

modern day dilapidations in a commercial lease -the Building Surveyor role

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To cover:

- Introduction
- Approach
- Common problems / Misconceptions
- Good Practice

Introduction

- Dilapidations Is Changing
- Building Surveyors – Ideal Professional?
- Rule of Thumb Approach
- Role is Transitional (Infancy)

Decoration

- Repair includes decoration
- Common law is not as prescriptive as decoration clauses
- Strict compliance with them
- But is there a loss?

Building Surveyors Approach

- Review of Documents
- Background Search
- Questionnaire – Client / Team
- Inspection
- Draft Report / Schedule
- Specialists?

Problems / Misconceptions – Timing / Serving

- Retail Park Ayr
 - Alt Clause 1: "If called upon to do so by the Landlord, the tenant shall reinstate..."
 - Alt Clause 2: "The tenant shall remove, reinstate.... At expiry of the lease howsoever determined..."
- Skypark, Glasgow
 - Alt Clause 1 Above
 - Access delayed, Schedule served after LEX
 - Horse Trade

Problems / Misconceptions - Statute

- Building Regulations
- Asbestos
- Services
- Equality
- Fire

- @SIPP v Insight

Problem / Misconceptions – Schedule of Condition

- How / Where Referenced in Lease
- Referenced but not located / agreed / recorded
- 'Present Condition'
- Alterations and extent of Premises
- Be Careful: New Lease / Extension

- Dem-Master v Healthcare Environmental

Problems / Misconceptions – Provisional Sums, Professional Fee's etc.

- Professional Fees
 - What does lease say?
 - Fair and reasonable
- Provisional Sums
- Contingency

Summary

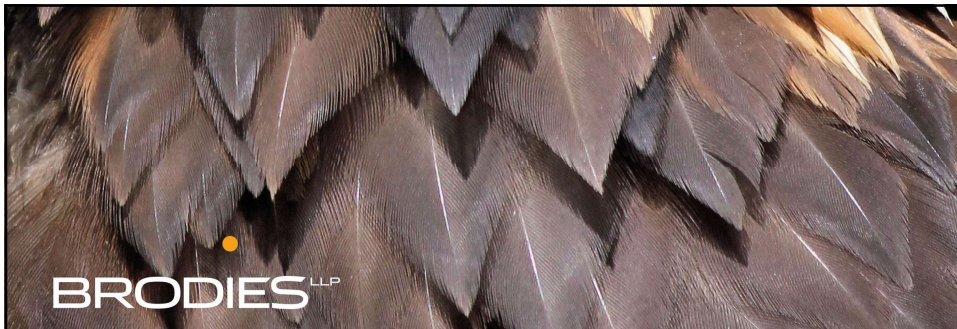
- Use Right Surveyor (& lawyer)
- Strategy – Plan, Build Claim / Defences
- Get Team in Place
- Lease Drafting/SoC

building surveying
project management
cost consultancy

pmp

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Dilapidations in a commercial lease – hot topics

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To keep or to put?

“...an obligation to keep subjects in good and substantial repair carries an obligation to put them into that state of repair. If there is no obligation to renew, replace and rebuild as necessary - as was the position in the McCall’s Entertainments case - a different conclusion might be drawn...”

Schedule of condition

“...the Tenant shall not be obliged to return the Premises in a better condition than that evidenced by the schedule of condition annexed and signed as relative hereto...”

“...the Tenant shall be obliged to return the Premises in no worse condition than that evidenced by the schedule of condition annexed and signed as relative hereto...”?

What other obligations are qualified?

Schedule of Condition

Dem-master Demolition Ltd v Healthcare Environmental Services Ltd

“The Tenants accept the Premises as being in such condition as shown on the attached Photographic Schedule and in all respects fit for the Tenants’ purposes and shall at their sole expense and, to the reasonable satisfaction of the Landlords, repair and maintain and renew (and, if necessary for the purposes of maintenance and repair, to replace and rebuild) and decorate and keep the Premises and all permitted additions and new buildings, if any, in like condition as is evidenced on the said Photographic Schedule”

Court’s decision:-

“...the standard of the repair obligation is referable to the actual state of the subjects of let, whatever that standard may be and however it may be proved, rather than a notional or objective standard”

Diminution in value

- Terminal dilapidations – measuring loss
- Section 18 of the Landlord and Tenant Act 1927
- Jury question in Scotland
- Reasonable loss – *Ruxley*
- Methodology – each work has a value

Payment obligations – how do they work?

- Notice and sometimes surveyor certificate
- “At the end” of the lease
- Obligation to pay terminal dilaps – REMOVES tenant’s ability to argue no loss or supersession
- Can usually still dispute liability and costs
- Lease can sometimes include loss of rent and fees
- Normal damages claim still available if notice not served

Grove Investments Ltd v Cape Building Products Ltd (2014)

- “...to **pay to the landlords the total value of the Schedule of dilapidations** prepared by the landlords in respect of the tenants' obligations under Articles Fifth and Sixth hereof declaring that the landlords shall be free to expend all moneys recovered as dilapidations as they think fit...”

***Mapeley Acquisition Co Ltd (In Receivership) v
City of Edinburgh Council (2015)***

- ... the Tenant shall pay to the Landlord **such reasonable sum as shall be certified by the Landlord's Surveyors as being equal to the cost of carrying out such work...**

***@Sipp Pension TRS v Insight Travel Services
Ltd (2016)***

- . . . Provided Always that if the Landlord shall so desire at the expiry or sooner termination of the foregoing Lease they may call upon the Tenant, by notice in writing (in which event the Tenant shall be bound), to pay to the Landlord at the determination date . . . **a sum equal to the amount required** to put the leased subjects into good and substantial repair and in good decorative condition in accordance with the obligations and conditions on the part of the Tenant herein contained in lieu of requiring the Tenant himself to carry out the work...

Tonsley 2 Trust v Scottish Enterprise (2016)

- ...the Tenant shall pay to the Landlord **the sum certified by the Landlord as being equal to the cost of carrying out such work** and the Tenant shall pay to the Landlord the sum as certified together with any surveyor's fees incurred by the Landlord in connection with such Certificate...

Dilapidations with other uses

- **Break notices** – *ARLINGTON BUSINESS PARKS GP LIMITED v SCOTTISH & NEWCASTLE LIMITED*
- **Withholding consent** – *CRIEFF HIGHLAND GATHERING LIMITED v PERTH AND KINROSS COUNCIL*
- **Common parts** - *AWG BUSINESS CENTRES LIMITED V REGUS CALEDONIA LIMITED & OTHERS*