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Disrepair to Property - New Obligations for Landlords

Landlords and tenants of commercial property will know that in almost all leases there is an obligation upon the tenant to return the demised property at the end of the tenancy in a good state of repair. If the tenant fails to do that then the landlord might have a claim for damages against it. The news that the Dilapidations Protocol is to become part of the Civil Procedure Rules (the rules which govern non-criminal court claims) represents an important development which will be of relevance to landlords, tenants, and their advisers.

What's the problem?

In a nutshell, the problem with dilapidations disputes was that there was a perception that landlords were exaggerating their claims, thus leading to a failure to resolve disputes which otherwise could have been dealt with in a commercial way. The problem was not helped by the fact that even if a building was indisputably in a state of disrepair, there would still be considerable room for differences as to the works necessary to put it back into repair, and even (perhaps if the landlord wishes to redevelop the property) whether any repair was necessary at all. The Landlord and Tenant Act 1927 has long established the way in which the landlord's loss is to be measured (and in many cases capped), by stating that the amount due from a tenant would not be more than the diminution in value of the property arising from the disrepair, that is, not simply the cost of repair works. This is known as a section 18 valuation. Nevertheless, the difficulties caused by landlords making unrealistic claims have continued. By way of rather extreme example, in the Business Environment Bow Lane Ltd *v* Deanwater Estates Ltd case in 2009 a schedule of dilapidations was served by the landlord claiming in excess of £550,000.00, only for the claim to be settled, during proceedings, at £1073.50.

How can a protocol help?

With the introduction of the Civil Procedure Rules in 1999 came the development of pre-action protocols. Such protocols were not designed to change the law, but to persuade parties who are in a dispute to take certain steps before issuing court proceedings to see if the dispute could be resolved, or at least any differences narrowed. The 'persuasion' arises from the risk that if a party chooses not to follow a protocol the court might express its displeasure by refusing to award that party its legal costs of the claim, even if it has been otherwise successful. There have been protocols introduced for a wide range of legal claims, including personal injury, housing disrepair and professional negligence.

The dilapidations protocol

At a meeting on Friday 14 October 2011 the Civil Procedure Rules Committee agreed that the dilapidations protocol should formally be adopted in England and Wales with effect from 1 January 2012. The Property Litigation Association (PLA) introduced the first (unadopted) version of the protocol in 2002, with a second edition produced in 2006. These were endorsed by the Royal Institution of Chartered Surveyors as best practice in its *Dilapidations Guidance Note*. Further minor amendments led to a third edition in 2008.

The version of the protocol which has been considered, and approved, by the Rules Committee is largely consistent with earlier versions, subject to changes in terminology to bring it into line with the wider CPR, and the introduction of a new obligation on the tenant in respect of a response to a landlord's claim. The material recommendations of the protocol are:

- The landlord should send a schedule of dilapidations to the tenant setting out its claim within 56 days of the end of the lease; a suggested form of schedule is provided.

- The landlord's schedule should include an endorsement indicating that the costs claimed are reasonable, that the works are reasonably necessary, and that the landlord's intentions (e.g. to redevelop) have been taken into account.

- If the landlord has carried out works of repair, a formal section 18 valuation is not required. If the landlord has not carried out works, it is.

- The tenant should be invited to give a detailed response within a further 56 days. The tenant's response should also include an endorsement that the costs they cite are reasonable and that the works referred to by the tenant are all that are reasonably required to remedy the alleged breaches of covenant.

- The parties and/or their advisers are encouraged to meet to discuss the claim.

It is important to note that whilst the protocol is an example of best practice, minor non-compliances (or variations) will not invalidate what would otherwise be a good claim. The decision as to whether compliance or non-compliance should have any impact upon the recovery of costs by a successful party remains one for the trial judge, although it is highly likely that substantial non-compliance will have a negative effect on the recovery of legal costs.

The protocol will come into effect as part of the CPR on 1 January 2012, but parties to dilapidations disputes would be well advised to consider its implications now. The RICS will also produce a new version of its *Guidance Note for Dilapidations in England and Wales*.

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