Dilapidations: The landlord strikes back

Real Estate Update

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A trilogy of cases over recent years have established that tenants will only have to pay dilapidations if the landlord can satisfy them, or alternatively the court, that it intends to carry out the necessary repairs. However, in December 2015 (in @sipp Pension Trustees v Insight Travel Services Limited), Scotland’s Court of Appeal reversed this approach, uphold a lease provision that allows a landlord to recover dilapidations without demonstrating that it will actually carry out the work.

Background

@sipp Pension Trustees and Insight Travel Services were landlord and tenant of commercial premises in Port Glasgow. The lease ended in 2012 and the landlord claimed for dilapidations, which the tenant refused to pay. A court action was started and at first instance the judge found in favour of the tenant. The court held that notwithstanding the clear terms of the lease the tenant only required to pay for dilapidations where there was evidence that the landlord actually intended to carry out the work. The landlord appealed.

The issues

The appeal judges considered two issues. The first issue was whether the repairing obligations in the lease required the tenant to put the premises into “good and substantial repair” if they were not in such repair at the start of the lease. The second issue was whether a clause in the lease, which provided that the tenant would pay the landlord at the end of the lease for the cost of putting the premises into “good and substantial repair”, was effective in circumstances where the landlord may not carry out the work.

The decision

The court found for the landlord on both counts. On the first issue, it held that the “obligation to keep subjects in good and substantial repair carries an obligation to put them into that state of repair”. The tenant therefore had to bring the premises up to the required standard even if they were not in that condition at the start of the lease. In relation to the second issue, it held that the clause was truly a payment clause and the landlord was entitled to payment if the tenant did not carry out the required repairs. Whether or not the landlord intended to carry out the work was irrelevant, on the wording of the lease, and it was inappropriate to import a stipulation to that effect.

Comment

The case will be welcomed by commercial landlords. It reverses the trend which has emerged from the courts over recent years in dilapidations cases. It also suggests that where terminal dilapidations provisions are drafted as a
payment provision (and not as a claim for damages for breach of contract) they will be upheld by the court and it will be unnecessary for a landlord to demonstrate that they actually intend to carry out the required repairs to effect recovery.

View the full judgment.

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