

Jersey Royal Court considers measure of damages for dilapidations claims

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In the absence of any statutory provision in Jersey addressing how dilapidations claims are to be quantified, the Royal Court's decision in *JSSL v Barclays* has provided some much needed guidance, particularly in circumstances where there is an acceptance that works to redress dilapidations have not been and will not be carried out.

Facts

The case involved JSSL's claim as lessor for damages against its tenant (Barclays) for breach of a repair covenant under the lease, and of a further specific agreement to remove a strong room which Barclays had installed from the premises. Following the termination of the lease, and in the absence of agreement over the dilapidations, the parties fell into dispute which they referred arbitration as provided in the lease. The arbitrator, Advocate Renouf, made an award in favour of JSSL but for a quantum of damages that was far less than that claimed. JSSL subsequently applied to the Royal Court for leave to appeal the award on the basis that the arbitrator had erred in law in respect of the calculation of damages(1).

Throughout the arbitration, JSSL had primarily argued that the damages should be calculated by reference to the cost of undertaking the repairs and of reinstating the premises, notwithstanding that it was accepted that the remedial works had not been and would not be carried out. The arbitrator's award applied that basis, but found that certain elements of JSSL's claim had not been proven(2).

Late in the arbitration, JSSL advanced an alternative argument for assessment, which was advanced in the application to the Royal Court for leave, namely that the correct measure of damages for breach of the repair obligations under the lease, was the loss suffered by reference to the diminution in the value

of the reversion. The sum that such a measure would lead to was also contended to be greater than the sum awarded. Notwithstanding that that argument had not been fully advanced during the arbitration, JSSL argued that the failure of the arbitrator to assess damages on that basis was an error of law.

The Royal Court refused JSSL's application for leave, on the grounds firstly that it was not open to JSSL to seek leave to appeal to bring a case based on a contrary argument to that put to the arbitrator, and secondly that Advocate Renouf had not erred in law or reached a decision no reasonable arbitrator could reach in respect of his approach to the measure of damages. On the latter ground, there was found to be no reasonable prospect of JSSL succeeding in showing on appeal that damages should be awarded by reference to the diminution of the value of the reversionary interest as opposed to by the cost of reinstating the premises. In doing so the Royal Court provided a helpful indication of what, as a matter of Jersey law, the correct approach is to the assessment of damages in breach of repair covenant cases, which has been a longstanding unresolved issue in Jersey.

Correct calculation of damages in cases involving breach of repair covenants

By way of background, in the same arbitration the question of the correct measure of damages under Jersey law for these kind of claims had been referred to the Royal Court in 2012 for a preliminary determination⁽³⁾, but the court declined the application, taking the view that it was too risky for the Court to pronounce "*general principles of very wide practical application*" relating to assessment of damages given the "*factual vacuum*" that existed at that stage of the proceedings. In his judgment, Commissioner Clyde-Smith did, however, observe that in certain circumstances it would be appropriate to calculate damages by capping these to the cost of reinstatement of the premises to their original condition but that this would depend on factors such as the terms of the lease, the nature of the breaches and cost of reinstatement, the conduct of the parties and the intentions of the lessor with regard to the works.

In the application for leave to appeal, the Bailiff considered it appropriate to pronounce on the Jersey law question issues given that the constraints identified at the earlier application did not exist.

In short, the decision in JSSL does not prefer one measure of damages over the other. The Bailiff held that the damages recoverable will depend first and foremost on the actual loss suffered by the landlord, noting that whilst in most cases this might equate to the cost of reinstating the property, in some cases the landlord will not suffer such loss if, for instance, the property is then sold to be redeveloped. In those circumstances, calculating damages by reference to the diminution in the reversionary interest would also be inappropriate and therefore the Court suggested that one would be inclined to think that the court would not make any award for damages.

The Bailiff referenced the stance taken analogous English cases, in particular the judgment in *Joyner v Weeks* in which the English court made an award for damages in favour of the landlord based on the

cost of repair, even though no actual loss had been suffered(4). The Bailiff held that this principle did not apply in Jersey. The Bailiff cited the English decision in *Ruxley Electronics & Construction Limited v Forsyth*(5) which was a case involving the defective construction of a swimming pool, which once completed, transpired to be of a depth different to that which the parties had agreed. The English Court had held that where it would be unreasonable for a plaintiff to insist on reinstatement because the expense of such reinstatement would be disproportionate to the benefit obtained, the plaintiff would be confined to damages by reference to the difference in value of what he had contracted to receive and what he actually received.

Going forward these considerations will have to be applied to cases where the breach of a repair covenant by a lessee causes tangible loss to the lessor. According to the Bailiff's decision the "true rule" regarding calculation of damages in such cases depends on the extent of the loss the landlord could actually be said to have suffered. Therefore, the Royal Court will not be restricted to considering just one measure. Damages in an appropriate case will be assessed by reference to the cost of reinstatement (and possibly the time to carry the works out), but in other cases, the measure could be the decrease in value of the reversionary interest as a result of the failure to carry out reinstatement works; in others, nominal or no damages may be awarded. Once the loss has been established, the principal consideration for the Court when measuring damages will be the reasonableness and proportionality of the remedy in light of the degree of loss.

The Court considered that the starting point where the cost of repairs is less than the diminution in value, is that repair cost will likely represent the true loss - to award damages based on diminution in such circumstances could lead to a windfall for the landlord if he ultimately carries out works for the lesser sum. There will need to be a careful consideration of the facts in each case to determine what is appropriate and reasonable.

Conclusion

Although not a determinative test for all situations arising in respect of cases involving breach of covenants for repair/reinstatement in a lease, at least there is now some judicial indication of how the Court in Jersey will approach the quantification of such claims and this decision provides some helpful guidance on the variables that could apply. For landlords, tenants and surveyors considering these kinds of issues, there is a clear steer towards the need to consider actual loss. It would appear that landlords opting not to do work with a view to recovering higher damages on loss of diminution are likely to come unstuck.

(1) Under article 21(3) of the Arbitration (Jersey) Law 1998

(2) The amount also happened to be less than the estimated decrease in the value of the premises

(3) *Barclays Bank v JSSL* 2012 JRC 019B

(4) [1891] 1 QB 31 This decision has now been superseded by legislation/section 18(1) of the Landlord and Tenant Act 1927.

(5) [1995] 3 All ER 268

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