



dilapidations

It is important for all tenants of commercial property to be aware of dilapidations and the implications for maintenance/repair strategies and financial planning.



"First class knowledge and experience with a stout pair of walking shoes!"

AITC

introduction

It is important for all tenants of commercial property to be aware of dilapidations and the implications for maintenance/repair strategies and financial planning.

Dilapidations are a complex subject, governed by the tenant's lease terms, statute and case law, the latter having evolved over many years.

The subject of Dilapidations encompasses decoration, repair, alterations and reinstatement obligations. The lease usually sets out the tenant's obligations relating to these, but will rarely set out the implications of failure to comply save an all encompassing but rarely used forfeiture procedure for alleged breaches of any obligations during the term.

A dilapidations liability can arise during the term of a lease, but more commonly materialises either at the end or approaching the end or determination of a lease.

It is therefore very important for tenants to consider these issues in good time before the end of their lease. Dilapidations are one of the most common aspects of leasehold obligations that often catch tenants unaware and are frequently exploited by landlords through carefully considered strategies.

Unless expressly stated within the lease to the contrary, a landlord is under no obligation to raise matters with the tenant relating to dilapidation responsibilities during or after the term of the lease and

so it is the tenant's responsibility to be aware of and deal with any alleged breaches of these. Indeed, landlords often avoid raising the matter until after a lease has expired and seek to submit a claim for financial damages when the tenant no longer has the opportunity to reparate. The landlord is generally entitled to make any claim up to six years after the expiry of a lease!

the landlords claim

If a tenant fails to comply with their dilapidation obligations the landlord can often aggregate a substantial potential claim with the following components:

Repairs - The cost of repairs, which can often include putting the premises in a better state of repair than it was at the beginning of the lease. This obligation can arise even where it is not expressly stated within the lease, but arising from the interrelationship of carefully worded clauses within the lease that give rise to this obligation and how the law treats them.

Decorations - Most leases require premises to be decorated (internally and externally) at given intervals (commonly 3-5 years) and at the end of the lease.

Reinstatement - A tenant is usually required to re-instate any alterations and fitting out that has taken place during the term of the lease (including those of previous occupants where the lease has been previously assigned to him).

Professional Fees - A landlord may recover professional fees incurred, including those arising from the inspection and preparation of schedules of dilapidations, specialist testing of services, the preparation of specifications, tenders and any works supervision and surveyor's and legal fees.

Loss of Rent - The market rent for the period required to undertake the works including the time taken for the preparation of a specification and tenders and contract mobilisation. This time period may be substantial (and expensive!).

Loss of Service/Estate Charge - Usually where the building is in multiple occupancy or on a managed estate.

Unrecoverable VAT - Value Added Tax on the cost of works where not recoverable by the landlord.

common misconceptions

There are a number of common misconceptions about dilapidations and some of these are highlighted below:

“We have no liability as the premises are in better condition than when we acquired it”

This is rarely relevant if you have taken a lease assignment from a previous tenant.

Even if you have taken a new lease, a tenant may still be liable if a lease contains the obligation to keep in good tenantable condition or repair and the premises are in disrepair, unless there is specific

provision restricting the tenant's obligation by reference to a schedule of condition prepared at the lease commencement.

“I have a schedule of condition”

This is only helpful in reducing a claim if it is referred to specifically in the lease and is properly constructed. It is always advisable to agree a schedule with a landlord at the outset and annex it to the lease or make specific reference to it.

“The premises are in good repair”

A landlord's opinion of good repair is often at odds to a tenant's. A tenant may also have the obligation to re-decorate (often to the landlord's choice of colours), reinstate and repair any damage caused by re-instatement.

“I do not need to take any action if the landlord has not requested me to”

or

“The landlord has said don't worry”

Dilapidations are the tenant's responsibility and a landlord is rarely obliged to draw such matters to the attention of a tenant. The landlord is entitled to make a claim for damages up to six years after the expiry of a lease and he often delays doing so until long after expiry and when the tenant is unable to obtain any evidence to support his position.

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Unless your closest friend or spouses, if the landlord says don't worry, you almost certainly should!

"I will repair the premises if I can't agree a financial settlement"

The landlord is under no obligation to allow you to re-enter the premises to undertake works after the expiry of your lease and indeed rarely will because he would rather maintain control over them. Any repairs must therefore be agreed with the landlord before the end of the term.

common implications for break clauses

Many break clauses in leases are conditional upon compliance or material compliance of covenants in the lease. If there are outstanding obligations for dilapidations, the break clause may be rendered inoperable and so the lease and all tenant's obligations under it will continue.

In these circumstances it is essential that the implications of such clauses are carefully considered and addressed well in advance of their effective date.

formulating a strategy

A tenant should be properly advised when first entering into any leasehold obligation that includes repairing obligations. This should be a Chartered Surveyor who inspects the premises. It is a common misconception that it is a legal advisers responsibility to address all aspects. A solicitor will rarely inspect premises when

advising on lease terms so cannot be expected to put lease obligations properly in to context when relating to repair.

"The only thing worse than a bad strategy is no strategy at all"

During the term of a lease, tenant should seek the advice of his Chartered Surveyor well in advance of a lease expiry or prior to seeking to exercise a break option to agree a strategy that best suits the tenant's needs and minimises the landlord's scope to exploit any alleged breaches of obligation by the tenant.

minimising a claim

If negotiating a settlement, a Chartered Surveyor is best placed to advise upon the scope to reduce the claim either through careful negotiation of the items on the schedule or drawing upon statute or case law that may provide scope for a reduced settlement and in conjunction with legal advisors concerning all legal aspects that may arise.

"It is an unfortunate fact that many landlords' surveyors prepare exaggerated claims"

This is a complex area and the subject of many journals and books in its own right. Our own copy of the industry standard reference book "Handbook of Dilapidations" is over 6 inches thick!

andrews denford & boyd

Andrews Denford & Boyd are a firm of Chartered Surveyors representing a wide range of both small and major multi-national businesses, from small start-up companies to some of the world's largest organisations. As well as commercial agency disposal and acquisition advice, our expertise in the field of dilapidations specifically encompasses the following specialist disciplines:-

- ◆ Quantity Surveying
- ◆ Planning Supervisor under CDM regulations
- ◆ Project Management
- ◆ Building Surveying including Planned Maintenance Programmes.

We are a firm of Chartered Surveyors where all Directors are either Members or Fellows of the Royal Institution of Chartered Surveyors and a Director will handle all work entrusted with us personally. We undertake to meet all the requirements set out by the RICS and will be guided by their code of conduct.

For further advice please contact Giles Andrews at Andrews Denford & Boyd on Switchboard **0207 495 5141** or Direct Dial **0207 495 4456** or visit our website, www.adblondon.com

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