The RICS Laypersons’ Guide to Dilapidations
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Introduction

This guide relates to Dilapidations in English Law, currently including Wales. Scotland and Northern Ireland have their own legislation and processes which can differ significantly from those detailed here. It remains to be seen whether going forward the Welsh Assembly will look to introduce their own legislation on the matter.

Dilapidations in England can trace its roots back over four hundred years to 1571. At that time it appears dilapidations was concerned about tenant’s taking down existing buildings and re-using the materials for other properties.

Today the term dilapidations is more usually applied to breach(es) of the lease covenants by either landlord or tenant, though mainly the later, and the process of remedying the breaches.

A Schedule of Dilapidations is the formal listing of the alleged breaches of the contract.

Dealing with a raft of legislation the modern dilapidations surveyor needs also to be familiar with the arguments and principles of case law, and how it is correctly applied. In addition many leases contain unique clauses and limitations which need to be accounted for in the preparation and defence of a schedule of dilapidations.

Whilst many surveyors and solicitors are capable of undertaking dilapidations work, the area is becoming increasingly more specialised, and for the best results experienced practitioners should be appointed.

A (very) Brief History

The earliest dilapidations legislation in England is considered to be the Ecclesiastical Leases Act 1571. It was not until the late 1800s however that further statutory consideration was given to the matter, with the Ecclesiastical Dilapidations Act 1871.

The twentieth century saw the proliferation of dilapidations legislation which directly affect today’s dilapidations process, including (but not exhaustively):

• The Law of Property Act 1925
• The Landlord and Tenant Act 1927
• The Leasehold Property Repairs Act 1938 and
• The Landlord and Tenant Act 1954
• The Fraud Act 2006 and
• The Bribery Act 2010

All the above statutes, as well as a number of others, must be taken into account when dealing with dilapidations matters in England.

Case law is similarly varied, with Proudfoot v Hart 1890 being the earliest case regularly referred to (though the case itself was founded on earlier cases dating as far back as 1834) and which established the principle of ‘age character and locality’, essentially restricting the standard of repair to that appropriate for a property of that nature.

When can a schedule of dilapidations be served?

A schedule of dilapidations can be served at any time during a lease, and up to twelve years after expiry if the lease is under seal, or six years after expiry if the lease is under hand. Some leases do impose other caps on timing of service.
There are differences in the type of schedule served depending on the timing in relation to the lease duration. The timeline below shows generally when each type of schedule should be served.

<table>
<thead>
<tr>
<th>Lease start</th>
<th>Last three years of lease</th>
<th>Last eighteen months of lease</th>
<th>Lease end</th>
<th>Statute bar</th>
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<tbody>
<tr>
<td></td>
<td>Tenant has protection of Leasehold Property Repairs Act 1938, IF the lease is for more than seven years</td>
<td>Protection of Leasehold Property Repairs Act 1938 ceased</td>
<td>Terminal Schedule of Dilapidations (should not be served as a S146 Notice)</td>
<td>Final Schedule of Dilapidations up to 12 years after lease end if the lease is under seal, or six years if under hand.</td>
</tr>
</tbody>
</table>

Fig 1

### Types of Schedule

**Interim schedules of Dilapidations** are served during the lease term, and can be served at any time from lease commencement. Whilst there is no legal bar to an interim schedule being served in the last 18 months of the lease it is more usual for a schedule at this time to be a terminal one. An interim schedule is not usually costed as the intention is for the party upon which it is served to rectify the breaches of covenant.

**Terminal Schedules of Dilapidations** are generally served within the last 18 months of the lease, and are intended to address all the alleged breaches of the lease, stipulating the required remedies. Typically a terminal schedule will include prices, but this may not be the case if the schedule is served a number of months before lease end.

**Final Schedule of Dilapidations** can only be served after the lease has ended. Under the Limitations Act 1980 an action for damages can be brought up to twelve years after the lease end if the contract was under seal (six if ‘under hand’ i.e. simply signed) though it is rare for this to be the case, as proximity of time can impact significantly on a dilapidations claim. Final schedules are usually in support of a claim for damages and should be priced.

