Principles of loss and recovery

Dilapidations In the second part of an article on the sixth edition of the RICS Guidance Note, the extent of its guidance on loss and liability for costs is considered

Part 1 of this article (EG, 14 July pp72-74) examined the "best practice" guidance set out in the sixth edition of the RICS Dilapidations Guidance Note (the Guidance Note) on the role of the surveyor, the CPR framework, the taking of client instructions and surveyors' fees. This article concludes the review by considering the adequacy of the Guidance Note on the common law principles of loss along with liability for, and recovery of, costs.

Common law principles of loss

Dilapidations claims are no different to any other claim for damages in respect of alleged breach of contract. They are claims by one party against another in which it is alleged that the second party has breached the terms of a contract and as a consequence the first party has suffered loss. In order to properly advise on the quantum of damages in such claims, the surveyor should have an understanding of the basic principles relating to breach of contract claims.

The Guidance Note, however, does not offer clarification in relation to the common law principles of loss, ie what a surveyor needs to know to enable him to understand the effect of each lease covenant. It is right to question how the "best practice" guidance has, over a period of 16 years, neglected to convey the fundamental common law principles of loss set out in *Ruxley Electronics and Construction Ltd* v *Forsyth* [1996] AC 344.

Ruxley establishes that a dilapidations claim and CPR Dilapidations Protocol "quantified demand" can only legitimately claim the "cost of works" measure as being the "true" measure of loss if:

a) there is a genuine intention to undertake the works; and

b) the cost of the reasonable works is not "grossly disproportionate" to the benefit achieved.

Unless these criteria are met, the true loss should be measured/claimed/demanded on the "diminution" measure, ie damage to the reversionary interest.

This relatively straightforward concept should have been included in the latest edition of the Guidance Note. An opportunity to help reduce instances of surveyor-led "reckless" claims based purely on the estimated cost of works measure was missed. The basic principle is that the diminution measure should be adopted as the default measure of loss when assessing a tenant's liability unless and until the landlord can evidentially substantiate intention, reasonableness and proportionality in support of a cost of works measure claim. This should not fall to be addressed solely by counsel in the cases that proceed to trial, but rather is fundamental to the process engaged in by any professional formulating a claim by preparation of the initial schedule and quantified demand at lease end.

The consequence of such an omission in best practice guidance is that, in many instances, the appointed surveyor will lack the knowledge to perform the services for which he is engaged in a professional and competent manner and could therefore expose his client to a risk of engaging in disputes and litigation on a false premise. Alternatively, surveyors may feel pressure to "negotiate" because they are unable to properly advise on the legal position.

Costs

Section 4.3 of the Guidance Note provides guidance in relation to the recovery of surveyors' fees:

> "In default of contractual and or statutory rights to recover fees, the landlord may be entitled to recover such costs as part of its claim to damages, but should seek appropriate legal advice before attempting to do so".

This guidance is misleading and incomplete and the Guidance Note should have incorporated the conclusions reached in *PGF II SA and another* v *Royal & Sun Alliance Insurance plc and another* [2010] EWHC 1459 (TCC). *PGF* considered whether, as a general principle, fees incurred by the landlord for preparing and serving a schedule of dilapidations can be recovered from the tenant. HH Judge Toulmin CMG QC concluded:

> "there was no reason why a reasonable sum should not be recovered from the tenant for serving the schedule at the end of the lease when the schedule was required as a direct consequence of the tenant's breach of covenant."

The judge commented further in relation to the costs incurred by the landlord following the service of the schedule and observed:

> "subsequent costs may be recoverable in litigation… and are in any event a matter for later assessment."

Costs liability is a major risk for clients who, in the early stage of any dispute, could be entirely reliant on the advice of a surveyor as to tactics and strategy. Surveyors all too often make claims for pre-action costs by misrepresenting them as "damages", thus leading their client into entrenched disputes when opposing parties take issue with the unjustified and erroneous demands. The Guidance Note should better reflect the common law position and the issue of costs should be a key part of this. The Guidance Note could provide clarity on costs as follows:

Phase 1 – Fees and costs for preparing and issuing the schedule

Reasonable costs are recoverable either pursuant to a specific lease clause or as a direct consequence of the tenant's breach and are therefore recoverable from the tenant as a head of damage.

Phase 2 – Costs incurred after sending the schedule of dilapidations to the tenant

As a general principle, costs, including surveyor's fees, are not recoverable by a party who prepares for litigation that is never commenced. It would be useful to include specific reference to CPR 44.12A, which provides that where the parties to a dispute have reached agreement on all issues, including which party is to pay costs, but have up to that point failed to agree the amount, then the parties can have those costs determined by a court.

Phase 3 – Recoverability of costs

After the issuing of court proceedings, the provisions of the CPR will dictate the principles applicable to the recoverability of, and liability for, costs.

Share your thoughts

The provision of guidance on dilapidations is an evolving process. This article has highlighted a number of areas of RICS guidance that would benefit from further discussion and peer review among professionals who advise on the quantum of damages properly recoverable at law as a consequence of alleged breach of contractual obligations to repair commercial property at lease end. Participate in the debate at LinkedIn's Dilapidations Discussion Forum and Interest Group: www.linkedin.com/groups?gid=4006639&trk=myg_ugrp_ovr.

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