



DILAPIDATIONS: PRE-ACTION PROTOCOL

'More said, soonest mended'

When a commercial tenancy is coming to an end, the landlord's building surveyor will prepare a terminal schedule of dilapidations to be served on the tenant a few months before the tenancy ends or soon thereafter. The tenant will instruct its own building surveyor to consider the schedule, meet with the landlord's surveyor to agree the remedial works required and the cost of those works.

However in most dilapidations claims, the issue is whether the landlord has in fact suffered any loss to its freehold reversion due to the tenant's breach of covenant to repair. This loss will depend on a number of factors, not least what the landlord's intentions are concerning the premises; that is, does the landlord intend to carry out the repairs? Thus a number of months down the line after the service of the schedule of dilapidations, the parties may still be without the relevant information which allows for meaningful settlement negotiations.

In the meantime, the tenant will be well advised to obtain a valuation expert's opinion on any diminution to landlord's reversion because of the disrepair. This expert may need to be guided by the landlord's legal advisers.

In order to obviate the difficulties outlined above, and keeping in mind the ethos behind Lord Woolf's introduction to pre-action protocols, that is that where ever possible disputes should be resolved without litigation, the Property Litigation Association's ("PLA") law reform sub-committee has drafted the pre-action protocol for dilapidations. The protocol has been agreed with the Royal Institution of Chartered Surveyors, ("RICS") and is expected to form part of the RICS' Guidance Notes to surveyors dealing with dilapidations disputes. It is anticipated that the protocol will become a protocol under the Civil Procedure Rules.

The requirements of the protocol encourage

the parties to provide and exchange full information in relation to the landlord's potential claim, thus allowing for early negotiations and settlement to the satisfaction of both parties without the need for litigation. This means that the parties will require expert and legal advice before a claim for dilapidations is made. The professional advisers will not only need to be aware of the requirements of the protocol but will also need to work together to be able to comply with these requirements. A need for such an all-round service to clients in dilapidations and other claims arising out of the landlord and tenant relationship has been recognised by the profession. For example, FPD Savills have recently formed a consultancy, which brings together a combination of expertise to sort out dilapidations and other problems.

Although the protocol has not yet been adopted under the Civil Procedure Rules, it is recommended that parties adopt the pre-action protocol drafted as the normal reasonable approach to pre-action conduct as this may be relevant on the issue of costs.

A fuller text of the draft protocol can be found on the CEP's website. Briefly some of its requirements are:-

The Schedule

The landlord must serve a schedule in the form annexed to the protocol, (which has also been agreed with the RICS.) within a reasonable time after the termination of the tenancy, (generally not more than two months after termination of tenancy).

The landlord can serve the schedule before the termination of the tenancy. This is particularly sensible where the landlord is seeking reinstatement and the lease requires notice of reinstatement to be served before the tenancy ends.

The schedule should include details of the breach, the remedial works required, the

landlord's costings, and breaches of other obligations.

The Claim

A separate document from schedule. Claim to contain full details of landlord and tenant, summary of facts, and (if based on costs of works) supporting evidence. All aspects of costs claimed to be set out, and timetable for negotiation to be proposed.

Valuation under Section 18(1)

Must be provided by the landlord if he does not intend to carry out the work. Should be provided where works not carried out, but landlord intends to carry them out. Not required if landlord has done the works.

Tenant's Response

Tenant must respond within reasonable time (protocol recommends two months) and must present the tenant's view on each item in the landlord's claim. If tenant intends to rely on section 18 it must say so and provide valuation. If no section 18 valuation has been provided by landlord, landlord can be asked to disclose documents relevant to its intention to carry out works.

Disclosure of documents

Disclosure will be limited to the documents required to be enclosed within the claim letter and the tenant's response. Either party can make an application for pre-action disclosure under CPR Part 31 if required.

Negotiations, Review and Stocktaking

Protocol anticipates without prejudice meeting on site no later than one month from tenant's response with a view to reviewing schedule and narrowing issues. Further meetings if required. Proceedings only after protocol exhausted without settlement.

For further information please contact **Chan D'Souza** of the Property Litigation team on chandsouza@cep-law.co.uk

The Late Payment of Commercial Debts (Interest) Act 1998 : final stage



We have commented previously on the earlier steps of this Act. Since November 1998, when the Act came into force, small firms have had a statutory right to charge large businesses interest for late payment. The second phase of the legislation came into force on 1st November 2000 and that has allowed small businesses to charge each other statutory interest for the late payment of commercial debts. A small business is defined as having 50 or fewer employees to qualify under the Act.

The final phase of the late payment legislation, known as Late Payment of Commercial Debts Regulations 2002 ("the Regulations"), came into force on **7 August 2002**. This now means that all businesses including the public sector will be able to claim interest from all businesses and the public sector on debts incurred under contracts agreed after this date.

The current rate of late payment interest is 12%, current Bank of England base rate (4%) plus 8% (both of these rates are subject to change).

There will be two dates on which interest will be calculated: 30 June and 31 December.

