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HISTORIC RECOVERY OF REPAIR COSTS AS 'JOYNER V WEEKS' IS CHALLENGED BY THE RECENT 'SUNLIFE V TIGER' CASE

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DILAPIDATIONS

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"SUNLIFE V TIGER" CASE

SUNLIFE EUROPE PROPERTIES LIMITED & TIGER ASPECT HOLDINGS LIMITED (2013)

The recent High Court decision in Sunlife Europe Properties Limited v Tiger Aspect Holdings Limited and another (2013) provides a useful reminder of the principles to be applied when setting a tenants' liability for dilapidations at the end of a lease.

Sunlife let prime Soho office premises to Tiger in 1973/1974, on fully repairing leases which expired in 2008. The tenant vacated at the end of the term leaving behind significant dilapidations, which the landlord's surveyor claimed would cost £2.42 million to remedy. Before re-letting the premises the landlord carried out a significant upgrade and refurbishment to the building. The tenant argued that had it complied with its obligations, the landlord would still have had to carry out significant upgrade works to attract a new tenant, because otherwise the premises would have only been in line with 1970's standards. The tenant contended that these improvements would 'supersede' the work that it should have carried out, the diminution in value to the reversion was only £240,000.

Sunlife was unable to agree the dilapidations settlement with Tiger and the matter progressed to Court. At trial Sunlife produced a costed schedule of dilapidations following completion of works and the total damages sought were £2.172 million (including 30 weeks loss of rent).

Tiger, by contrast, asserted that the remedial works should attribute to wants of repair amounting to around £700,000. Tiger further contended it was not obliged to pay more than £240,000, being the diminution in the landlord's reversionary interest under Section 18(1) of the Landlord & Tenant Act 1927. Tiger argued that even if the premises had been left in a good state of repair by reference to the standards at the date of the leases, the building would not have been lettable without substantial upgrade and improvement works, which the landlord had to carry out.

Tiger questioned many aspects of Sunlife's dilapidations schedule and the works performed, citing supersession on many accounts, with the removal of all associated costs from the Schedule of Dilapidations.

On the question of supersession, the Judge did not accept the fact that because Sunlife carried out more extensive work, that they would be prevented from recovering the costs of such repairs as necessary. The Judge said that the starting point was to ask whether assuming the tenant had complied with its obligations, the landlord could have let or sold the building without any significant discount on the price to reflect the actual condition.

If Sunlife had suffered a loss due to the actual condition of the building, then the supersession argument cited by Tiger would not apply and the diminution in value would ordinarily reflect the cost of putting the building back into a condition which it should have been delivered up in. However, if Sunlife had suffered no loss due to the actual condition of the building, then the Court would have been obliged to consider what works would have been required to place the premises into a condition that would secure an appropriate tenant, as per Proudfoot v Hart (1890).

When discussing supersession arguments, particularly under the first limb of Section 18(1) of the Landlord & Tenant Act 1927, the issue is often an objective one and does not depend on the works the landlord actually performs, but relates to the work that a hypothetical purchaser would factor into its bid for the reversion.

Tiger were unable to successfully challenge Sunlife's case and it was concluded that had Tiger complied with its obligations in 2008, the building could have been let to an appropriate type of tenant with only minor improvements required. The landlord was, therefore, permitted to claim damages, despite the fact that the works performed had gone beyond the tenant's obligation.

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During the course of the trial reference was made by the Judge to Ruxley v Forsyth (1996), stating that Ruxley demonstrated 'that the general rule that the cost of reinstatement is the appropriate measure of damage does not apply if the expenditure would be out of proportion to the benefit to be obtained'.

What the Courts failed to consider, was the long-standing decision under Joyner v Weeks (1891), where landlords have been able to claim for the actual cost of works performed in remedying a tenants' obligations under a lease, and such sums have rarely been challenged under any reference to Ruxley v Forsyth, as the works performed have provided prima facie evidence of the landlord's position.

In setting the level of the claim, the presiding Judge made a number of observations when considering the terminal dilapidations claim, and applied a number of principles to enable him to reach a verdict that the sum due to Sunlife totalled £1,353,253, a total just under the statutory cap as assessed by the Judge (and close to the half way point between the parties' starting positions). In reaching this conclusion, the Judge assessed the works as performed, minus those items where supersession had occurred (where relevant) and reviewed the Section 18(1) valuation methods. When analysing the S18(1) Valuations, the Judge noted that a lack of detail in the calculations made by the experts existed. In light of this, the Court was not in a position to adjust the expert's conclusions to reflect the Court's decision. This left the Court to determine the valuation question itself.

Many lessons have been learned through this case and many long-standing judgements and principles under dilapidations, in particular, the decisions under Joyner v Weeks (1891) have now been challenged. The presiding Judge's observations, when making his assessment of damages, are noted below:-

1. A tenant is entitled to choose a less costly method of complying with its covenants and this should form the starting point for any assessment of damages.

2. In the absence of any wording to the contrary within the lease, a tenant is under no obligation to deliver up to a landlord an upgraded property, including any plant and machinery. Tenants are required (depending on the wording of the lease) if necessary, to replace plant and machinery on a 'like for like basis'. The standard to which this repair is to be performed should reflect that which existed at the time the demise was originally let, and not to a condition that would be expected of an equivalent building at the time of lease expiry (albeit consequential improvements that maybe required in line with current statute).

3. The landlord cannot look to recover costs which he could have avoided (due to mitigate loss) and he cannot recover costs where works are 'disproportionate' to the benefit to be obtained (Ruxley v Forsyth 1996).

4. Where a breach of the tenant's covenants is evidenced, and the tenant is unable to challenge the breach to the contrary, it is reasonable for the landlord to be entitled to recover remedial works to remedy the breach.

5. Landlords claims for works as performed due to a breach of the tenant's covenants do not prevent the landlord from recovering the costs of such works as would be necessary, even where more extensive work (supersession) has been performed.

6. Where a covenant against making alterations exists, the tenant is not entitled or obliged to deliver up the premises with any material alterations. Tiger believed that the works performed by Sunlife were greater than that required, including making unauthorised alterations. The fact that a landlord consents to any such alteration does not affect the basic obligation, as this would be a breach of the terms of the lease.

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The case is a useful reminder that landlords and tenants must consider liabilities for dilapidations at the end of the lease in a proportionate and realistic manner, and not stick steadfast to the principle that the cost of carrying out repairs will equate to the level of the claim. It reinforces the commitment of the Judiciary to focus heavily on both the cost of repairs and valuation issues when assessing such claims.

At this time we are yet to see if the case will be challenged by Tiger, but the outcome should serve as a warning to occupiers who neglect their duties under a lease, as to do so can have expensive consequences.