Landlords' Intentions and their Relevance

A Paper for the RICS Dilapidations Forum

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Introduction

1. The outgoing tide during the current economic cycle has left exposed some interesting things on the beach. In particular, a number of propositions that have routinely been accepted as dogma in dilapidations circles are now open to more searching analysis, if not to outright rejection as heretical.

2. This paper examines some of those propositions against the background of the following assumed (but typical) state of affairs:

   (a) an office block constructed in the 1970s – dated, but with functioning services,

   (b) now vacant, the tenant having moved out a week or two ago,

   (c) leaving behind it the usual dilapidations, failures to reinstate, and lack of decoration, and

   (d) an owner who purchased at the top of the cycle, intending then to redevelop, but who has since revised his plans in view of the current uncertainty.

3. The propositions which I examine below all spring from the wording of section 18(1) of the Landlord and Tenant Act 1927, which provides:

   First limb: "Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid;"

Second limb: "and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy 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. Let me notice in passing three curiosities produced by the wording of the second limb. First, the words "*and in particular*" which introduce the second limb may be taken to suggest that this limb operates as an extension of the first limb, under which damages are limited by a valuation ceiling. In fact, however, the second limb deals with a quite different situation, in which damage may or may not be present, and in relation to which the reversion may or may not be diminished.

5. Take the egregious example of the Marquess of Salisbury and his property at No.59 New Bond Street in London. Lord Salisbury had let that the property for a term expiring on 28 September 1939, 26 days after the outbreak of the Second World War. In 1937, he had decided to demolish and redevelop the property, and so informed his tenant. Three days before lease expiry, however, Lord Salisbury's agents wrote to him advising that it would be "*inadvisable to contemplate erecting a new building while the risk of war damage is still present*".

6. The hapless tenant (who had, it may be supposed, depended upon the redevelopment plans for his complete failure to carry out any repairs) was subsequently told that Lord Salisbury intended after all to enforce the repairing obligations. Lord Salisbury succeeded at first instance, but the decision was reversed on appeal[1], thanks no doubt in part to the advocacy of A.T. Denning KC on behalf of the tenant.

7. The appeal decision turned upon the question whether Lord Salisbury's intention concerning the redevelopment had changed at the critical date, namely 28 September 1939. Even if it had (and Lord Salisbury's cross-examination suggested that it had come a few days late), the result was not communicated to the tenant until some weeks later. In those circumstances, Lord Salisbury's case failed.

8. The case also illustrates that there was little, if any, actual diminution in the value of the reversion. Accordingly, even if Lord Salisbury had prevailed

[1] See Marquess of Salisbury v Gilmore [1942] 2 KB 38.

in relation to the second limb, he would nevertheless have been vulnerable under the first limb. It is easy, however, to conceive of circumstances where a landlord fails on the second limb despite the fact that there is a provable and substantial diminution in the value of its reversion. Tough luck, some might say – the well advised landlord will play its cards correctly, in order to ensure that it will not fail on the second limb.

9. The second conundrum results from the focus in the second limb upon demolition and structural alterations. Again, it is easy to conceive of works that a landlord might have decided to carry out (such as the removal of non-structural partitioning) which, too, would render valueless any repairs carried out. A clear second limb scenario, but not one that is covered by the language of the second limb itself. Here, the tenant would have to take its chances in relation to the first limb. Again, a curious result.

10. The third conundrum relates to the repairs that are rendered valueless. Common sense suggests that this limb should be applied pro tanto, so that for example a decision to demolish half the premises should afford the tenant a second limb defence to that extent. However, common sense also suggests that the world is flat, and the wording of the second limb[2] is against this interpretation.

11. So much for the conundrums – now for the dogma.

Dogma (1): the ambit of the second limb

12. Here is the first dogma: the second limb is *only* available for use where the actual property owner (or a third party with the ability to procure the result, such as a compulsorily acquiring local authority) has *actually* formed the requisite intention to demolish or carry out a relevant structural alteration as at the valuation date (which will usually be the contractual term date under the lease, unless the tenant has stayed in occupation).

13. This interpretation is routinely adopted by the courts[3]. The second limb has therefore come to be seen as a purely subjective test to be applied to the actual landlord or actual relevant third party. There is no support for this level of restriction in the language of the second limb itself. All that it

[2] As well as the analysis of Mr Recorder Reese in Firle Investments Ltd v Datapoint International Ltd [2000] EWHC 105 (TCC).

