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The high price of “Sexing Up”

How landlords can suffer if they exaggerate dilapidations claims

Landlords are currently looking to maximise all possible avenues of income. Tenants are also now less likely to seek to renew their leases when they expire. A landlord might in these circumstances consider that a claim for dilapidations for disrepair to its building is away of mitigating its loss of income, particularly in a market where the premises might not be easily re-let.
However, the case of *Business Environment Bow Lane Ltd v Deanwater Estates Ltd [2007]* shows it is not a good idea to exaggerate a dilapidations claim.

Claims for disrepair to a building are subject to a statutory limit or cap imposed by the LandlordandTenantAct1927. The practical effect of this cap is that a landlord should have evidence of the diminuition in value to their interest at the outset of a claim, because this will "cap" the amount which they can recover.

Exaggerated claims

Nevertheless, traditionally, it has been accepted practice to prepare a weighty schedule of dilapidations, including every possible element of disrepair, and serve this upon the tenant as, in effect, an opening bid in negotiations. This inevitably has meant exaggerated dilapidations claims have been made which bear no relation to the statutory cap.

In the *Deanwater* case a landlord served a schedule of dilapidations claiming around £550,000 in damages for disrepair. Following a series of pre-litigation exchanges, proceedings were eventually issued claiming around £415,000. The claim was settled on terms that the tenant paid £1073.50, around 0.002% of the sum claimed. The valuation attributed to certain works originally claimed by the landlord was unsustainable and other works which it claimed had been carried out had not been carried out. The landlord had also refurbished the building, rendering much of the claim worthless.

Costs penalty

The sting in the tail for the landlord was that in settling the claim the parties agreed that the court should decide who should pay the costs of the litigation. The court held that the landlord’s exaggerated claim had been wholly unreasonable and should not have been brought. In spite of ‘winning’ just over £1000, the landlord was therefore ordered to pay all the tenant’s costs of the litigation on an ‘indemnity’ basis to reflect the landlord’s unreasonable behaviour.

The *Deanwater* case is an extreme example of the contradiction inherent in the role which is usually played by surveyors and valuers in dilapidations claims. At the outset the surveyor is

asked to be an advocate or negotiator and understandably produces a ‘best’ figure for the landlord. This will be included in the schedule of dilapidations. However, if a claim proceeds, the valuer will then be asked to act as an expert with a valuation opinion. An expert in court proceedings has a primary duty to the court, not to those instructing him or her. This might cause the valuer to modify their best figure, sometimes quite considerably.

A landlord would almost always be criticised by a court for issuing court proceedings without serving a schedule of dilapidations in advance the‘ cards on the table’ approach. Under the Civil Procedure Rules, the courts expect parties to litigation to put all their cards on the table, not simply their good cards. The lesson from the *Deanwater* case is that landlords who make unreasonable demands at the outset make themselves hostages to fortune.

There was no suggestion of fraud in the *Deanwater* case. Landlords must, however, take care because since the enactment of the Fraud Act 2006 a person will be guilty of an offence of fraud if “he... dishonestly makes a false representation... and intends, by making the representation... to make again for himself or another”. A conviction under this Act carries a potential prison term of 10 years, and a fine. Whilst it has been notoriously difficult in the past to persuade a court to consider fraud in the context of commercial transactions, the Fraud Act does appear to widen the offence and it is possible that a landlord who did not take heed of the lessons in the *Deanwater* case could find they are at risk of a fraud conviction. Due to the above, landlords, and their advisers, should proceed with caution on dilapidations claims.

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