Dilapidations case law update: Judgement continues recent trend in favour of tenants

Real Estate Update

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Introduction

This case, which was heard in the Outer House of the Court of Session by Lord Doherty, follows on from two recent high profile Scottish dilapidations cases (Grove Investments Ltd v Cape Building Products Ltd [2014] CSIH 43 and @SIPP (Pension Trustees) Ltd v Insight Travel Services Ltd [2014] CSOH 137) in which the Court favoured the tenants' interpretation of the lease.

Background

By way of background, Mapeley Acquisition Co (3) Limited (In Receivership) (Mapeley) is the owner of office premises known as Chesser House in Edinburgh. City of Edinburgh Council (CEC) were the tenant. Mapeley were seeking payment of £8,062,006.91 including £3,000,000 in relation to replacement of items of plant and equipment.

The Court's opinion was sought in relation to the construction of:

(1) a provision in the lease which gave the landlord an option to require the tenant to pay "such reasonable sum as shall be certified by the Landlord's Surveyors as being equal to the cost of carrying out [the works necessary to put the premises in the condition required by the lease]", and

(2) the extent of the tenant's obligation "to renew and replace any of the Landlord's fixtures and fittings, and the aforementioned items of plant and equipment which shall be missing, broken, worn, damaged or destroyed with others of a similar character, condition and quality and, without prejudice to the foregoing generality, to renew and replace the items which were present in the Premises at the Date of Entry with others of a character, condition and quality which...are the modern equivalents of those provided at the Date of Entry".

Mapeley's construction

In relation to (1) Mapeley sought to distinguish the two previous cases mentioned above and argued that the provision was additional to the right to claim common law damages. They argued that the wording meant that it did not matter whether or not the works were carried out, and that there was no need for the landlord to prove loss.
In relation to (2) Mapeley argued that the wording required the tenant to replace all items of plant and equipment which were present at the date of entry with modern equivalents, not just those that were missing, broken, worn, damaged or destroyed.

**CEC's construction**

In relation to (1) CEC argued that the provision entitled a landlord who had carried out or intended to carry out the works to recover the costs of those works, but it did not entitle the landlord to payment where the landlord has not undertaken and does not intend to undertake the works in question.

In relation to (2) CEC argued that this provision obliged the tenant to replace only those fixtures and fittings and plant and equipment (whether in the premises or not at the date of entry) which at termination were missing, broken, worn, damaged or destroyed.

**The decision of the Court**

Lord Doherty preferred CEC's construction of both provisions.

In relation to (1) Lord Doherty said that CEC's construction was "consonant with the common law in that it does not enable the landlord to recover notional costs which it has not and will not incur". His Lordship's view was that the landlord's construction would be a "radical departure from the landlord's entitlement at common law" and that such a departure would need to be "clearly indicated".

As to (2), Lord Doherty took a similar approach and saw Mapeley's interpretation as not being in accord with the commercial purposes of the lease, and again being a "radical departure from the common law without clear provision having been made plain that that was the parties' intention".

**Comment**

It is important to note that each case of this nature will be considered on its own merits. However, Lord Doherty's judgement highlights a trend showing the Court's willingness to interpret provisions in relation to dilapidations and recovery of sums in lieu thereof so as to accord with the principles of damages at common law (ie recovery of actual loss) restricted to works which the landlord actually intends to carry out, or has actually carried out.

See the full judgement

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