[3] See again, for example, Marquess of Salisbury v Gilmore; and see paragraph 87 of the judgment of Ramsey J in Hammersmatch Properties (Welwyn) Ltd v Saint-Gobain Ceramics & Plastics Ltd [2013] 2 P&CR 18.

contemplates is a state of affairs whereby it can be said, as a matter of probability assessed at the contractual term date, that demolition or structural alterations (etc) "*would*" be carried out at or shortly after that date.

14. What, though, of a situation where *any* reasonable landlord (but not the actual landlord) would carry out such works? Why is that not a second limb situation as well? In this context, it will of course be borne in mind that canny landlords – that is to say, those in receipt of advice from members of the PLA – will take care to ensure that there is no record of any decision to demolish (etc) prior to the contractual term date. Ultra cautious advisers will perhaps go as far as suggesting to their client that it should wait before even launching a planning application for redevelopment, so as to avoid any suggestion that it has entered the valley of decision in relation to such works. The prudent advice to the client in such circumstances is to be seen to be keeping its options open, even if it knows perfectly well what its actual intentions are.

15. In this way, if the orthodox approach to the second limb is correct, the result is that the well advised landlord can evade the application of the second limb, even though it will be behaving in a way that no reasonable property owner would.

16. An example of this may be provided by the facts of PGF II SA v Royal & Sun Alliance Insurance plc [2010] EWHC 1459 (TCC). The case concerned an outdated office building in the City of London, subject to a lease that expired on 24 June 2008. The evidence was that the cladding to the building was in disrepair. The question was whether the landlord had taken the decision to replace the cladding, such that the second limb eliminated the cost of repair.

17. In oral evidence, when pressed, the landlord's principal, Mr Crader, said on this subject:

> "We had not decided to replace the cladding. We thought replacing the cladding was certainly possible, maybe even probable, but we had not made the decision to do so. We couldn't. We did not have the information to make that decision".

18. Mr Crader went on to say in oral evidence that it was not until 5 September 2008 (a bare two months after the contractual term date) that he made the decision to replace the cladding.

19. It seems to me that there is room for a challenge to this dogma. In circumstances where premises are ripe for redevelopment; where any property owner in its right mind would redevelop; but where the actual landlord has taken care to leave no paper trail evidencing a decision to redevelop, it should be possible for the tenant to mount a challenge based upon the second limb, on the ground that the premises *would* nevertheless be pulled down (etc) - particularly if they have in fact been pulled down by the time of the hearing.

Dogma (2): the cost of works valuation

20. Let me revert to the state of affairs we are considering, and assume that a second limb argument is not available, and that the focus is now upon the extent to which the landlord's reversion has been diminished by the breaches of covenant.

21. The valuation surveyors who each party will appoint will inform themselves of the next section 18 dogma: that the first limb requires a comparison between two notional transactions - one involving the sale of the building in repair; the other a sale of the building out of repair.

22. The next stage in their appreciation is to find examples of comparable transactions involving buildings in repair. There are normally a number of such transactions, and this part of the valuation will therefore proceed with little difficulty (albeit of course with radically different figures produced by each valuer).

23. With regard to the "out of repair" valuation, it will normally be the case that there will no comparable transactions involving buildings in disrepair. The valuers' recourse in such circumstances is to carry out what is described as a "valuation", of which the example set out on the next page is the simplest type.

24. For the sake of this example:

- the area of the building is taken as 20,000 square feet;
- the value in repair is taken at £20 per square foot;
- 6 months is allowed for marketing and a rent free period for the new tenant;
- the cost of repair works is £225,000; and
- the repair works would take about 6 months to carry out.

VALUATION IN REPAIR	
ERV 20,000 ft² x £20/ ft²	£400,000
Years' purchase in perpetuity @ 8%	x 12.5
	£5,000,000
Less	
6 months loss of rent during marketing and rent free periods	- £200,000
VALUE IN REPAIR:	£4,800,000
VALUATION OUT OF REPAIR	
ERV 20,000 ft² x £20/ ft²	£400,000
Years' purchase in perpetuity at 8.25%	x 12.1325
	£4,853,000
Less	
Cost of works (say)	- £225,000
Loss of rent during works period (say 6 months)	- £200,000
6 months loss of rent during marketing and rent free periods	- £200,000
VALUE OUT OF REPAIR	£4,228,000
DIMINUTION IN VALUE	**£572,000**

25. That is the simplest type of example[4]. In practice, there may well be many more variables (such as interest, developer's profit and so forth) which will need to be taken into account. Nevertheless, at its heart, it may be observed that this valuation sets out by assuming that which it seeks to prove, namely that the cost of the works (and ancillaries) represent the diminution in the value of the reversion.

