Understanding Dilapidations Case Law

Generally speaking, judges come to their decisions based on the very specific facts of the case and the arguments presented to them by lawyers within the context of the applicable law. Whilst judgments may contain “snippets” useful for practitioners in considering different facts and circumstances, they are not generally handed down with the intention of giving guidance to practitioners, students or academics. This is true particularly in the field of dilapidations. Yet practitioners jostle to be the first to point to a newly reported case which they allege alters decades of established law. Rarely do new cases do any such thing.

Experience shows that practitioners anxiously scrutinize the latest reported case in fear they might be missing a legal trick. They then turn to websites, blogs and tweets to tell the world of their new found understanding or misunderstanding. Worse – widely circulated ‘straw poles’ seek yes/no responses to the effect of new case law upon important principles of law and practice. Whilst these practices may have no serious intention behind them, they can and do mislead inexperienced or even experienced practitioners. This is something that afflicts lawyers but it is also creeping into the practices of building surveyors and valuers in dilapidations claims. Indeed, the essential facts and circumstances of recent cases are frequently ignored as the surveyor adjusts his or her argument to a purportedly helpful sentence from the new decision.

Putting aside the question of whether property professionals have anything at all to gain by immersing themselves in case law ‘developments’, reported cases are at best of marginal value to a surveyor arguing out particular items of disrepair with his opposite number. Equally, valuers will rarely be helped by tailoring their specific exercise to fit similar valuations found in reported cases (or even worked examples in practitioners’ text books). In practice, particularly in the dilapidations field, where legal principles are well established, usually there will be little new in a recently reported judgment to alter the basic factual and opinion based exercise that is the task of the surveyor or valuer. Nowadays dilapidations cases usually reiterate established principles only and then apply them to the factually unique circumstances of the particular case. They rarely change or develop the law significantly.

The problem of property professionals misunderstanding the supposed effect of new case law has proliferated. Since the introduction of the internet, almost all high court judgments are publicly available. Whilst this can aid the practitioner, it can also lead to misunderstanding. The fact that a case has been ‘reported’ in this way does not mean it is legally significant (and this is not simply because ‘first instance’ decisions, made at trials, do not even bind high court judges dealing in future cases with similar facts).
Furthermore snippets from judgments are frequently quoted out of context, particularly in the field of dilapidations. Practitioners often fail to understand or appreciate how the facts and circumstances upon which a judgment is based are wholly unique. Wording of a lease; the physical make-up of the instant building; the precise physical state of the demised premises and the reasons for it, will rarely, if ever, match the facts and circumstances of any other claim. It should be obvious to practitioners that the fact that the roof of a shopping centre in Milton Keynes was required to be replaced in the case of *Postel Properties Ltd v Boots the Chemist Ltd* (1996) 2 EGLR 60, does not mean that the appropriate repair of another roof of another building in another geographical area will be the same. Yet the authors are aware of such extraordinary arguments being advanced. This is often the fault of practitioners anxious to quote, and often unintentionally misconstrue, judgments in the belief it assists their argument.

Judges cannot be blamed. They resist any temptation to offer general guidance to the profession. This is illustrated for example in the ‘leading’ cases on the interpretation of lease repairing covenants. One cannot take the meaning of a word in the context of one lease and attempt to apply it directly to another (see our highlighted box).

Further, judges at first instance (i.e. in civil courts below the Court of Appeal) do not like making ‘new’ law. They are nervous about appeals. So their decisions will be couched in and will purport to apply, existing principles to particular facts. Judges are aware that

- If they re-state familiar, accepted legal principles and apply them to the facts before them, they cannot be criticised by a higher court, or by practitioners and
- It is very hard to appeal pure questions of fact rather than law. So, if a judge applies existing law to the unique facts found by him, a successful appeal is less likely. The Court of Appeal will rarely interfere with a finding of fact unless there has been some serious error or misinterpretation of the factual or expert evidence.

However, it would be wrong to leave the impression that judges never intend their words to guide the reader (whoever that reader might be). Ramsey J giving recent judgment in *Hammersmatch Properties (Welwyn) Limited v Saint-Gobain Ceramics and Plastics Limited* (2013) was no doubt aware that his general principles (listed in paragraph 53) might be quoted in future dilapidations disputes. However, that would not have been his intention in compiling his ‘list’. He was flagging up that he was applying familiar principles - not altering or developing them.

Such cases in the dilapidations field are to be distinguished from certain other areas of lease law. Thus the Court of Appeal, considering in *International Drilling Fluids v Louisville Investment (Uxbridge)* (1986) landlord’s reasonableness when objecting to a proposed assignment, went out of its way specifically to lay down general
guidance for the practitioner. This guidance has been developed by later judgments in the light of later statute law, but it remains key. Such instances are rare.

Yet it would also be wrong to leave the impression that the law is not developed by the judges, particularly in the higher courts. It is. The legal tort of negligence is a classic example. But it is crucial to understand that much landlord and tenant case law represents judicial findings in the context of specific facts and other evidence before the courts. Context is all important. The findings could differ if the context differs.

It is, therefore, as stated above, in distinguishing one case from another – one judgment from another – where the true skill of the practitioner lies. But this is not the task of the surveyor or valuer. Nor anyway can this be achieved by skimming through, for example, a 31+ page judgment relating to the service charge provisions in one lease to find the quotable sentence which might support an argument in another dispute.

A final example: the sentence: "In short the works – i.e. the standard to be adopted – must be such as the tenants, given the length of their leases, could fairly be expected to pay for” must be one of the most quoted from Blackburne J’s judgment in Fluor Daniel Properties Limited and others v Shortlands Investments Limited [2001]. Reading it in isolation ignores the end of the paragraph in which the sentence appears. Thus: “If the landlord wished to carry out repairs which go beyond those for which the tenants, given their more limited interest, can be fairly expected to pay, then, subject always to the terms of the lease or leases, the landlord must bear the additional cost himself” (our underlining). Further the much quoted first sentence, which has led numerous valuers, surveyors and, it must be said, lawyers, to conclude that one should always look at all service charge items primarily (or even solely) in the context of the length of a tenant’s lease, misses the fact that it follows a quotation from another case relating to a particular scheme of works which went beyond “what was sensibly needed to cure certain physical defects in the leased premises”.

We could conclude with just one sentence: ‘Every dilapidations dispute involves unique facts/evidence.’ However, we wish to emphasise that surveyors and valuers rarely assist their clients by descending into arguments about the applicability of recent case law. Modern cases tend merely to reiterate broad guidance to practitioners, providing no more than a context in which a particular dispute can be argued out. By attempting to extend a judgment in one case to the facts and circumstances in another, practitioners can miss the practicalities of the case before them and unnecessarily cloud the issues and extend and waste costs.
One cannot take the meaning of a word in the context of one lease and attempt to apply it directly to another.

Hoffman J (later Lord Hoffmann) in *Post Office v Aquarius Properties Ltd* (1985) considered the word ‘repair’ and declared it to be ‘an ordinary English word.’

“It also contains a timely warning against attempting to impose the crudities of judicial exegesis upon the subtle and often intuitive discriminations of ordinary speech. All words take meaning from context, and it is, of course, necessary to have regard to the language of the particular covenant and the lease as a whole, the commercial relationship between the parties, the state of the premises at the time of the demise and any other surrounding circumstances which may colour the way in which the word is used. In the end, however, the question is whether the ordinary speaker of English would consider that the word “repair” as used in the covenant was appropriate to describe the work which has to be done. The cases do no more than illustrate specific contexts in which judges, as ordinary speakers of English, have thought that is was or was not appropriate to do so.”

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