What?s the damage?

19 December 2017

'Supersession' is a term that can cause confusion at lease-end, so Jon Rowling clarifies matters

---

Supersession is a word that appears to mean many things to many people. It is widely used in the context of lease-end dilapidations, though, to indicate a limit on what a landlord is able to claim from a former tenant.

All lease-end dilapidations claims are damages claims; so, to understand supersession, 2 standard legal principles of the law of damages should be considered and applied, namely 'mitigation' and 'causation'.

Mitigation

A claimant ? the landlord ? should seek to mitigate its loss. If it does not do so, it is limited to claiming a sum equivalent to a mitigated position.

In a dilapidations context, the landlord should therefore not be claiming more than the cost of the most economic form of remedial works that would satisfy the obligation ? potentially, patch repairs ? even if it chooses to complete more expensive or more extensive remedial works.

Causation

A claimant needs to be able to demonstrate that any loss suffered was caused by a breach of obligation on the part of the defendant, in this case the tenant. In a dilapidations context, if the landlord undertakes the more expensive or extensive form of remedial works, the question should therefore be why it has chosen to do so.

If the answer is held to be 'because of the tenant?s breach', then there is a causal link, there is no supersession, and the landlord can properly claim the cost of the most economic form of remedial work. If the answer is held to be different ? perhaps that the market would demand that the more extensive or expensive remedial works should be carried out even if the most economic form of remedial works had already been completed ? then there is no causal link, supersession has occurred, and the landlord cannot properly make a claim.

Remedial work

A landlord is not obliged to carry out remedial work in order to make a dilapidations claim. However, if it does it will generally be in a better position, in terms of evidence, when attempting to persuade a tribunal that a loss has been suffered and that the correct measure of the loss is the cost of the works.

A landlord who does not complete remedial work is certainly not prevented from making a claim but, to demonstrate a loss, would normally need to prepare a diminution valuation prior to issuing proceedings.

When a landlord does not carry out works, the supersession argument can only be theoretical. For example, the landlord might claim ?1,000 for replacement of an item that was left in a non-compliant state; the tenant might argue that it could be patch-repaired for ?600 but that, even if it had been, any sensible landlord would then replace the item to satisfy the market?s expectations. The landlord will disagree.

How do you resolve the disagreement? Ideally there is a sensible negotiation and then settlement. If not, the parties will need to present evidence to a tribunal indicating the respective merits and costs of replacement and repair, plus evidence of the market?s and the landlord?s approach to the matter. The landlord may need to be able to justify why it has not undertaken the remedial works.

The recent case of Car Giant Ltd & Anor v Hammersmith and Fulham Borough Council [2017] EWHC 197 (TCC) involved a landlord who had not completed remedial work for six years and, despite presenting a valuation claiming a loss, was not successful in this part of the claim.

Two limbs

In England and Wales, breaches of the repair obligation are also subject to section 18(1) of the Landlord and Tenant Act 1927 , which is generally regarded as having two 'limbs'.

The first requires a calculation to identify the diminution ? reduction ? in the value of the premises caused by the failure to undertake repairs in the most economic form.

The second limb is generally regarded as relating to the landlord?s intentions for the premises and, in particular, when the lease term ends or ended, whether there is or was an intention to pull the premises down or make such structural alterations as to render the repairs valueless; if this is the case, no damages will be payable.

In conclusion, to help navigate the concept of supersession in lease-end dilapidations claims, the principles of mitigation and then causation should be considered. Don?t just think about what remedial work the landlord has undertaken, ask why the remedial works were required. In England and Wales, the particular features of section 18(1) should also be applied to breaches of the obligation to repair.

Jon Rowling is a technical partner at Tuffin Ferraby Taylor

Further information

- Related competencies include Legal/regulatory compliance , Quantification and costing of construction works
- This feature is taken from the RICS Property journal (December/January 2018)
- Related categories: Dilapidations