DILAPIDATIONS FOR TENANTS For fools rush in (to negotiate) where angels fear to tread

Michael Watson Michael.watson@concorde-solicitors.co.uk

Following two articles in 2021 Summer and Winter Terriers concerning dilapidations claims and strategies for successful outcomes, Michael here sees claims from the tenant's viewpoint, but the advice also sets out warning for landlords.

The process

"Dilapidations" is a well-trodden path travelled by many tenants over the years with the consequence that the rules of the game are well known. Tenants' advisers know how the game plays and are able to guide their clients through the process of negotiation in order to conclude matters usually with some form of payment from the former tenant to their landlord.

A typical sequence of events will be for the landlord to instruct a building surveyor to prepare a schedule of dilapidations. This will set out a list of alleged breaches of contract, what works the surveyor considers to be necessary to remedy those breaches and what that will cost. This will often be prepared with the expectation that it will simply provide a start point for the process of negotiation.

The schedule is served on the tenant by the landlord and the tenant then appoints their own surveyor to "respond" to the schedule. The surveyor annotates an electronic copy of the schedule with their comments and costings. This is sent to the landlord and sets the parameters for the process of haggling, which is then anticipated to follow so as to define the quantum of the payment to be made by the tenant to the landlord.

The schedule served on the tenant will invariably remind the tenant of the requirement for a response within 56 days, in accordance with the Civil Procedure Rules Dilapidations Protocol, so the tenant may feel a degree of pressure to dive into the process of preparing a response to the schedule and then progressing the process of negotiation.

Diving into a response and negotiation may not be best course of action for the tenant. Instead of rushing into responding, haggling, and paying money, tenants may be well served to step back and take stock of the apparent claim being made against them.

A negotiated settlement of £250,000 against a claim of £500,000 may seem like a cracking result. The tenant (and their advisers) can report a "saving" of a quarter of a million pounds. But is that necessarily correct? What if there never was a claim of £500,000? What if the breaches the tenant was actually liable to equated to £100,000, or even nothing?

Tenants' advisers are the guardians of their purse so to speak and therefore, rather than just diving into a response and negotiation, they may be well advised to step back and look at the evidence disclosed in support of the claim and the legal basis upon which it is presented.

Before approving any settlement recommended to them, decision makers would be well served asking the following questions:

1. What sum was claimed?
2. What sum are we being offered as a settlement?
3. What sum are we legally liable for as damages properly recoverable at law as a consequence of breach of contract?

Michael is a solicitor who has specialised on property litigation and risk management for most of his career and is a strong advocate of a proactive approach to the management of risks associated with owning and occupying property.

Michael has a particular expertise in relation to legal issues relating to telecommunications matters and property, for example, issues relating to the Electronic Communications Code, Code Rights, MSV surveys and phone masts. He also extensive experience in relation to commercial property dilapidations claims advising both landlords and tenants. He regularly presents CPD seminars and he is also the founder of the Linkedin Dilapidations Discussion Forum and Interest Group which has in excess of 2,500 members.

Having worked for a number of the large national law firms Michael established Concorde Solicitors in 2022 with the aim of "doing work I enjoy, for people I like working with at sensible prices".

Question 3 is probably of particular importance for those who are the guardians of the public purse and those who audit them or hold them accountable.

What is a dilapidations claim?

A dilapidations claim is a legal claim for damages in respect of alleged breach of contract.

The objective of pursuing such a claim is to secure compensation for losses actually suffered, or in other words, to put the landlord in the same position they would have been in had their contractual promises been kept by the tenant. Where claims are brought after the end of the lease term, the landlord has no mechanism by which to enforce compliance with the terms of the lease and the only course of action available to them is to pursue a damages claim. In short, they want money.

There are only two ways they can obtain that money. The first is that they persuade the tenant to pay up. The second is that they place their expert witnesses on oath in front of a judge and try to persuade the judge to tell the tenant to pay. There is no other way. The landlord has the burden of proof.

Litigation can be both time consuming and expensive – both of which are significant disincentives to landlords taking action to recover damages for breach of contract. Instead, they rely on the goodwill of their tenants to agree to pay them something. If the tenant will not, then they either prove their claim at court or they forget it and move on.

Responding to a claim

It is still common for surveyors acting for landlords to take dilapidations instructions on a contingency fee basis, whereby they agree to charge a fixed price in relation to the preparation of the schedule of dilapidations, but then to take a percentage of whatever sum they manage to negotiate as a payment from the tenant. This has the consequence that the larger the settlement they can achieve in the shortest time then the greater their fee. It is in their interests, therefore, for the tenant to respond so they can then engage in the process of negotiation, with a view to closing matters off quickly.

It is a common misconception that contingency fees "incentivise" landlord's surveyors to achieve the best result for their client. Where, for example, the fee is 10% of the settlement, a settlement at £50,000 achieved with 20 hours' work will be much more profitable than a settlement of £75,000 that takes 50 hours of work. The former will generate an effective rate of £250 per hour for the landlord's surveyor, whereas the latter will equate to a rate of £150. The longer the process goes on, the less profitable it becomes for the landlord's surveyor. Ultimately a point in time may be reached where the investment of time required by the surveyor actually means the instruction becomes loss making. The contingency fee becomes a disincentive, and it becomes in the interests of the landlord's surveyor to close matters off and cut their losses. This may be something for the tenant to factor into their strategy for dealing with any claim.