- The Bank of England base rate on 31 December will be the "reference rate" for late payment interest calculations for the period 1 January to 30 June; and
- The Bank of England base rate on 30 June will become the "reference rate" for late payment interest calculations for the period 1 July to 31 December.

To determine the interest rate to be used when calculating interest on a late payment, 8% is added to the "reference rate" that covers the six-month period in which the debt became due.

Where no credit period is defined in a contract, or no written contract

exists, the Act sets a mandatory default credit period of 30 days from delivery of the invoice and interest can be claimed after that period.

Once statutory interest begins to run, the creditor is also entitled to claim a fixed sum (in accordance with Section 5A of the Regulations) for compensation in respect of debt recovery costs and this entitlement to compensation does not prevent the usual costs being recovered in any court proceedings. The statutory compensation can be recovered together with late payment interest and the fixed amount recoverable is as follows:-

- for a debt less than £1,000, the sum is £40;
- for a debt of £1,000 or more, but less than £10,000, the sum is £70;
- for a debt of £10,000 or more, the sum is £100.

At present, the usual practice is of course to claim statutory interest at 8% per annum on the issue of proceedings from the date on which the debt became due until payment. Following the implementation of the final stage of the Act, we recommend that, where applicable, demands for late payments for debts due on contracts made after 7th August 2002 should include a claim for:

1. interest pursuant to the Act; and
2. a fixed compensation fee pursuant to the Late Payment of Commercial Debts Regulations 2002.

*If you have any questions about this new legislation, or if we can assist in the recovery of debts owed to your business please contact **Tom Murphy** (e: tommurphy@cep-law.co.uk) or **Sherrie Okuns** (e: sherrieokuns@cep-law.co.uk) of our Commercial Litigation Group.*

ADDITIONAL PROFESSIONAL INFORMATION

We also have on our website the following articles:

- **Tim Bartlett** on the need to register land in the light of the Land Registration Act 2002
- Another article by Tim on the essential requirement to challenge adverse possession if your ownership of land is not to be put in jeopardy
- **Nicky Waldman** head of Private Client has written on the principles that apply in deciding whether charity trustees can receive payment from their charity
- **Susie Fritsche** of the Property Litigation team sets out what stamp duty is payable on residential tenancy agreements.

A LIGHTEARTED LOOK AT COMPUTERS

Why Computers Sometimes Crash

(Read this to yourself aloud, if you can!)

If a packet hits a pocket on a socket on a port,
and the bus is interrupted at a very last resort,
and the access of the memory makes your floppy disk abort,
then the socket packet pocket has an error to report.
If your cursor finds a menu item followed by a dash,
and the double-clicking icon puts your window in the trash,
and your data is corrupted cause the index doesn't hash,
then your situation's hopeless and your system's gonna crash!!
If the label on the cable on the table at your house
says the network is connected to the button on your mouse,
but your packets want to tunnel to another protocol,
that's repeatedly rejected by the printer down the hall,
and your screen is all distorted by the side effects of gauss,
so your icons in the window are as wavy as a souse;
then you may as well reboot and go out with a bang,
'cuz sure as I'm a poet, the sucker's gonna hang!
When the copy of your floppy's getting sloppy in the disk,
and the macro code instructions cause unnecessary risk,
then you'll have to flash the memory and you'll want to RAM your ROM.
Quickly turn off the computer and be sure to tell your Mom!
WELL! That certainly clears things up for ME.



KEEP YOUR SOLICITOR ON THE STRAIGHT AND NARROW

The property industry is beginning to take note of the fact that the conventional method of settling heads of terms on commercial lettings often results in delays and increased costs: hence the updating of the guidelines under **the Code of Practice for Commercial Leases in England and Wales**. The reason is that very often surveyors, landlords and tenants take too an simplistic approach in agreeing heads of terms and do not go far enough. Consequently the landlord's solicitor in drafting the lease may, after the negotiations, either refer back to the landlord or its surveyor for clarification, or possibly fill in the blank spaces without referring back at all. As a result the first draft lease can, and often does, get the transaction off onto the wrong foot simply because, where there are no clear instructions or where matters of details were not even discussed in the early stages, the landlord's solicitor is invariably going to draft the lease in favour of the landlord. Once this has happened and contentious terms are put on paper there is psychological resistance to change them; this may result in the draft going backwards and forwards several times, whilst opposing solicitors try and score points. A classic example of this is where the landlord has agreed a short term letting, (i.e. five years or less) and in the absence of clear instructions the solicitor produces a comprehensive form of lease for the landlord's building incorporating full service charge recovery. The tenant does not want to pay long-term capital expenditure for a short term lease, whilst the landlord wants a standard lease for each, and every tenant, irrespective of the length of the term. As a result the solicitors lock horns and before you know it several weeks (and several drafts) later, one or other of the parties has to bite the bullet and compromise, or alternatively, the

parties agree a cap on the service charges. The tenant is not going to be hit for one-off major capital expenditure items, and the landlord keeps the standard lease. The parties have however had to pay their lawyers to sort out something that really should have been agreed at the outset.

