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TWINMAR HOLDINGS LTD V. KLARIUS UK LIMITED & ANOR

THE COURTS GIVE USEFUL GUIDANCE IN THIS RECENT TERMINAL DILAPIDATIONS CASE.

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TWINMAR HOLDINGS LIMITED V KLARIUS UK LIMITED & ANOR

The Technology and Construction Courts recent decision in the Twinmar Holdings Limited v Klarius UK Limited & Anor (2013) shows evidence of the Courts giving useful guidance to surveyors when claiming damages for terminal dilapidations. This comes in the wake of three dilapidations judgements being published in the same number of months.

Twinmar let the 50,000 ft2 Hemel Hempstead warehouse to Klarius on 28 September 1993 following its recent construction, for a term of 25 years. The property was sub-let by the tenant to a third party between January 2005 and July 2008 and the remainder of the term saw the tenant re-occupy, prior to exercising their break clause that determined the lease on 28 September 2008.

In July 2007, after the tenant exercised their break clause, Twinmars surveyor estimated a dilapidations works cost circa £400,000 plus fees. However, following a tender process and the landlord's decision to remove items from the claim they couldn't prove were the tenant's liability, the claim was reduced to around £225,000.

Whilst many of the items within the dilapidations schedule were agreed, numerous items remained in contention, with the highest value item being the condition of the rooflights. The landlord argued that they were in disrepair and sought to recover the cost for a proprietary coating system 'Delglaze' to be applied, including all costs for associated safety netting and perimeter edge scaffolding.

The tenant argued the rooflights were not in disrepair as moss and lichen had not taken hold and they were not leaking. Common ground when dealing with such disrepair would involve the ruling of Proudfoot v Hart [1890], to keep the premises in good, tenantable repair. However, as with this case, it must be read in light of the subsequent decision in Anstruther-Gough-Calthorpe v McOscar [1924], that the repair should be judged as per the condition at commencement of the lease.

In this case the warehouse was brand new when the lease was taken, therefore the judge held that the rooflights must be in the condition in which they were in 1993; capable of letting in about the same amount of light, weatherproof and structurally sound.

The judge considered the views of both the expert surveyors working on the case and literature produced by the rooflight manufacturers during the 1980s and 1990s. The literature suggested the rooflights had a life expectancy of at least 20 years, which the experts agreed, although some loss of translucence could be expected after 10 years. He did take into account the report from the Delglaze manufacturers following their inspection in 2008, however accepted that suppliers often seek to secure a contract for the works and therefore may paint a gloomy picture of their condition.

Consequently, the judge held the rooflights were in disrepair, even though they were not leaking, due to wearing of the gel coating allowing abrasion of the surface which had significantly reduced their ability to let in light. In addition to the costs for treatment of the rooflights with the Delglaze system, the Claimant was able to recover costs for the associated safety measures, including safety netting, and agreed that cherry pickers would provide suitable edge protection for the works in this instance.

The judgement also finalised a number of other issues, including damaged external panels. The tenant argued the panels were damaged by the Buncefield explosion in 2005, however this was dismissed by the judge on the basis the property was inspected by a loss adjuster in order to identify the extent of the damage and therefore any damage would have been picked up then.

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Overall, the judge made some reduction to the claim, however the £24,200 claim for preliminaries was not reduced, on the basis the judge felt the reduction in the scale of the work, will not significantly impact the time taken to complete it. He awarded loss of rent as occupation was delayed and 12% of the awarded damages for professional fees. However, the costs for preparation and service of the Schedule of Dilapidations were reduced, as the amount sought in the schedule was significantly inflated and subsequently numerous items were removed from the actual works. Due to the delays held, interest was awarded to the Claimant at 3% above base rate.

As an interesting 'sting in the tail', one month prior to the judgement being distributed in draft, a recent winding up order was made against the Defendant (well after the trial had concluded and the submission of the parties' closing submissions). The appointed liquidator notified the court that, in their opinion, judgement should not be handed down by virtue of Section 130 of the Insolvency Act 1986. Therefore following the winding up order, no action or proceeding shall be commenced against the company or its property, except by the leave of the court. The judge disagreed with the Section 130 argument simply with the comment "I disagree" and stated he could see no reason why the judgement should not be handed down in the form prepared.

Reflecting on this case, useful dilapidations principles and determinants of disrepair have been considered:

1. Water tightness of a rooflight is not in itself, a determinant of being in repair.
2. The appropriate standard of repair must reflect the age, character and locality of the premises (Proudfoot v Hart [1890]). Although the standard of repair should reflect the condition of the premises at lease commencement (Anstruther-Gough-Calthorpe v McOscar [1924]).
3. A claim for preparation and service of a schedule of dilapidations should accurately reflect the size and nature of the works.
4. Where a company is made insolvent, this may not relieve them of all court decisions and claims for damages under Section 130 of the Insolvency Act 1986.

The case is a useful reminder that disrepair cannot always be pre-determined by obvious failure (impact damage, leakage etc) and the requirement that a Schedule of Dilapidations must be fair and reasonable from the initial claim, as stated in the latest PLA Dilapidations protocol.