A swift outcome can be in the interests of the landlord's advisers but may not be to the benefit of the tenant.

Whether on a contingency fee or otherwise, the landlord's surveyor will be keen to progress the negotiation and the tenant is often reminded that they should respond to the claim within 56 days. This is not strictly correct.

The Dilapidations Protocol is not mandatory but advises:

This protocol sets out conduct that the court would normally expect prospective parties to follow prior to the commencement of proceedings. It establishes a reasonable process and timetable for the exchange of information relevant to a dispute, sets standards for the content and quality of schedules and Quantified Demands and, in particular, the conduct of pre-action negotiations.

The Protocol is guidance as to what should generally be considered to be reasonable conduct and it recommends that the tenant should respond within a reasonable time, suggesting that this will usually be within 56 days.

The Protocol specifically refers to "negotiations" and indeed has a complete section dealing with "negotiations" (section 7) reinforcing the preconception that dilapidations is about a process of negotiation.

Tenants should not feel under pressure to rush into responding because of the Protocol. In most cases the Protocol is of no practical relevance at all because it only really comes into play when the court, after having had a trial and given judgment, then comes to consider the question of costs and conduct.

Tenants and their advisers should keep in mind question 3) above.

Tenant due diligence

If the landlord cannot persuade the tenant to open their purse, then their only option is to go to court. To do this they need a claim that is well prepared, credible and based upon good evidence and sound legal principles. Their expert witness(es), in formulating the claim, need to ensure that they have properly applied the principles of contractual interpretation laid down by the courts over the years. Having properly interpreted the contractual obligations, such as the contractual standard of repair, the landlord's expert witness(es) need to be sure as to the contractually compliant condition and configuration of the property at lease end. They then need diligently to inspect the property and collect detailed evidence, in order to opine on the extent of breaches of contract.

Having identified the breaches of contract, they can then apply their expertise to setting out their opinion, as experts in their field, as to what works are required to remedy the breaches of contract and what this will cost.

Armed with the advice of their expert witness in building surveying (and perhaps other disciplines such as M & E Services) the landlord can then take valuation advice to consider whether there is any cap on their damages claim consequent upon the application of s18 of the Landlord and Tenant Act 1927.

Having done all of this, the landlord can then set out and substantiate their claim for damages properly recoverable at law in respect of breach of contract.

Upon receipt of a claim, a tenant would be well served to take stock of that which is presented to them; rather than just launching into a response and negotiation, they should undertake some basic due diligence to examine whether the claim as presented will actually stand scrutiny at court.

They would also be well served to undertake some form of risk assessment as to the landlord's appetite for litigation.

If they conclude that the claim as presented is not sufficiently credible as to be able to be placed before a court, or the landlord does not have the will to take them to court, the tenant might ask themselves what is the hurry?

Certainly, before rushing into

negotiation, the tenant should be checking carefully that which is presented to them, because if it is not credible (in whole or in part), then why should they even take up time and expense in a detailed response and then negotiating against something that would not stand up in court?

The Protocol does not actually require a response to the schedule of dilapidations.

Section 5 of the Protocol details the recommendations in terms of responding to any claim and provides as follows:

> 5.1 The Response is not intended to have the same status as a defence in proceedings
> 5.2 The tenant should respond to the Quantified Demand within a reasonable time. This will usually be within 56 days after the landlord sends the Quantified Demand
> 5.3 Where appropriate, the tenant should respond using the schedule provided by the landlord. The Response should be set out in sufficient detail to enable the landlord to understand clearly the tenant's views on each item.

The obligation is to provide a response to a Quantified Demand.

Paragraph 4 of the Protocol sets out the requirements of a Quantified Demand:

> 4.1 The Quantified Demand is not intended to have the same status as a statement of case in proceedings
> 4.2 The Quantified Demand should:
> 4.2.1 set out clearly all aspects of the dispute, and set out and substantiate the monetary sum sought as damages in respect of the breaches detailed in the schedule as well as any other items of loss for which damages are sought. It should also set out whether VAT applies
> 4.2.2 confirm that the landlord and/or its surveyor will attend a meeting or meetings as proposed under section 7 below
> 4.2.3 be sent within the same timescale for sending the tenant a schedule; and
> 4.2.4 specify a date (being a reasonable time) by which the tenant should respond. This will usually be within 56 days after sending the Quantified Demand.
> 4.3 Where the monetary sum sought is based on the cost of works, it should be fully quantified and substantiated by either an invoice or a detailed estimate
> 4.4 If the Quantified Demand includes any other losses, they must be set out in detail, substantiated and fully quantified. The landlord should explain the legal basis for the recovery of losses, e.g. whether they are sought as part of the damages claim or under some express or implied provision of the lease
> 4.5 The figures set out in the Quantified Demand should be restricted to the landlord's likely loss. This is not necessarily the same as the cost of works to remedy the breaches
> 4.6 The Quantified Demand should not include items of work that are likely to be superseded by the landlord's intentions for the property
> 4.7 If the landlord's surveyor prepares the Quantified Demand, the surveyor should have regard to the principles laid down in the RICS' Guidance Note on Dilapidations.