It has to be said that sometimes this issue is addressed in the initial negotiations, but very often a tenant is not fully aware of the implications until the repairing obligation, or service charge provisions are explained. Hence the Code recommends amongst other things that:

- (1) landlords and tenants should negotiate the terms of the lease openly, constructively and considering each other's views
- (2) the tenant's repairing obligations, and any repair costs included in service charges, should be appropriate to the length of the term and the condition and age of the property at the start of the lease

There are numerous other examples where extra time spent at the negotiation stage would have saved time and expense in the long run. Clearly it pays the landlord and the tenant to understand and agree matters of detail from the outset. They are after all paying their surveyors to agree terms and their solicitors to implement them.

As the Code puts it:

"Parties intending to enter into leases should seek early advice from property professionals or lawyers".

How could we possibly disagree?

Richard Lester (richardlester@cep-law.co.uk) or any other member of the Property team will be pleased to discuss further.



CHRISTMAS HOLIDAYS

The offices of Cumberland Ellis Peirs will be closed on the following days:

Tuesday, 24th December

Wednesday, 25th December

Thursday, 26th December

Friday, 27th December

Wednesday, 1st January 2003

A Happy Christmas to all our readers.

INFORMATION SHEETS

We have produced a number of information sheets across a range of subjects. The idea is that these will acquaint clients with the basic principles of a particular topic, as a lead-in to more detailed discussion if required. Topics so far covered include Family, Employment, Private Client, Commercial and Property.

Copies can be obtained via our website or from your usual contact.

ART EXHIBITION

In November we hosted our annual Art Exhibition. The exhibitors this year were Rose Eva (sculptor) sister of our managing partner Suzanne Eva, Denis Kelly (watercolour artist), and Lou Sexty (contemporary artist). Spread over three nights, the show was enjoyed by more than 200 guests. Our thanks to Barry Jameson, Susan Pape, Susan Barraclough and Hayley Pritchard the main organisers of the event, not forgetting many others who assisted on the nights.



John Sharman

We said goodbye with sadness at the end of October to **John Sharman** on his retirement. John joined Darley Cumberland in 1971 as a partner shortly before his father's firm (Reid Sharman & Co) amalgamated with Darley Cumberland. He remained a partner in that firm and with Cumberland Ellis Peirs until he became a consultant in 1998. John dealt for 31 years with some of our longest established private clients, doing their conveyancing, dealing with their wills and probate and setting up and administering trusts, and generally performing the functions of a valued family solicitor. His astonishing record of attendance (no-one can remember him ever being ill), his encyclopaedic memory and unswerving loyalty to the firm will be greatly missed, as will the peals of laughter that erupted from his room as he saw the lighter side of things.

John acted for many years in an advisory capacity for a number of museums, particularly the National Maritime Museum, and he will continue his association with them in retirement. May it be a long, happy and healthy one so that he can continue to lead the Editor on our annual walks over moorland peat and bog.

Welcome

In the last few months we have welcomed four new arrivals.

Matthew Sabey is an assistant solicitor in the Private Client department who came to us from Pictons (a north London firm). Matthew's interests include arts, theatre and particularly

music, and the outdoors. He is currently learning Spanish (and claims to be reasonably competent).

Phil Limbrey (brother of Edward) has arrived as our IT expert to cope with the increasingly involved task of maintaining and updating all aspects of our system. Phil enjoys following Wolverhampton Wanderers, playing football & squash, and is a self-confessed armchair lover of most sports. Other interests include mountain biking, hiking & camping, photography and black & white processing.

We also welcomed our new trainees **Laura Nicholson** and **Joanna Kay** who joined us in September. Laura who has started her training in Private Client enjoys playing saxophone, exercise, cooking, James Bond films and spending time with friends. Joanna is with the Property department. Her interests include travelling abroad (Peru and Bolivia last summer), playing the flute, skiing, swimming and voluntary work with children in England and America.

Goodbye: members of the firm to have left us recently are Margaret Dowdles, Edward Limbrey and Sheree Mummery. We wish them all the best for the future.

Congratulations to our latest group of trainees to qualify as solicitors: Andrea London, now an assistant with Property Litigation, Raj Koria now with Company Commercial and Edward Limbrey (seeking his fortune in Australia).

Social

Another MacMillan Cancer Relief Day in September. Thanks to Katie Adkin and the others who organised it.

A very successful pool night (Minnesota Fats, not Esther Williams) was arranged by Andrea London at the King George pub, where a distressingly large number of people showed evident signs of a misspent youth.

In the annual softball match with Cooper Lancaster Brewers we were beaten by one run, a considerably better result than last year. We were handicapped by injuries to Richard Lester and Michael Jaques, lack of knowledge of the rules and the fact that the other side both scored and umpired. Despite this we remain on excellent terms with CLB (see photo below).

Unfortunately the advertised cricket match with stockbrokers Gerrard had to be cancelled (as the opposition could not field a full team). We claim a moral victory.



The views and recommendations in this publication are those of Cumberland Ellis Peirs and have been obtained from a variety of sources. Whilst we believe that our sources are reliable, we cannot guarantee that the information in this publication is accurate and it may be condensed or incomplete. No responsibility can be accepted for the accuracy of the information in this newsletter and no action should be taken in reliance on it without advice.

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