If a job?s worth doing ...

2 January 2018

Emma Humphreys reviews a recent landmark dilapidations case

It is becoming fairly rare to see a classic dilapidations case coming before the court, perhaps because clear standards for pre-action conduct and evidence are now set out in the Dilapidations Protocol .

However, the decision in Car Giant Ltd & Anor v Hammersmith and Fulham Borough Council [2017] EWHC 197 (TCC) gave an opportunity for the court to confirm the correct approach to assessing damages where a landlord has done some but not all of the repair works.

Facts

The claimants were seeking damages of more than ?400,000 from the former tenant of a commercial property comprising 39 units used as warehouses, a number of which were sublet. The 25-year lease had contained full repairing covenants, including one to yield up the property in good and substantial repair.

The parties agreed that the tenant?s breaches of these covenants when the lease ended in February 2011 would cost ?402,887.86 to remedy. By September 2016, remedial work costing around ?170,773 had been carried out at the premises by the claimants.

The tenant argued that the dilapidations claim was limited to ?110,000 by section 18 of the Landlord and Tenant Act 1927 ; this imposes a ceiling on damages recoverable for a disrepair claim, so a landlord cannot recover more than the amount by which the value of its interest has been reduced as a result of the relevant breaches.

Appropriate approach

The court stated that the correct approach to this type of dilapidations claim is to identify the breaches and the works that the tenant should have undertaken to remedy them before considering the section 18 ceiling and valuing the damage to the landlord?s interest as at the end of the tenancy.

The court also confirmed that this valuation should be reached by comparing the hypothetical value of the premises had they been returned in the condition required by the tenant?s covenants, and the value in their actual state and condition.

Looking at the pertinent case law, the court noted that:

- where the relevant work has been carried out by the landlord, those costs should be used as a guide for the damage to the reversion
- where a landlord can clearly demonstrate that it intends to do the repairs, then in

practice the burden of proving whether the damage to the reversion is less than the cost of the works may shift to the tenant

- a failure to undertake the repairs may indicate that they are unnecessary and that damage to the reversion should not be inferred from them. However, there might be explanations for the failure, such as the landlord deciding to sell the property at a lower price rather than undertake the repairs itself.

Decision

The above principles were relevant in Car Giant because only some of the repairs had been done by the claimants.

A landlord cannot recover more than the amount by which the value of its interest has been reduced

The court reduced the cost of this work under consideration ? ?170,773 ? by ?10,000, which was deemed the amount that the hypothetical purchaser might reasonably expect to recover in due course from the subtenants still in occupation of the various units towards repairs. After allowing recovery for financing costs of ?5,000 based on the claimants? actual expenditure, this led to a diminution in value calculation of ?166,000, rounded up.

Turning to the repairs that had not been undertaken by the claimants, the court felt that it could not take account of these additional elements when deciding on the diminution in the value of the reversion, since there was no evidence to suggest that this value had been reduced by the outstanding works.

In particular, the claimants had not explained the six-year delay in undertaking these repairs, and there was no evidence that the remaining work would ever be carried out, neither that the outstanding repairs were serious or substantial. Indeed, the court noted that the claimants appeared to have undertaken such repairs as were required to obtain market value for the units.

The court therefore concluded that the damages for the tenant?s disrepair should be limited to ?166,000. It also awarded interest at 1% above base rate and fees of ?13,125 incurred in the preparation and service of the schedule of dilapidations, claim summary and drainage report.

The claimants suffered on costs in a separate judgment in the same case, not least because the tenant had made an offer under Part 36 of the Civil Procedure Rules well before trial to pay ?250,000 in damages. The claimants? costs recovery before this offer was reduced to 50%, and the tenant was awarded its costs from the date of the offer was made.

Emma Humphreys is a partner at Charles Russell Speechlys

Further information

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

- Related categories: Dilapidations