26. Valuation reports under section 18 routinely adopt this approach. The reported cases abound with examples of so-called valuations which are little

[4] And here I gratefully acknowledge the assistance given in paragraph 30-08 of Dowding & Reynolds "Dilapidations: The Modern Law and Practice". In that case, it should be noted, the working example set out merely to show how actual disrepair might be valued.

more than lightly camouflaged arithmetic re-presenting the cost of works as the landlord's actual loss.

27. An approach of this type was criticised by the judge in Simmonds v Dresden [2004] EWHC 993 (TCC):

> "… the critical weakness of the method in a case such as the present, as it seems to me, is that the calculation assumes that which has to be demonstrated, namely that there has been a diminution in the value of the reversion. The calculation is not designed to test whether there has actually been a diminution in the value of the reversion, but on the assumption that there has been, to calculate what it was."

28. I do not for a moment challenge the notion that the cost of works may well represent the landlord's real loss. Where it does, however, it is usually the case that the landlord will have done the works, in which case it will face little opposition from the Court, and may not even have to adduce a valuation surveyor's evidence[5].

29. Problems arise, however, where the landlord has not done the works (perhaps for perfectly genuine reasons to do with financing, or simply an unwillingness to take the risk until it has the dilapidations money safely in its pocket).

30. Let us suppose that the client is one such landlord, and has a perfectly genuine intention to carry out the works necessary to remedy the disregard as soon as it is in funds following the successful outcome of the proceedings. In the meantime, it faces the daunting prospect of having to engage a valuation surveyor who will go through a simulacrum of the process set out above.

31. Why is any of this necessary? In particular, why is it necessary to produce:

(1) valuations of the property in repair (£***x***),

(2) and then in disrepair (£***y***),

in order to calculate

(3) the diminution in the value of the reversion (ie £***z***, representing £***x*** minus £***y***)?

[5] As in Latimer v Carney [2007] 1 P&CR 13.

In other words, why bother with attempting to establish either value ***x*** or ***y***, if value ***z*** can be arrived at simply by considering how much less the hypothetical party would bid for the premises as a result of their dilapidated condition?

32. Support for this pared-down approach is lent by the first limb of section 18. This requires simply a calculation of "*the amount … by which the value of the reversion … is diminished owing to the breach of [repairing] covenant*". There is no mention there of valuations of the property in repair and out of repair, and it is difficult to see why the parties should be put to the expense of these two valuations, especially where this approach serves to widen rather than narrow the ambit of the dispute.

33. Is there anything impractical or unsound about this suggestion? I believe not, at least at a simple level.

34. In each case, the approach under the first limb should start with an investigation into the market at the valuation date, to establish what work the reasonable property owner is likely to have done given (a) the premises in the assumed (ie covenanted) condition; and (b) the premises in their actual condition.

35. If the answer to both is the same - for example "demolish", or "refurbish to the same extent", then there can be no diminution, and a quest to establish the value of (a) and (b) would be a sorry waste of time. Note that this analysis is effectively a second limb approach, albeit one that does not depend upon the actual landlord's intentions.

36. If by contrast the answer is different - perhaps "do nothing but place on the market for reletting" in relation to (a); and "do the works and then place on the market" in relation to (b), then the difference will be the cost of the works and ancillary matters. In this case too, there is no need to carry out two capital valuations[6].

37. Now suppose the facts are between those two ends of the spectrum:

- (a) given the building in the covenanted condition, the landlord would do some work to make the building look attractive (say overcladding and new lighting).

[6] An approach which commended itself to Glidewell J in Drummond v S&U Stores Ltd [1981] 1 EGLR 42.

- (b) given the building in its actual condition, the landlord would naturally do the same work to make the building look attractive, and would in addition carry out most of the repairs that are not rendered nugatory by the overcladding and new lighting.

The net result? The disrepair has diminished the value of the reversion by the extent to which the landlord carries out the repairs that have not been superseded by its refurbishment works. Are two capital valuations necessary to prove that? Surely not.

Dogma (3): supersession

38. And that leads me neatly on to dogma 3. Let me start with an extract from a hypothetical valuation surveyor's report that exemplifies this dogma:

> "Given the level of expenditure that would be required to bring this property into a state of compliance with the tenant's covenants in the lease, I consider it highly unlikely that a reasonably minded landlord would incur such cost. I think it rather more likely that the landlord would carry out substantial alterations or a complete redevelopment of the property so as to provide accommodation that would be more likely to achieve a letting in the market."

39. So far so good: the valuer is in the process of evaluating scenario (b). What then happens is a piece of reverse engineering, along the following lines. First:

> "Such alterations would render nugatory the repairs for which the tenant would otherwise be liable."

And then:

> "In those circumstances, the landlord has suffered no loss, because the works of repair have been superseded by the works the landlord would actually carry out."

40. At first sight, it seems difficult to fault this logic. On second thoughts, it produces this conundrum: if correct, it would operate as a bad tenant's charter, allowing those whose compliance has been deficient to rely upon their own default to drive down the valuation case against them. It must be wrong.

41. The reason the logic does not work is because the supersession argument is only considered in relation to the (b) (out of repair) scenario, and no

account is taken of what the owner would have done had the building been delivered up in repair. Yes, it may well be the case that in this scenario the landlord would carry out works which would render any repairs nugatory. That is not, however, the only point. As always with the first limb, the task is to compare (a) what the reasonable owner would do with the actual premises, with (b) what it would have done had the premises been in the covenanted condition. If the answer to scenario (a) is that the reasonable owner would do nothing, but simply put the premises on the market to let, then the comparison does not yield the answer that there will have been no diminution. The valuation exercise then becomes more complex, because the reasonable owner on these assumed facts is spending money not solely attributable to repairs, and which will increase the value of its building.

42. This version of the supersession dogma is routinely misunderstood, and should be seen as the heresy that it is. There is of course a place for argument based upon supersession, but only where the application of principle rather than dogma allows it.

Dogma (4): in a first limb case, the intentions of the actual landlord are irrelevant

43. In paragraph 87 of his judgment in Hammersmatch Properties (Welwyn) Ltd v Saint-Gobain Ceramics & Plastics Ltd [2013] 2 P&CR 18, Ramsey J said the following about the two limbs of s.18(1):

> "The first limb limits damages to the amount by which the value of the landlord's reversion is diminished because of the breaches of the repairing obligation. This considers, objectively, the reduction, if any, in the market value of the landlord's interest on the term date because of those breaches. The second limb extinguishes damages altogether where, on the term date, the landlord intends at or shortly after the term date to demolish the premises or carry out such structural alterations as would render the repairs valueless. This looks, subjectively, to the landlord's actual state of mind on the term date."

44. Well, that comment in relation to the first limb is certainly not the way either the RICS or the Dilapidations Protocol see this dogma. Take paragraph 4.5 of the RICS Dilapidations guidance note, 6th Edition. Among the investigations that it is suggested might be carried out by the surveyor is:

> "the landlord's intentions for the property at, or shortly after, the termination of the tenancy (this might include details of works proposed to the premises)"

And in paragraph 7.2.2:

> "… the intentions of the landlord with regard to the premises at or shortly after the end of the term should be ascertained. It should be established, for example, whether the building is to be demolished or physically altered in any way and if so, in what manner."

And again in paragraph 7.5.4:

> "Where a schedule of dilapidations is prepared after the lease end date, the surveyor should ask the landlord to confirm what its intentions were for the property in writing before making the endorsement (see 4.5 and 7.2.2), and ensure that a written record of the reply is made and kept on file."

And paragraph 7.5.5:

> "Where a schedule of dilapidations is prepared before the lease end date, the landlord's intentions, or anticipated intentions, on the lease end date may not be known. If, after enquiry, as described in paragraph 7.5.4, the landlord's intentions are not known, the surveyor will, of course, be unable to endorse the schedule of dilapidations to the full extent set out in paragraph 7.5.2.
>
> Under these circumstances, the endorsement should confirm that, in the opinion of the surveyor, all the works set out in the schedule are reasonably required to remedy the breaches identified in the schedule and that the costs quoted, if any, for such works are reasonable."

And finally in paragraph 8.3:

> "8.3.1 Whether the unadjusted cost of works properly reflects that loss will depend on a number of factors, including:
>
> - the landlord's intentions for the property
> - whether the landlord has carried out, or intends to carry out, the works
> - whether the property has potential for redevelopment or refurbishment

- the market for the property; and
- what arrangements might be made with a new tenant.

