

## **What is this thing called Dilapidation?**

So, what is this thing called dilapidations and why is it so complicated? Is it really as complicated as people make out, or just a subject over which it is difficult to be precise. The aim of dilapidations is to identify and compensate the landlord (usually) for the loss that has been caused by the tenant failing to comply with his or her liabilities under a lease. Sometimes that will mean drawing to the attention of the tenant their failures in the hope or expectation that they will remedy the defects, and on other occasions it will mean seeking money to compensate for the financial loss that has been suffered. So far, not very complicated.

The reason for the subject being complicated is that there are a lot of variables. The interpretation of liability will depend upon the condition of the building being agreed, and the method of remedy of any item that may require repair or remedy being unchallenged. But a building's condition is not an absolute. A brick wall may have a bulge in it of an agreed dimension, but the need to undertake any work to strengthen or eradicate the bulge may not be clear-cut. On another occasion it may be agreed that, for example, there is water staining inside a building, caused by rainwater entry. But the cause may have been due to unusual storm conditions that resulted in water being driven through a gap that on all other occasions was weathered sufficient to keep out rain. The need to remedy or do nothing may be a matter of debate. That condition may only be determined by testing and intrusive investigation. The cost of that work may result in the claimant being unenthusiastic, resulting in their being a debate as to whether the defect exists or not, with neither side prepared to pay for an absolute decision.

Being in repair is an easy concept. A tap would be out of repair if one turns on the tap and no water comes out. But turn on the hot tap and warm water comes out may mean it is in or out of repair. The decision may relate to what expectation of 'hotness' was reasonable in the circumstances of that lease for that building at that time and for those tenants. Then the decision is less a 'yes' or 'no' test of the performance, but one of judgement based upon the a qualitative identification of what is being provided set against an interpretation of what should have been provided. It is on the jagged edges of these variables that many settlements flounder.

It is not just the condition of the building and the remedy that are imprecise; the interpretation of the lease is not always without challenge. To start with, the area of the property for which the tenant took on a responsibility may not be clear in the way that the lease has been worded.

The extent of the repairing obligation may be open to debate, the implications of other clauses of the lease capable of different interpretations. When reading a lease clause that has been written without punctuation, it is difficult to determine the precise meaning of many clauses. A clause can be read different ways, depending upon where the dots, commas, semi colons or colons are added. This is particularly the case where a sentence could be an amplification of a previous obligation, or a new obligation added at the end of the clause. Whilst new leases avoid this problem, dealing with the older leases that relate to property at the end of the term, the absence of punctuation still causes major problems.

Even if the lease's covenants are capable of a precise meaning, there remains at the end of the term the question of what loss the landlord may have suffered as a result of the tenant having breached the covenants of the lease.

For example, the building may have been handed back with the internal decorations not having been repainted in the last year of the term. That redecoration is a standard requirement in most commercial leases. If the landlord decorates the building at a cost of £20,000 then surely the landlord is out of pocket by an amount that, had the tenant complied with their obligation, the landlord would not have had to incur. Not quite that simple. In most cases the landlord should expect to recover the cost but there will be exceptions. For example, the landlord may have undertaken substantial changes to the building, prior to the redecoration. If that were the case then the landlord should not recover the cost of the decoration, because that does not represent the loss that has been suffered. Had the tenant undertaken the decoration prior to the end of the lease, then those new decorations would have been damaged by the landlord's alterations. As a result the failure of the tenant to do the work would have resulted in no loss, and even though the landlord had to pay for the decorations, those decorations of the altered building would have had to be carried out in any case, even if the tenant had done the work. If the alterations affected only part of the decorations that should have been done there may remain some part of the decoration cost (e.g., the cost of doing the work that the tenant should have done to meet the tenant's obligations under the lease) that represents a loss to the landlord.

But even if the landlord made no changes, and is faced with a bill for the agreed works of repair for agreed defects in the building, that does not mean that the landlord will receive the cost of these works. That costs may not be a cost that would be incurred by a purchaser, were the building to be acquired by the ordinary purchaser of a building such as this one at the time that the lease ended. For example, the market for 1960s office buildings tends to be among people who are going to amend or alter the building after its purchase. The purchaser is not viewing the building as one where each failure of a tenant under a former lease will represent works for which the purchaser reduces the purchase price by the exact cost of the repair. Unless that repair cost represents the loss that the landlord has suffered as a direct result of the actions of the tenant, the compensation that the tenant will have to pay will be for a lesser amount.

The actions of the parties may determine what is to be the settlement figure, but it will be the difference between the market value for the building in repair and in its existing state that may cap the liability of the tenant by identifying the loss that has been suffered.

So this is a subject that challenges the expertise of the surveyor in identifying the condition of the building, the lawyer in identifying the interpretation of the lease, the judge in interpreting what condition is acceptable and what is not acceptable based on the contemplated standards expected under the lease, and the valuer for interpreting the market's perception of the differences in value between an actual and a hypothetical building in a hypothetical condition at the date on which the lease ended. When all of those variables have been agreed, one then has to consider what may have happened to the building or what did happen to the building shortly after the end of the term.

Before the introduction of the Civil Procedures Rules (CPR) the resolution of a dilapidation claim may have also included the works of a private detective, but with the more open approach to conflict that these Procedures encourage, (and sometimes but still too rarely achieve) documents that relate to decisions over the future of a building should be disclosed. For example, where a building is handed back to the landlord at the end of the term the landlord has seven options. He or she could relet the building without doing the repairs, they could do the repairs and let the building, they could sell the building with or without repairing the property, they could alter amend or demolish the building or do nothing and wait until the market improves. Each variable will influence the amount of money that the tenant may pay in compensation for agreed costs of repairs for agreed works, because each variable changes the loss that may have been suffered.

There remain the statutory interpretations of the limitation to claims made for breaches that exist during the term of a lease, or for any adjustment to the compensation that may be due to a landlord if they enter into the property during the currency of the term. But those are confusions added to the existing complications.

All of these imprecisions should be capable of reasonable interpretation by those acting for the parties, but 'reasonable' is not a word that best describes the approaches of those who deal in these rough and turbulent waters. Adversarial point scoring typifies the common attitude. This may have been complicated by guerrilla warfare between the parties during the lease, intransigence of one, both or all parties, and ignorance of the subject by someone in the decision spiral. These matters cost far too much to resolve when that should not be the case. Unreasonable expectations and overdeveloped senses of injustice frequently lie behind the failure to resolve the matter quickly and economically. If one can control the emotion and ensure that no party is misled into expectations unrepresentative of the circumstances, a prompt and commercial resolution is possible.

When it comes to making decisions as to liability and compensation, it should not be forgotten that one party has contracted to be responsible, and in the final analysis is trying to get out of some of those obligations, or is trying to avoid paying for their failures to meet their contractual undertakings.

So, what is this thing called dilapidations and why is it so complicated? It is not complicated, just a subject over which it is difficult to be precise. It is more complicated than three-dimensional noughts and crosses but less complicated than three-dimensional chess. It relies upon knowledge, investigation, expertise and common sense, and the most important of all is common sense.

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