LOSS OF RENT
IN TERMINAL DILAPIDATIONS CLAIMS

by

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1. Claims against tenants for damages for terminal dilapidations routinely include an amount for loss of rent, usually formulated by reference to the income said to have been foregone during the period reasonably necessary for carrying out the requisite repair works. In practice, such claims do not often succeed. What are the applicable legal principles?

2. As with any other head of damage for disrepair, it is necessary to look at the matter in two stages: first, to consider what is recoverable at common law; and second, to apply the statutory cap imposed by s.18(1) of the Landlord and Tenant Act 1927.

3. The well-known decision in Joyner v Weeks [1891] 2 K.B. 31 established a general principle that the common law measure of damages for disrepair is the reasonable cost of the remedial works, irrespective of whether or not that actually represents the landlord’s loss. But the same is not true of loss of rent. Such cases as there are suggest that loss of rent is only recoverable at common law where it genuinely equates to the landlord’s loss, i.e. (in the most common case) where the landlord is unable to relet the premises because of the need to carry out the repair works.

4. It follows that there must be a causal connection between the failure to repair and the loss of rent claimed (Firle Investments Limited v. Datapoint International Limited [2000] EWHC 105 (TCC); PgfII SA v Royal & Sun Alliance Insurance [2011] P. & C. R. 11 at [70]). So in Scottish Mutual Assurance Society Ltd v British Telecommunications (unreported decision dated 18th March 1994) Mr Anthony Butcher QC sitting as a deputy Official Referee said in a well-known passage:

“If the loss of rent during the period needed to carry out repairs is to figure as a head of damages in a claim for damages for breach of the obligation to carry out such repairs during the currency of the term of the lease then it is, I consider, an essential prerequisite that it should be demonstrated on the balance of probabilities that the carrying out of those repairs after the end of the term has prevented or will prevent the letting of the premises for that period.”
5. It is for this reason that claims for loss of rent generally fail in practice. In *Scottish Mutual* itself, the claim failed because the relevant market at the time (for offices in Ipswich in the early 1990s) was so depressed that it was impossible to show that the landlord would have been able to relet the premises to better advantage even if the premises had been delivered up in repair. A further example is *Marchday Group v BT* [2003] EWHC 2627 (TCC), in which it was held that there was, on the facts, no reason to suppose that the premises would have been relet any earlier than they had been even if they had been yielded up in repair.

6. The problem tends to be even more acute where the landlord carries out a refurbishment scheme which includes additional works for which the outgoing tenant is not liable. Thus, a claim for loss of rent failed in *Firle Investments Limited v. Datapoint International Limited*, the judge saying:

“It is well established that [loss of rent] may be awarded in appropriate cases but a proper causal connection must be demonstrated. If the landlord would not have been able to re-let the premises even if yielded up in repair or if, as here, the hypothetical purchaser would not have attempted to re-let until after the premises had been refurbished, no rental loss will have been caused by the breach of the repairing covenant unless the extent of the survival items [i.e. those repairs works which would not be negated by the refurbishment] was such that, had they been done, the period reasonably required to carry out the refurbishment would have been reduced. In such circumstances loss of rent over that period might well be a material factor to be taken into account when valuing the reversion. However, in this case, Mr Scarr’s oral evidence in chief was that the refurbishment contract would have taken about the same time even if the repairs which, he contended would have survived, had been carried out. Accordingly, in my judgment, no loss of rent component needs to be considered in this case.”

7. Where loss of rent is recoverable in principle, two separate components fall to be considered.

8. The first concerns the period over which loss of rent is recoverable. This will generally be limited to the time it would reasonably take to carry out and complete the works. In an appropriate case, that will include the time necessary for preparing plans, specifications and working drawings; putting the work out to tender; analysing tenders; selecting a contractor; and commencing and completing the work.
9. However, it may also be relevant to consider how much the landlord could reasonably have done before the expiry of the lease (Drummond v S & U Stores [1981] 1 E.G.L.R. 42). If, for example, the tenant has long since vacated and informed the landlord that he does not wish to renew, it may be said (depending on the precise circumstances) that the landlord ought reasonably to be in a position to start on site relatively shortly after lease expiry.

10. The general rule set out above may, however, be subject to one possible qualification. The landlord may be unable either to pay for the repair works himself or to obtain appropriate financing. Where the tenant disputes his liability for damages, the matter may not be resolved for years after the term date. Until that happens, the landlord cannot carry out the works and relet. Is he entitled to loss of rent for the whole period?

