New requirements on dilapidations

In the four years since the last edition of the RICS Dilapidations Guidance Note was published we have seen a dramatic downturn in the UK economy. As is usually the case in times of recession, this has also led to a significant increase in the frequency of dilapidations disputes, exacerbated by high street closures, a spate of 25 and 15 year lease expiries and the trend for shorter lease terms.

Leases are, by their very nature, open to contention on the basis of interpretation and the prevailing economic environment has led to a greater to dispute lease end costs.

I’m sure many would observe that what is on the face of it quite a "dry" subject can in fact inflame very passionate views! Some would argue that this 6th Edition is somewhat overdue, however it will no doubt be generally appreciated that very wide consultation has been necessary prior to going to print, particularly as it was essential to inextricably ally it to the adoption of a formal legal protocol for the conduct of cases prior to litigation under the Civil Procedure Rules (CPR). The Ministry of Justice finally passed the Dilapidations Protocol for use at the beginning of this year and it is very important that practitioners now refer to the latest version of the Protocol.

It is undoubtedly the case that the risks of straying from the principles now laid down in both these documents, for clients and their advisers, have never been greater. The courts have wide powers to financially penalise any party that is not adjudged to have conducted itself in the spirit of the CPR.

The following outlines some of the key points of the new Guidance Note:

**Reasonable Conduct**

Parties in a dispute are expected to act reasonably by carefully setting out their respective positions and making genuine endeavours to settle the matter in a manner that is proportionate to the sums of money at stake. The role of the surveyor in this process is dealt with in detail at part 2 of the Guidance Note. It makes it very clear that surveyors instructed prior to the onset of litigation (as an adviser) are not subject to any of the court's rules and procedures unless and until they are instructed to provide evidence in ongoing litigation. This is very distinct from that of an "expert witness". Crucially however, any litigation that may proceed following a failure to achieve a negotiated settlement carries with it the danger of a heavy costs order against the party who exaggerates or understates its position. It is absolutely vital therefore that surveyors act with all due integrity, to undertake their instructions in an objective, honest and professional manner.

**Endorsements**

The use of endorsements, not just for the landlord but also now for the tenant, is intended to underpin the principle that positions are adopted in good faith, rather than simply trying to gain an advantage in negotiations. Central to this requirement is the need for a proper understanding of the landlord's intentions for the building or demise at the end of the term. Surveyors on both sides must ensure that they make all reasonable enquiries necessary to ensure that they can properly justify their respective positions based upon the available evidence. Whether or not it will be necessary to obtain a diminution valuation (commonly referred to as a "Section 18" valuation) will depend on the specifics of each case. The provisions in this regard are set out at Sections 7 and 8 of the Guidance.
It should be noted that proceedings cannot be issued without a proper quantification of the landlord's loss, be that on the basis of the cost of the works or a diminution valuation or both. The need for proportionality on costs in seeking to conclude a deal that avoids formal legal action should not be ignored. It is just as important therefore that each party genuinely seeks to determine a resolution to such disputes at the earliest stage reasonably possible, rather than developing a preoccupation with the need to tick all procedural boxes before settlement can be contemplated.

**Recovery of fees**

Importantly, on the matter of costs, section 4 of the Guidance makes it clear that the recovery of professional fees is primarily a matter of contract under the terms of the lease. In extreme cases though there is always recourse for the landlord through the courts.

**Quantified Demand**

Another important new feature is what is now termed the "Quantified Demand" (dealt with at paragraph 7.6 of the Guidance and section 4 of the Protocol). This is a complete statement of all the costs that are sought in damages - not just the cost of the works but all other ancillary and consequential losses. The previous edition of the Guidance classified this as a "Statement of Loss". It has always been desirable for the landlord to articulate the full extent of the claim as early as possible in the process as it is important that the recipient has a clear understanding of every element that is being sought, not just part of it.

**Glossary of terms**

It was thought that the inclusion of a Glossary of terms would also be a useful addition to the new Guidance. There is perhaps a tendency amongst practitioners to sometimes refer to documents generically without recognising that certain classifications are quite strict and have a clear legal meaning. One such example is the common reference to a "Terminal Schedule of Dilapidations" that is in practice very often prepared in advance of lease expiry in order to facilitate an early dialogue regarding compliance and/or damages. However, technically it is inappropriate to refer to any schedule served during the term as anything other than an Interim Schedule.

**Avoiding the courts**

The vast majority of dilapidations claims should settle before they get anywhere near a courtroom. By discharging dilapidations claims through negotiation the professionals involved will retain the confidence of their clients who will hopefully acknowledge that their interests are being best served in this way.

At no time has this been more important than in the harsh economic environment within which we continue to operate.

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