

Number 15

## The Importance of Obtaining Valuation Evidence at an Early Stage in Dilapidations Claims

The draft pre-action protocol for terminal dilapidations claims<sup>1</sup> which was prepared by the Property Litigation Association and published in 2002, with the support of the Royal Institution of Chartered Surveyors, is likely to be adopted by the Lord Chancellor's Department and become one of the pre-action protocols which parties to a dispute are expected to follow under the Civil Procedure Rules, the rules governing the conduct of litigation in England and Wales.

The protocol relates to claims for damages brought by landlords against tenants which are in breach of repairing obligations upon the expiry of their leases. It has been used by parties to dilapidations disputes with the approval of the judiciary for some time and is regarded as best practice in terms of identifying and resolving the relevant issues before cases come to court, sometimes avoiding the need for legal proceedings altogether. A party which refuses to follow the protocol already runs the risk of being penalised by the court with adverse costs orders.

One of the objectives of the protocol is to ensure that as much information about the claim is exchanged as soon as possible. Therefore it is essential for a landlord to consider the nature of the evidence necessary to prove a claim in damages against a tenant. This is particularly important in the light of the very specific statutory limit on the recovery of such damages.

Section 18(1) of the Landlord and Tenant Act 1927 limits a landlord's claim against a tenant for a breach of repairing obligations to the amount by which its reversionary interest has diminished in value due to the disrepair. Where a landlord intends to demolish or redevelop the property, it will not be entitled to recover any damages for breach of repairing obligations which are rendered obsolete by the development plans.

Sometimes a landlord will carry out the works of repair itself on the expiry of a lease, with the aim of re-letting the property as soon as possible. In such circumstances the cost of the works, together with lost rent during the time taken to carry out the works will be the amount of damages sought by a landlord and the prima facie measure of loss.

However, in cases where a landlord has not carried out the works before bringing a claim, but intends them to be carried out at a later stage, the protocol requires it to state when it intends to do the work and what steps it has taken towards that end, such as preparing a specification and inviting tenders as well as providing a valuation pursuant to Section 18(1) of the Landlord and Tenant Act 1927, to show whether or not the cost of the works will exceed the amount by which the value of the landlord's interest has diminished due to the disrepair.

On occasions, the diminution in value of the reversion will be less than the cost of putting the premises back into repair, so a landlord will not be entitled to recover more than that, even if a fully-detailed and costed schedule of dilapidations has been prepared setting out all the tenant's breaches of its repairing obligations, ostensibly giving rise to a substantial claim.

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If a landlord intends to make significant alterations to premises, irrespective of the disrepair, a Section 18(1) valuation should be obtained at an early stage and disclosed in evidence. In claims where the cost of the work will exceed the diminution in value, careful consideration should be given as to whether a Section 18(1) valuation should be obtained and served on the tenant, or whether it would be appropriate to leave the issue for the tenant to raise as a defence. The valuation evidence should also deal with the issue of whether the property could be worth more than its current value if it were redeveloped for a different use, as this is something which could be raised by a tenant and which could potentially negate a claim for damages.

A recent case (*Ultraworth Limited –v- General Accident Fire and Life Assurance Group Plc* [2000] 2 EGLR 115) highlighted the risks of not obtaining such evidence at an early stage and pursuing a dilapidations claim without it. The parties reached agreement in connection with the cost of some of the works, but not others. The matter proceeded to court and the landlord sold the property during the course of the action. The court took the view that the property would only have been of interest to a developer and that the disrepair had not caused a diminution in value of the reversion, therefore the landlord had not suffered any recoverable loss and in consequence had no claim. In such a situation a landlord is likely to be ordered to pay the costs of the legal proceedings.

If a section 18 (1) valuation had been obtained at the outset, it may well have shown that there was no diminution in value caused by the disrepair and the landlord would not have spent time and money pursuing a claim which, on the face of it, was very valuable.

Landlords should as a preliminary step, following the preparation of a costed schedule of dilapidations, obtain a Section 18(1) valuation as an overview of a claim for dilapidations to establish whether the cost of the repairs exceeds any diminution in value of its reversionary interest, taking account of the potential of the property.

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing. For further information on property disputes or litigation please contact:

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