11. There is no reported case where loss of rent has been awarded for any longer period than the period reasonably necessary for the carrying out of the works. However, there is certainly something to be said in favour of the view that loss of rent ought to be assessed by reference to the longer period. A landlord in the above position cannot be said to have failed unreasonably to mitigate his loss, and to assess his claim by reference to the shorter period will be to under-compensate him for what is, on any view, a real loss. On the other hand, it can be argued that the question is not one of mitigation but causation or remoteness. So (i) the disrepair at the end of the lease cannot be said to have caused loss for any period in excess of the period necessary to put right the defects, and/or (ii) loss of rent for any longer period is not (applying the test of contractual remoteness in Transfield Shipping Inc v Mercator Shipping Inc (The Achilles) [2008] UKHL 48) a loss for which it can reasonably be supposed the tenant assumed liability when entering into the lease: at that time, absent special circumstances, the reasonable expectation would have been that, insofar as the state of the premises at the end of the lease affected their
letting value, the landlord would put the works in hand straightaway, if necessary borrowing for this purpose.¹ The question is not straightforward.

12. The second component is the rate of rent. This will generally be the rate at which the landlord could have relet the premises if they had been yielded up in repair on the term date. Sometimes, there will have been an actual re-letting of the premises following the completion of the repair works, in which case the level of rent agreed under such letting may be the best evidence of what could have been achieved if the premises had been delivered up in repair. In other cases, expert valuation evidence may be necessary.

13. What happens where the market changes after the end of the lease? Suppose, for example, that if the premises had been given back in repair, the landlord could have relet them straightaway at a headline rent of £35 psf and a rent free period of 6 months. But by the time the works have been completed, the headline rent has dropped to £30 psf and the rent free period is 12 months. Is the loss of rent claim (assuming it to be otherwise well founded) to be assessed by reference to the market at the relevant time or the market as it was on the term date?

14. The general rule that damages are to be assessed as at the date of breach suggests that what is relevant is the state of the market on the term date. That conclusion might further be supported on the basis that the true cause of the additional loss is not the tenant’s breach but the movement in the market, and/or that the additional loss is too remote. On the other hand, if the tenant’s breach prevents the landlord from reletting for a period, fairness might suggest that the relevant date for assessing his loss is the date on which he is able to relet.

¹ Per Lord Hope at [36]: “…a party cannot be expected to assume responsibility for something that he cannot control and, because he does not know anything about it, cannot quantify. … The policy of the law is that effect should be given to the presumed intention of the parties. That is why the damages that are recoverable for breach of contract are limited to what happens in ordinary circumstances – in the great multitude of cases, as Alderson B put it in Hadley v Baxendale – where an assumption of responsibility can be presumed, or what arises from special circumstances known to or communicated to the party who is in breach at the time of entering into the contract which because he knew about he can be expected to provide for.”
15. The question is not straightforward. One point to consider is that if it is correct in principle to have regard to market movements after the term date, it would logically follow that the tenant would be entitled to credit where the market goes up and the increased rental values cancel out some or all of the loss caused by the landlord’s inability to relet at an earlier time. In any event, however, the point may be academic at least so far as concerns falls in the market, because in practice s. 18 is likely to cap the claim at the amount which the notional buyer would have allowed at the end of the lease without the benefit of hindsight as to what has actually occurred.

16. In principle, claims for damages for terminal dilapidations may also include (i) service charges and insurance rent which the landlord would have been able to recover from an incoming tenant during the period reasonably necessary for carrying out the repair works, and (ii) void rates which the landlord would not have had to pay during such period. The principles are similar to claims for loss of rent. In relation to service charges, however, the amount recoverable will be limited to the cost (or the proportion of the cost applicable to the demised premises) of services which the landlord has in fact provided during the relevant period.

17. Where loss of rent is recoverable at common law, it will be necessary to consider whether the amount is capped by s.18(1). The question will be whether, as at the term date, the hypothetical buyer of the premises in disrepair would reduce what he would otherwise have bid for the premises in repair by an amount representing loss of rent for some or all of the period reasonably necessary for carrying out the works. That will involve looking at what the buyer would be likely to do with the premises once he has acquired them. In most cases, however, s.18(1) is unlikely to be much of a problem in practice, because it will already have been established that the actual landlord has suffered a loss of rent, and it may not take too much to persuade the court that the hypothetical buyer would discount his bid by a corresponding amount.

18. Finally, it should be noted that claims for loss of rent may arise in different circumstances. One is that considered above, namely, where the landlord does the
work and is unable to let the premises until the work is completed. Another is where the landlord does not himself do the work but relets the premises in their unrepaired state, either at a lower rent to reflect the disrepair, or (more commonly in modern times) an extended rent free period to reflect the time and cost of doing such of the works as the incoming tenant regards as necessary. In either of the last two cases, damages will, where appropriate, be assessed by reference to the rent foregone.

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