

**Dilapidations claims:
Something old, (nothing) new, something borrowed, something blue**

Perhaps it is because of the continuing difficult economy and property market, but there seem to have been several prominent dilapidations cases already this year.

The dilapidations industry has been quite excited about them, but do they actually tell us anything new? We suggest not.

In *Hammersmatch Properties (Welwyn) Ltd v Saint-Gobain Ceramics & Plastics Ltd* (May 2013), the judge gave a useful summary of the law:

“In approaching the remaining items in dispute I bear in mind the following general principles:

- (1) A covenant to keep in good repair and condition is not engaged unless there exists a state of disrepair, that is a deterioration from some previous physical condition: see *Post Office v Aquarius Properties* [1987] 1 All ER 1055 and *Fluor Daniel Properties v Shortlands* [2001] 2 EGLR 103.
- (2) If there is a state of disrepair it has to be established that the item is below the standard of repair contemplated by the covenant and, if so, what remedial work is needed to restore that item to that standard.
- (3) The appropriate standard of repair is such repair as having regard to the age, character, and locality of the premises, would make them reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take them: see *Proudfoot v Hart* (1890) 25 QBD 42; *Fluor Daniel Properties v Shortlands* [2001] 2 EGLR 103; *Mason v TotalFinaElf (UK)* [2003] 3 EGLR 91.
- (4) The standard of repair is an objective one which is to be ascertained by reference to the circumstances at the date of the lease and what a reasonably minded tenant would require to render the premises reasonably fit for use as a place from which to run its business; see *Fluor Daniel Properties v Shortlands* [2001] 2 EGLR 103.
- (5) The question is what would be required to make the premises reasonably fit for occupation, not what an incoming tenant would require at the end of the lease: see *Westbury Estates v RBS* [2006] CSOH 177; *Carmel Southend Limited v Strachan and Henshaw Limited* [2007] 3 EGLR 15.
- (6) The appropriate standard of repair must take account of the age of the building. The obligation is not to return the premises to the condition that they were in at the start: see *Mason v TotalFinaElf (UK)* [2003] 3 EGLR 91.
- (7) In considering the appropriate standard of repair it is relevant to consider the user clause in the lease: *Simmons v Dresden* [2004] EWHC 993(TCC).

(8) When considering whether replacement rather than repair is the appropriate standard:

(a) Replacement is only required if repair is not reasonably or sensibly possible: see *Dame Margaret Hungerford Charity Trustees v Beazeley* [1993] 2 EGLR 143 and *Carmel Southend Limited v Strachan and Henshaw Limited* [2007] 3 EGLR 15.

(b) It is for a claimant to prove relevant disrepair and that it is of such an extent or nature that repair is not reasonably or sensibly possible: see *Mason v TotalFinaElf (UK)* [2003] 3 EGLR 91.

(c) Where a reasonable surveyor might equally well advise either repair or replacement, damages are to be assessed by reference to the cost of repair unless replacement would be cheaper: *Riverside Property Investments v Blackhawk Automotive* [2005] 1 EGLR 1114; *Carmel Southend Limited v Strachan and Henshaw Limited* [2007] 3 EGLR 15.

(d) The fact that an item has exceeded its indicative life expectancy so that it would or might be economic for a prudent owner to replace it does not mean that it is not in a good and safe working order repair and condition: see *Fluor Daniel Properties v Shortlands* [2001] 2 EGLR 103 at 111G and *Westbury Estates v RBS* [2006] CSOH 177.

In the present case I must therefore take into account the age, character and locality of the Norton Building which was a purpose-built manufacturing building which was about 50 years old at the date of the lease. It is necessary to consider what a reasonably minded tenant of the relevant user class would reasonably require in December 1984 to render the building fit for occupation for the purposes contemplated by the lease...”

We have retained all of the case references the judge used, because they illustrate that the principles he applied were not new.

So, if the principles were not novel, why did the case go to trial and why was it reported?

We can only surmise, but the claim when originally formulated was put at £6.8m. Even after negotiation on it, it was still a large sum. Despite the notorious expense and uncertainty of outcome in dilapidations litigation, that made it something worth fighting about. That is probably even more the case because the judge concluded that the claim in fact was only worth £900,000. We can only guess at the costs that were incurred to fight the case to the end of a trial, but we would expect there will be a heated contest about who pays them and how much.

The slightly earlier case of *Sunlife Europe Properties Limited v Tiger Aspect Holdings Limited & anor* (March 2013) has also excited the dilapidations community, but again we contend that it has not established any new legal principles – it was just another case worth a lot of money, that was (probably/possibly) worth fighting to trial. The main point it (re)emphasised is that a tenant can mainly avoid being hit with upgrading works as part of a dilapidations claim against it.

Other recent cases of dilapidations interest are:

- *Twinmar Holdings Limited v Klarius UK Limited and anor* (April 2013) which considered whether some skylights were out of repair because their surface had become so degraded that they were opaque and had to be treated with a coating to restore their translucence. The court said that they were out of repair. It also said that skylights could be windows.
- *Peel Land and Property (Ports No3) Ltd v TS Sherness Steel Ltd* (June 2013) which reviewed the law in relation to chattels (which can be removed from a property) and

fixtures (which might be removed from the property, in some cases). The case was of interest because it considered these issues in the context of some very large industrial equipment at a steel works, concluding that things like cranes and 95-tonne ladles (used to move molten steel around) were either chattels or removable fixtures. The landlord had wanted to stop the tenant removing them.

It seems to us that the main reason these cases have come to the fore is that they concerned property or items of such value that litigation to trial was (probably/possibly) warranted. We make that point because dilapidations claims regularly cost substantial sums of money to fight. In the case of many lower value claims, taking early advice about the established legal principles should help the parties to find some common ground and avoid the need for expensive legal proceedings.

Forming a realistic view at an early stage in relation to dilapidations claims has become more important since the introduction of a Court approved pre-action protocol (<http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-claims-for-damages-in-relation-to-the-physical-state-of-commercial-property-at-termination-of-a-tenancy-the-dilapidations-protocol>). The protocol has made compliance with certain procedural requirements all but compulsory (see paragraph 4 of the Practice Direction Pre-Action Conduct - http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#1DADCA2).

Whilst any steps to eliminate speculative claims is to be welcomed, the requirement under the protocol to incur sometimes quite large amounts of costs up-front (e.g. engaging valuation experts and lawyers) risks making anything but the large claims referred to above uneconomic.

If you would like any further advice on these matters, please contact:

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