

PROPERTY BRIEFING

DILAPIDATIONS, WANTS OF REPAIR & REINSTATEMENT LIABILITIES “DON’T BE AN OSTRICH”

Introduction

For many tenant occupiers the question of dilapidations, wants of repair and reinstatement liabilities under their lease represents a bewildering and complex problem, which is frequently ignored in the hope that it will simply “go away”.

Recent changes under the Civil Procedure Rules (CPR) have however fundamentally changed the way that terminal dilapidations claims are considered and agreed. The RICS has recently produced a supporting guidance note with respect to the protocol to be followed by landlords and tenants when dealing with terminal dilapidations, wants of repairs and reinstatement liabilities.

The financial implications for tenants can be very substantial and is likely to be greatly compounded if tenants fail to address the situation and “*bury their heads in the sand like an ostrich*”.

With careful planning and professional advice however tenant’s liabilities can generally be substantially reduced in relation to the costs estimated by the Landlord’s surveyor and specified in any schedules served upon them.

What Are Terminal Dilapidations, Wants Of Repair And Reinstatement Liabilities?

The occupation of any commercial building is governed by the terms and conditions contained within the lease between the landlord and tenant. These usually require the tenant to maintain, repair, replace and decorate the premises in order that it is kept in good condition throughout the duration of the term.

Each lease will specify set periods for internal and external decoration, generally between 3 and 7 years and in addition will require tenants to generally upkeep the property.

At the end of the lease the landlord expects to have his property returned in good decorative order and general condition, frequently by reference to the condition in which the property was first let, or alternatively under a general assumption that the property is to be in “full” repair.

Frequently, tenants do not undertake such repairs, maintenance or decoration, resulting in ‘dis-repair’ due to breaches of the tenant’s covenants contained in the lease. The landlord’s remedy in such cases is to serve a formal notice of terminal dilapidations, wants of repairs and reinstatement liabilities detailing those works required by the tenant at the end of their lease.



How Would The Tenant Know What Works To Do?

In accordance with the CPR rules, Landlords are required to adopt a formal and set procedure for such claims. The notice and schedule is required to be submitted in a standard form and will include details of the landlord and tenant, the precise clauses within the lease relating to repairs, maintenance, decoration, reinstatement etc; details of each breach of covenant that has occurred; the landlord's proposed remedy to rectify each defect and an estimate of cost. The tenant will therefore be provided with a detailed "schedule of necessary works" together with an estimate or claim.

Are All Schedules And Claims The Same?

No – all dilapidations claims will be unique, as there are numerous variances between leases. The landlord's right to pursue such claims will not only depend on the terms contained within the lease but will also be directly related to the level of repairs, maintenance and redecoration undertaken by the tenant during the course of the lease.

What Action Do I Need To Take If I Receive A Dilapidations Claim?

In a similar fashion to any contractual situation, the most important step is to address the situation quickly and with professional advice to minimise your liability.

By prompt action and negotiation, claims can frequently be very substantially reduced either because the landlord has sought to include works to which he is not entitled or estimates of the cost of remedying such breaches of covenant have been 'overstated'.

However, if no action is taken, tenants can and frequently do, find themselves involved with expensive litigation and a legal claim for damages, which can run into tens if not hundreds of thousands of pounds.

Is The Claim Limited To The Cost Of The Works?

This will primarily depend upon the point at which works are carried out.

If the tenant vacates the property before the end of the lease, and arranges for any necessary works to be undertaken, the landlord's claim should be limited strictly to the cost of these works.

On the other hand, if the tenant remains in occupation until the last day of the lease and the landlord then has to make a retrospective claim for damages against the tenant, the landlord will be entitled in most instances to add additional costs over and above the physical cost of the works, that are incurred by the landlord whilst he undertakes the works that should have been completed by the tenant.

This can include such items as rent, rates, service charge, insurance etc until such time as works are completed and the premises are available to let in the market. Frequently, this element of a claim can be as substantial, indeed if not more substantial than the cost of the works themselves!

Timing is therefore crucial and early consideration and planning to accommodate any necessary dilapidations works during the last period of the lease is both prudent and logical.



Is The Landlord's Claim Limited In Any Other Way?

The simple answer is yes, but once again this is unfortunately rather complicated.

