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A TUFFIN FERRABY TAYLOR WHITE PAPER

JON ROWLING, JANUARY 2018

TFT TWO STEP APPROACH TO SUPERSESSION

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Step one: Mitigation: The landlord is obliged to mitigate its loss;

Step two: Causation: Did the tenant's breach cause the landlord's loss?

What is supersession?

Supersession is an undefined quasi-legal term used during dilapidations disputes to suggest that a landlord's claim should be limited or extinguished by virtue of their actions, proposed actions, or likely actions.

Examples of supersession

Circumstances whereby supersession may be relevant are, for example:

- A landlord who claims for repairs to an outdated office reception even though the landlord proposes to update the reception.
- A landlord who claims for repairs to an old air conditioning system even though the landlord proposes to replace the system for a modern equivalent.

Why is supersession complicated?

The term 'supersession' appears to mean different things to different people and often gets conflated with diminution in value (although supersession can be a relevant factor in a diminution valuation calculation).

To date there has been no means by which to evaluate supersession in a structured or logical manner. The TFT Two Step Approach to Supersession has been developed to assist dilapidations surveyors and clients in understanding and anticipating the potential impact of supersession.

RICS Guidance

Jon Rowling heads our dilapidations, service charge and dispute resolution service lines. Jon was lead author of the current RICS Guidance Note:Dilapidations (England and Wales) (7th edition) within which guidance on the concept of supersession was introduced for the first time. The guidance given in that document is based on the TFT Two Step Analysis of Supersession.

Step one: Mitigation

Mitigation is a standard legal principle applied to damages claims for breach of contract.

The claimant (the landlord in this context) is expected to mitigate its loss and claim only the loss suffered after mitigation. If a claimant fails to mitigate its loss, then the amount which can properly be claimed from the defendant is limited to the loss which would have been incurred had the loss been mitigated.

By way of example, it might be possible to repair a brick wall in a number of different ways. The cheapest way might be to re-face some of the bricks and, assuming doing so would satisfy the tenant's repairing obligation, that cheapest form of repair would represent mitigation of the loss.

However, it may also be possible to repair the wall by replacing some of the bricks, this work costing more than the former option. A claimant landlord who replaces the bricks should therefore limit any claim to the cost of re-facing because re-facing represents mitigation of the loss.

We call the mitigated works the 'Basic Works'.

We call the more expensive work the 'Fancy Works'.

Step two: Causation

Once the scope and cost of the Basic Work has been established, the second stage can be considered, namely 'causation'. Causation is another standard legal principle applied to damages claims for breach of contract.

The principle is that the tenant's breach must have caused the landlord's loss in order for the landlord to claim the mitigated cost of the remedial works.

Another way to look at this is to ask, 'why has the landlord carried out remedial works?' If the reason the landlord carried out remedial works is the tenant's breach, then the breach caused the loss and the landlord can claim the cost of the Basic Work. But, if the reason the landlord carried out the remedial works is not because of the tenant's breach (perhaps the reason is market expectations) then the breach did not cause the loss and the landlord should not be claiming anything.

Example

The tenant has a repairing obligation in relation to a comfort cooling system with R407C refrigerant; the system is out of repair and remedial works are required to put the system back into repair. The landlord proposes to replace the system.

STAGE ONE: Mitigation:It is established that the minimum scope of works which would be required to put the comfort cooling system into repair is the replacement of half of the external condensers.

STAGE TWO: Causation:The landlord should confirm why the comfort cooling system is to be replaced. Is it because of the disrepair or for another reason? The question is:

"If the tenant had replaced half of the external condensers, what would you have done to the comfort cooling system?"

If the answer is that the landlord would have done nothing to the comfort cooling system under these circumstances then the reason why the system is being replaced is because of the disrepair, there is no supersession and the landlord can claim the cost of replacing half of the external condensers.

If the answer is that the landlord would still have replaced the comfort cooling system under these circumstances then the reason why the system is being replaced is not because of the disrepair, there is supersession and the landlord should not claim for the cost of any works to the comfort cooling system.

Further assistance

If you require any help with a dilapidations claim then please do get in touch and we can help you navigate this complex area of practice. Our team of dilapidations specialists work across the UK and are supported by a team of dilapidations specialist M&E engineers.

We also offer dispute resolution options for landlords and tenant; expert determination, neutral evaluation, arbitration and mediation.

January 2018

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