhead.