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“When faced with a damages claim for terminal dilapidations, can a tenant argue that damages should not be measured on the basis of the diminution in value but on the basis of the actual loss suffered by the actual landlord? For example, if the landlord is actually able to sell the property without any price reduction, can it still recover damages on the basis that most purchasers (but not the actual purchaser) would have sought a price discount to reflect the disrepair?”

1. The first of these questions reflects a surprisingly widespread misunderstanding about the effect on dilapidations claims of section 18 of the Landlord and Tenant Act 1927. It is not uncommon to find one or more parties proceeding on the basis that the only question they need to investigate is the amount (if any) by which the tenant’s breaches of his repairing obligations have caused the value of the landlord’s reversion to be diminished.

2. In fact, section 18 does not prescribe any special measure of damages for dilapidations. What it does, is impose a “cap” on the level of compensation that a landlord might recover. The first question to be considered is always what damages might the landlord recover using ordinary common law principles. If that amount is larger than the amount by which the breaches of covenant have caused his reversion to be diminished in value, then the most he can recover is the amount of the diminution in value. So section 18 does not excuse a landlord from proving that he has suffered loss. In this respect, he must proceed like anyone else who claims damages. The effect of section 18 is to limit the amount he can recover.

3. That is the so-called “first limb” of section 18. The “second limb” is different and more extreme in its effect, but it works in a similar way. Under the second limb of section 18, a landlord’s claim for damages will fail entirely “if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenant have been or be pulled down, or such

structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.”

4. Section 18 was enacted at a time when it was widely thought that the correct measure of damages for terminal dilapidations was the cost of putting the premises into repair. That was, or was seen to be, the effect of the Court of Appeal’s decision in *Joyner v. Weekes* [1891] 2 QB 31. It may be doubted whether the Court of Appeal actually laid down a rule for all cases. But that was the received wisdom, and it has gone largely unchallenged over the years. It was capable of producing a pretty startling result. To take the extreme example now covered by the second limb of section 18, it would be pretty odd for a landlord to recover substantial damages for disrepair from a tenant on day 1, only to pull down the building for reasons having nothing to do with the disrepair on day 2.

5. Surprisingly, the authorities do not elaborate upon why such an outcome is unattractive. But it is worth spelling it out. It is unattractive because it leaves the landlord *better off* than he would have been had the tenant complied with his repairing covenant. If the tenant had complied with his covenant, then the landlord would have been left with a useless building in good repair, needing demolition or reworking to be of any value. The fact that it was in repair would have made no difference to any of that. By breaching his covenant, the tenant leaves the landlord with the same useless building, neither more nor less useless because of the disrepair. The only difference is that in this situation the tenant is obliged to give the landlord a pot of money. Damages are thus being awarded not to compensate the landlord for any loss, but to confer on him an advantage which has nothing to do with the condition of the building.

6. *Joyner v. Weekes* has never been overruled. But it is open to serious doubt in light of the modern law. It is possible that it would not survive serious challenge in light of, for example, *Ruxley Electronics & Construction v. Forsyth* [1996] AC 344. It is possible that the common law has now developed beyond a point at which there is any need of section 18, because it is open to the Courts to apply a diminution in value approach whenever this measure most correctly identifies the actual loss suffered by a claimant.

7. Further, these and other developments have interesting implications for those cases where section 18 may work harshly upon a landlord who for some

perfectly sensible reason wants to do the repairs rather than sell his reversion. It remains to be seen whether, in a serious challenge, section 18 could really prevent a landlord from recovering the cost of repairs where it is otherwise reasonable to do them, merely because an open market sale of the reversion would not attract a discount for the disrepair.

8. The answer to the second question largely follows from the points already made. A landlord who has actually sold the reversion of a building out of repair, without doing any works of repair himself, has suffered no loss on any possible view. He cannot rely on the fact that “most” purchasers would have expected a discount, because he did not sell to “most” purchasers: he found a purchaser at a price which left him with no loss. This is an example of mitigation, or avoidance, of damage. This point should not be confused, however, with the question of how to value the reversion at the end of the lease. In that context, it is necessary to be sure that events occurring after the valuation date really shed light on the value as at that date (which may be unlikely if they were unpredictable at the valuation date). Neither should it be confused with the principle that the landlord’s arrangements with an incoming tenant are *res inter alios acta*. Neither of those topics is without controversy in itself, but they do not arise on this question.