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Dealing with dilapidations

An Insider's Guide

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Dealing with dilapidations – An insider's guide

Dealing with disrepair remains a major issue for landlord and tenants, whether it is a landlord trying to enforce repairing obligations and protect or maximise the value of its asset, or tenants trying to move on to pastures new. Here are our insider tips for dealing with dilapidations.

For the landlord

1. Don't leave disrepair until the end of the term

Most commercial leases will contain a clause allowing the landlord to enter and inspect the condition of the property, and then to serve notice of the landlord's intention to enter and repair if breaches are identified but not remedied within certain timescales.

After the notice period expires, a landlord has the right to enter the property, make the repairs and reclaim the costs as a debt. This can be an effective way of enforcing repairing obligations during the term, rather than leaving matters to the end of the term, when a tenant might not be good for any money.

2. Serve a schedule of dilapidations before the end of the lease

Consider serving a Schedule of Dilapidations before the end of the tenancy, and on other parties who may be liable for dilapidations under the lease – serving the Schedule of Dilapidations in plenty of time to allow the tenant to remedy dilapidations before the end of the tenancy maximises the chances that the tenant will remedy breaches and may mean that the property is ready to be re-let more quickly. Serving the Schedule of Dilapidations on other parties that may be liable (such as guarantors or former tenants, for example) may cause them to encourage the tenant to carry out the works, as other parties will not want to be pursued for damages.

When the term ends, a revised Terminal Schedule can then be served on the tenant to deal with any leftover breaches.

3. To present the strongest claim possible, consider doing the work

The strongest way to present a terminal claim, after the end of the Lease, is to do the remedial works – subject to the remedial works relating to a proven breach, the cost of those works is legally sufficient evidence of the value of the dilapidations claim.

It will then be the tenant's job to either show why the landlord should not be compensated for certain aspects of the works or that the works were unreasonably expensive. A landlord can never be sure to recover the full value of the works this way, but this approach does make it much more difficult for the tenant to argue against the cost of any legitimate works and, in the meantime, the works have already been carried out.

4. Make sure you don't wrongly characterise breaches as disrepair, rather than failure to reinstate

Dilapidations which are breaches of the covenant to reinstate, as opposed to breaches of the repair covenant, are not subject to the law that a landlord cannot recover any more than the diminution in value to its property interest by reason of the breach in question.

So, by presenting dilapidations as breaches of covenants other than the covenant to repair, the landlord may be able to avoid capped damages in respect of those items. Of course, the tenant will want to argue that as many items of disrepair as possible are in fact breaches of the covenant to repair, in order to take advantage of the potential cap on damages.

5. Follow the Terminal Dilapidations Protocol, and don't let your surveyor exaggerate the claim

Get good advice, and follow the Dilapidations Protocol – the Courts take a dim view of landlords who, without good reason, do not follow the pre-action process set out in the Dilapidations Protocol, and/or exaggerate their claim. This could result in a landlord not recovering its legal costs, or a proportion of them, or even being ordered to pay a proportion of the tenant's legal costs.

For the tenant

1. Get it right from the start

Do not be afraid to define your repairing obligations by reference to a Schedule of Condition. One way to minimise liability for dilapidations is to limit the extent of repairing obligations by reference to a Schedule of Condition, which evidences the state of the property at the start of the tenancy. The Schedule should be prepared by specialist building surveyors, who know what they are looking for when acting for a tenant.

2. Deal with disrepair during the term of the Lease

Anticipate the landlord's dilapidations claim – instruct a dilapidations surveyor before the lease terminates to identify breaches of repair obligations that may give rise to a claim, and consider doing the works yourself to try and retain costs control. Use building surveyors to put works out to tender so that you can obtain competitive prices for works and materials.

3. If you are presented with a terminal claim, get the right professionals involved

As well as instructing a building surveyor to advise on the individual breaches, get a quantity surveyor's comments on the landlord's costings. Quantity surveyors specialise in managing the costs of building projects and can be expected to have an intimate knowledge of the current

price of labour and materials. Seeking a quantity surveyor's expert comments on anticipated remedial works outlined in a landlord's Schedule of Dilapidations can show the landlord's anticipated costs to be unreasonable, and help to either negotiate the claim down, or to reduce any damages awarded by the Court.

4. Obtain a valuation of the landlord's interest in repair, and out of repair

The damages available to a landlord for breach of a repairing covenant is restricted to the amount by which the breach reduces the value of the landlord's interest in the property. Section 18(1) of the Landlord and Tenant Act 1927

The diminution in the value of the landlord's interest in the property is often lower than the cost of remedying the relevant breaches. Where this is the case, section 18(1) caps any damages at the lower diminution in value figure. A section 18(1) valuation may therefore enable a tenant to argue that any damages should be capped.

5. Analyse the landlord's intentions for the property

Where a landlord intends to pull down or carry out alterations to the property at the end of the tenancy, a dilapidations claim may be superseded by the landlord's works – Section 18(1) of the Landlord and Tenant Act 1927 extinguishes a landlord's rights to damages in respect of a dilapidations claim where any repairs would be rendered valueless in light of a landlord's intended works.

So make sure you know what will be happening to the premises that you are vacating, as it may be the case that you could avoid dilapidation costs if there are plans afoot to radically alter them.

Contact

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