Essentially, the landlord is not permitted to make any claim, which exceeds the loss in value that he would otherwise suffer, if the works have not been undertaken. Hence, if the cost of the works exceeds the "diminution in value of the landlord's reversionary interest" the claim is limited to that loss of value. Again, the Civil Procedure Rules requires the landlord to prepare a valuation under Section 18 (1) of the Landlord and Tenant Act (1927) to prove such loss.

Can I Agree A "Cash" Settlement With My Landlord?

Once again the answer is yes. Frequently cash settlements are agreed in lieu of the cost of dilapidations claims. However, the negotiation of cash settlements can only be undertaken from a position of relative strength if the tenant addresses the matter quickly hence providing sufficient time to physically undertake the works themselves before the lease expires, in the event that a mutually acceptable payment can not be agreed with the landlord.

What Happens If The Landlord Intends To Redevelop The Property?

In some instances a landlord's claim for dilapidations, wants of repair and reinstatement can be substantially reduced or potentially eliminated, if the landlord intends to substantially refurbish or redevelop the property after the lease expires. There are a number of conditions that would need to be satisfied to enable a claim to be reduced on this basis but it can be a very useful tool, if the right circumstances prevail.

Do I Have To Pay Any Costs?

Unfortunately, in the majority of instances the tenant will be required to pay not only his costs but those of the landlord, including legal and surveyors costs. The justification for this approach is that no such claim would have been necessary had the tenant complied with the terms of his lease and maintained the property in full repair and condition.

Once again, these costs can be very substantial since they not only include the costs of the landlord's surveyor and solicitor in preparing the claim and the schedule of dilapidations but can also include the cost of physically overseeing the works necessary.

I Have Spent A Lot Of Money On Fitting Out The Property – This Is Very Valuable And Why Should I Have To Pay To Remove These Improvements?

This is a question that is frequently asked by tenants as it does seem totally illogical to remove such items such as partitioning, structured cabling systems, computer room facilities, comfort cooling installations, receptions, etc - particularly if they have been well maintained by the tenant.

Sadly, most landlords will require the premises to be returned to their original "open plan" layout as it is very rare that two tenants have the same requirements for fitting out. Likewise, structured cabling systems, i.e. telephone, computer and power supplies, are frequently updated and rapidly become obsolete to any future tenant. The cost of removing such items can be extraordinarily high and the landlord does not want to be faced with such cost before attempting to re-let the space in the market.



However, frequently by negotiation concessions can be made to retain such features and substantial savings can be made as a result - there is however no automatic right to retain alterations regardless of the apparent value of such items to the existing tenant.

Do I Have To Replace Everything With New And Modern Fixtures And Fittings?

This will entirely depend upon the nature of the disrepair and the specific obligations on the tenant contained within each lease. As a point of principle, landlords are not entitled to “betterment” namely, requiring tenants to put back something that is better than the original.

However, frequently when needing to replace items, the modern day equivalent will be “better” than the original specification but fortunately for the tenant such replacement can often be cheaper than replicating original features.

How Do I Minimise Any Claim For Dilapidations?

There are many stages involved with minimising dilapidations at the end of a lease and significant reductions in liability can be achieved during most stages of the property cycle. Even the original negotiations when taking the lease are of paramount importance in order that the maintenance, repairing and reinstatement covenants within the original lease are worded in the tenant’s favour to minimise liability at the end of the lease.

Likewise, as previously noted it is generally far more cost effective to physically undertake any necessary works prior to the end of the lease and/or agree a cash settlement at that time with the landlord, rather than facing a claim for damages from the landlord after the lease has ended. Retrospective claims will invariably include additional heads of claim with respect to any loss of rent, rates, service charge etc faced by the landlord whilst the works are undertaken.

Early professional advice is therefore critical in order that a controlled and timely approach can be made to addressing terminal dilapidations, wants of repairs and reinstatement works.

Cummings Commercial has a wealth of experience in acting for tenants to minimise financial liabilities in this respect and generally we are prepared to work on a performance related fee basis, whereby Cummings Commercial’s fees are geared to a percentage of the actual savings achieved for the tenant against the cost of the landlord’s original financial claim. Alternatively, we would be happy to discuss a fixed fee for acting on your behalf, should this be preferred.

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