The first and most important piece of due diligence that a tenant should undertake is to consider whether the claim documents that they have been served with actually include a Quantified Demand. It is not uncommon to see at the end of a schedule of dilapidations a single page headed "Quantified Demand" which in reality does nothing more than set out the total cost of works claimed, adds some percentages on for preliminaries, overheads, profit, contract administration, etc., includes sums for professional fees, and then has numerous other items marked as "TBC".

In short, there is no document served that actually sets out clearly all aspects of the dispute and sets out and substantiates the monetary sum sought as damages in respect of the breaches detailed in the schedule, as well as any other items of loss for which damages are sought.

In the absence of a Quantified Demand in accordance with the provisions of paragraph 4 of the Protocol, the obligation to respond at paragraph 5 is not triggered, so rather than rushing into instructing a surveyor to respond to the schedule of dilapidations and then to negotiate, the tenant would be well served in the first instance to invite the landlord to try again and set out their claim properly. Only when this has been done is the tenant able to evaluate the claim for damages and to formulate a response.

Tenants (or those advising them), when considering claim documents presented by a landlord, might usefully ask themselves some or all of the following questions:

a. Do the documents served set out clearly all aspects of the dispute?

b. Do they set out and substantiate the monetary sum sought as damages in respect of the breaches detailed in the schedule?

c. Do the claim documents include claims for any other losses and if so, are they set out in detail, substantiated and fully quantified?

d. Does the landlord explain the legal basis for the recovery of losses, e.g. whether they are sought as part of the damages claim or under some express or implied provision of the lease?

e. Is the monetary sum sought based on the cost of works and if so, is it fully quantified and substantiated by either an invoice or a detailed estimate?

f. Are the figures set out in the Quantified Demand restricted to the landlord's likely loss?

Experience of dealing with many claims for tenants over the years shows that landlords are often very lazy and slapdash in the preparation of the documents that they produce, cutting corners but not really bothered because they anticipate that the tenant will just play the age old game and pass the documents to a surveyor to negotiate a cash payment. This works for landlords for so long as the tenant will play that game, but what if they will not?

What if a tenant faced with a poorly prepared claim just ignores the landlord, or even tells them to "get lost" and they aren't going to waste any time on it?

What can a landlord do with a tenant that will not engage and respond? They could actually take the time to do the job properly but that costs money. They could put the claim into court. That too costs money and also requires them to prepare their claim properly, because someone is going to have to sign a statement of truth to that claim, stating that they believe that the facts stated in the particulars of claim are true and that they understand that proceedings for contempt of court may be brought against anyone who makes, or

causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Whoever will sign the statement of truth needs genuinely to believe that the sum they say is due and owing as damages is properly recoverable as damages at law. That will be a challenge in relation to a claim based on a schedule that throws in everything, including the kitchen sink, so as to provide a start point for the landlord to negotiate from.

If the landlord is foolish enough to put a claim into court that is not substantiated, then if the tenant calls their bluff and is prepared to run the case to trial, things could unravel spectacularly for the landlord or rather their expert witness(es) in the witness box under cross examination. There are stark examples in the law reports where, for example, a lack of evidence has led to the downfall of the landlord and their claim along with humiliation for their surveyor expert witnesses.

Conclusion

Any tenant in receipt of a claim for damages for breach of contract arising from the repairing, reinstatement, decorating and other covenants in a lease would be well advised in the first instance to take stock of what they have been served with. They should critically examine the claim documents and consider whether in fact they do actually present a credible, coherent legal claim for damages.

If they conclude that they do not, then rather than rushing into cobbling together a response and then haggling a payment to the landlord, they may better be served by inviting the landlord to do the job of setting out their claim properly. The tenant should not be wasting time and expense in dealing with claims which are poorly prepared and lacking substantiation.

If the landlord is not prepared to do that then they cannot credibly threaten the tenant with court action. If they cannot make any credible threat of court action, there is no reason for the tenant to take time and incur expense with the claim. The primary motivation for tenants to negotiate a settlement of any claim is because if no settlement is reached, the tenant is at risk of the landlord doing something more painful and expensive to them. In short, they don't want to go to court. But if the landlord presents a poor claim, it can be better in the long run for the tenant to test the landlord in the context of court proceedings, rather than just throwing money at the problem.

While the answer to question 3) above may be difficult to establish, the one person who does know it is the judge. It is the landlord that bears the burden of proving it.

Tenants and their advisers would be well served to keep this in mind so as not to be fools rushing into negotiation where those more sophisticated in their approach to the analysis of claims might fear to tread.

With this in mind it is not unusual to find that the cost of remedying each of the breaches is a conveniently round number.