8.3.2 Where the landlord has carried out, or intends to carry out, all the works that the tenant failed to complete, the cost of works set out in the original schedule of dilapidations could represent the landlord's loss and no adjustment might be required.

8.3.3 If, however, the landlord has not done and does not intend to do some or any of the works, the cost of works set out in the original schedule of dilapidations might not be a fair reflection of the landlord's loss. The reason for the landlord not doing the works and his or her intentions for the property might need to be examined."

45. The Dilapidations Protocol[7] is drafted in similar vein. Paragraph 3.5 provides that the schedule of dilapidations should be endorsed either by the landlord or its surveyor, while paragraph 3.6 continues:

> "The endorsement should confirm that in the landlord's or the landlord's surveyor's opinion:
>
> 3.6.1 all the works set out in the schedule are reasonably required to remedy breaches referred to in paragraph 3.1 above;
>
> 3.6.2 where endorsed by the landlord, *full account has been taken of its intentions* for the property;
>
> 3.6.3 where endorsed by the landlord's surveyor, *full account has been taken of the landlord's intentions* for the property, as advised by the landlord; and
>
> 3.6.4 the costings, if any, are reasonable."

46. Paragraph 9.3 adds:

> "If the landlord has not carried out all the works specified in the schedule but intends to carry out some or all of them, the landlord must:
>
> 9.3.1 identify which works it intends to carry out;
>
> 9.3.2 state when it intends to do such proposed works;

[7] The Pre-Action Protocol for Claims for Damages in Relation to the Physical State of Commercial Property at Termination of a Tenancy – see http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-claims-for-damages-in-relation-to-the-physical-state-of-commercial-property-at-termination-of-a-tenancy-the-dilapidations-protocol.

> 9.3.3 state what steps it has taken towards getting such proposed works done, e.g. preparing a specification or bills of quantities or inviting tenders; and
>
> 9.3.4 clearly show the scope of such proposed works to enable any effect on the dilapidations claim to be identified."

47. This drafting is fine insofar as it is dealing with limb (2) cases – for it is surely right that the landlord should come clean with its proposals for the premises (which might otherwise take much time, effort and money for the tenant to discover). But neither the guidance note nor the Protocol specifies that their recommendations are directed only at limb (2) cases – and I venture to suggest that they are clearly designed to cover both limb (1) and limb (2) cases.

48. But this treatment prompts the question:

Of what relevance is it to first limb cases what the landlord chooses to do with the premises?

49. Remember that the test under the first limb is an objective one: the investigation is not into what the actual landlord may or may not do with the dilapidated premises; rather it is into what is the loss attributable to the breaches of covenant. One *might* find out the answer to that question by looking at the expense incurred by the actual landlord in carrying out the requisite remedial work – but that is far from being a foolproof test (because the landlord might carry out the works too expensively; or unreasonably; or even not at all).

50. The only proper approach is to measure the loss by reference to the market:
- do the works need doing, or are they unnecessary in view of the fact that any incoming tenant would carry out its own refit?
- if they need doing, how much would they cost?

51. I am conscious that in advancing these views, I am coming close to saying that the first limb is an unnecessary statutory overlay, because it lays down what should be the correct approach to the quantification of loss in any event – but that seems to me to be the approach compelled by logic.

52. Let me make my point clear by approaching the matter in terms of causation. T leaves the premises in disrepair. L says it has suffered loss by reason of T's breach of covenant. In order for L to win, it must show that T's breach has caused its loss – that is the orthodox role that causation plays

in the law. If L carries out the works, then its costs are said to represent "the common law claim". But that is a slapdash contraction of the true position. L has not been *caused* to carry out the works, which has led to its loss. Instead, L has suffered a loss, in that its premises are worth less than they would have been had T complied with its covenants – so the diminution in the value of the reversion is L's "common law" loss. In choosing to carry out the works, L is attempting to address its loss, and the costs to which it will be put will then form the basis of its claim against T.

53. I recognise that it is too late to reverse the characterisation of the cost of works as "the common law loss" – and Her Majesty's judiciary are complicit in this labelling, with perhaps the clearest expression being in paragraph 143 of the judgment of Blackburne J in Mason v Totalfinaelf UK Ltd [2003] 3 EGLR 91:

> "How is diminution in value to be assessed? If the landlord has carried out the works or clearly intends to do so, the cost of the works is, or at least can be, prima facie evidence of the diminution in value. If, on the other hand he has not carried them out and there is no evidence that he intends to do so, the cost of the works is of no assistance."

Other recent judgments are to like effect[8].

54. So, if I am right, does this mean that the cost of the works is a simple irrelevance, and that one takes one's damages computation from the world of valuation theory?

55. Well, no. The cost of works is relevant insofar as it is an example of how much it would cost the reasonable landlord to remedy the breaches (ie as evidence of the objective position). Jenkins put the point clearly in Jones v Herxheimer [1952] 2 KB 106:

> "… if there is evidence that the repairs done, being repairs within the covenant, were *no more than reasonably necessary* to make the

[8] See for example the judgment of Edwards-Stuart J in Sunlife Europe Properties Ltd v Tiger Aspect Holdings Ltd [2013] 2 P&CR 4, para 40: "… *the measure of loss is … the cost of putting the building back into the condition in which it should have been delivered up*"; HH Judge Toulmin QC in PGF II SA and PGF II (Lime) SA v Royal & Sun Alliance Insurance Plc and London & Edinburgh Insurance Co Ltd [2011] 1 P&CR 11: "*First, it was necessary to value the common law damages of putting the premises in repair*"; Latimer v Carney [2007] 1 P&CR 13: "*the general rule at common law is that the measure of damages is the cost of putting the premises into the state of repair required by the covenant*".

> rooms fit for occupation or reletting for residential purposes, we fail to see why *the proper cost of those repairs* should not be regarded *prima facie* as representing a diminution in the value of the reversion due to the tenant's breach of covenant, being money which the landlord, *acting as an ordinary prudent owner*, had to spend on the property owing to the breach and would not had to spend but for the breach …"

56. Here, the Court of Appeal was being very careful to stipulate that what the actual landlord had spent was not necessarily the diminution, but rather that the expenditure was evidence from which diminution might be inferred. And that, in my humble opinion, is a pragmatic approach that should work in most cases.

57. Latimer v Carney provides another useful pragmatic point. In paragraph 48 of her judgment, Arden LJ said:

> "The failure to carry out the repairs would clearly be an indication that the repairs were not necessary as the landlords claimed. Put another way, whether sums were actually spent on doing repairs is relevant to the question whether the repairs were necessary or not. If they were not necessary, damage to the reversion could not be inferred from them. But even where the repairs had not been carried out there could be other explanations for the failure that could satisfy the judge that the indication was not well-founded, as where the landlord decides not to repair the property himself but proceeds to sell it at a lower price than he could have obtained if the repairs had been remedied."

58. This is dangerous, but sensible. Dangerous, because it should not be relevant what L chooses to do after the valuation date; as I have said, L's actual intention in a first limb case is irrelevant[9]. Sensible, though, because no judge is going to ignore what L does – a case of putting your money where your mouth is. Of course, L may have no money, as Arden LJ went on to recognise:

> "But even where the repairs had not been carried out there could be other explanations for the failure that could satisfy the judge that the

[9] A point that was avoided by Arden LJ in paragraph 24 of her judgment in Latimer: "*In Ruxley, the owner of the asset had no intention of expending the money required to remedy the defect and this point raises the question of the extent to which the subjective intention of the claimant is relevant. However, it is unnecessary to deal with that point in this case as the landlords have executed the repairs, that is, they have done works which are or supersede the repairs the respondents were bound to effect. Although courts are not normally concerned with what a claimant does with his damages, a landlord's conduct in taking steps or not taking steps to remedy a breach of the covenant to repair may throw light on the question whether the repairs are reasonably necessary, and thus on the question whether there was any diminution in value of the reversion as a result of the disrepair.*"

> indication was not well-founded, as where the landlord decides not to repair the property himself but proceeds to sell it at a lower price than he could have obtained if the repairs had been remedied."

In such a case, however, the landlord should make its inability to do the works very plain if it is not to suffer a credibility problem in court.

59. Conversely, where L could do the works, but chooses not to (perhaps because it is hedging its bets), then it should heed the observation of Denning LJ in Smiley v Townshend [1950] 2 KB 311:

> "in cases where it is plain that the repairs are not going to be done by the landlord, the cost of them is little or no guide to the diminution in value of the reversion, which may be nominal."

Accordingly, while there are no absolutes in this game, and while in theory L's intentions are irrelevant under limb (2), the prudent landlord would be well advised to bear in mind how the court will regard his failure to act – or for the matter the way in which it does act.

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