### I’m a Landlord, what should I know?

Dilapidations are not intended to profit the landlord. Any claim is merely intended to return the landlord to the same position as if the Tenant had performed their lease obligations.

The case of Proudfoot v Hart restricts the standard of repair to that appropriate for a property of that nature rather than as new condition. Common law and The Landlord and Tenant Act 1927 S18.1 place a further cap on the level of dilapidations that can be claimed, setting this as the level of the damage to the landlord’s reversionary interest, often referred to as diminution. It is worth seeking specialist advice with regards to the level of repair that is appropriate.

When a tenant is however in breach of the lease covenants the landlord has various options available to him:
In strict terms the Landlord can apply to the Courts at any time to end the lease (forfeiture) however this rarely occurs once the lease has entered its final eighteen months, and the Courts tend to be sympathetic towards the tenant approaching lease end. Similarly the courts tend to frown upon an application for strict performance the closer to the lease end it is made.

With regards interim schedules, for leases over seven years with three or more years until expiry the tenant is entitled to the relief of the Leasehold Property Repairs Act 1938 (the LPRA). The LPRA effectively restricts an interim schedule to matters that are essential, wind and weathertight, or so called ‘stitches in time’, where action now will prevent significant future decay and cost.

Many modern leases however include a ‘Jervis and Harris clause’, essentially a landlord’s right to enter the property and repair on the tenant’s default, reclaiming the costs. These clauses by-pass the protection of the Leasehold Property Repairs Act, however a Landlord must be careful not to interfere with the tenant’s quiet enjoyment of the property, and such clauses are usually operated as a last resort.

Many older leases limit recovery of landlord’s legal and professional costs for dilapidations to notices under S146 of the Law of Property Act 1925, however Terminal Schedules should not be served under S146, as the tenant cannot forfeit a lease that is about to terminate naturally.

In terminal dilapidations the landlord’s intent at lease end is important and the landlord will need to carefully consider what he actually intends to do with the property when making a claim. If the Landlord undertakes the works listed in the schedule this will provide strong evidence of the Landlord’s loss, however as we touched on earlier, the works must be reasonable and the principles of diminution still apply and the Landlord may not be able to recover the full cost of the works.

If you are intending to redevelop the property this may impact significantly upon the level of a dilapidations that can be claimed and specialist advice should be sought in this respect.

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**Fig 2**

<table>
<thead>
<tr>
<th>Lease timeline</th>
<th>Last three years of lease</th>
<th>Last eighteen months of lease</th>
<th>Lease end</th>
<th>Statute bar</th>
</tr>
</thead>
<tbody>
<tr>
<td>Remedy</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Serve an interim schedule informally</td>
<td>Tenant has protection of Leasehold Property Repairs Act 1938 if the lease is for more than seven years</td>
<td>Protection of Leasehold Property Repairs Act 1938 ceased</td>
<td>Serve a terminal schedule of dilapidations and if the tenant defaults bring a financial claim for damages</td>
<td>Serve a final schedule and claim for damages. The tenant cannot be compelled to undertake the works</td>
</tr>
<tr>
<td>Serve a schedule formally and apply to the Courts to end the lease under S146 of the Law of Property Act 1925*</td>
<td>If the lease allows, serve an interim schedule formally under the landlord’s right of repair clause. If the tenant defaults on the notice enter the premises and undertake works. Costs may not be recoverable</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Serve a schedule formally and apply to the Courts for strict performance of the lease clauses</td>
<td></td>
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</tbody>
</table>
I’m a Tenant, what should I know?

We looked at the type of dilapidations schedules earlier, and any of these may be served upon the Tenant. Most, though not all, leases include repairing and decorating obligations for the tenant, and varying obligations for the Landlord also. The principle of ‘buyer beware’ holds as true for leases as it does for any other contract purchase and you should familiarise yourself with the lease terms and obligations prior to signing the contract. It is recommended that specialist advice be taken as many leases contain peculiarities which can be easily overlooked.

A common misconception is that as a particular part of the property is in disrepair at the start of the lease, repairs are not required to that element. Unfortunately this is rarely the case, and where a lease requires a Tenant to ‘keep in repair’ the property must first be ‘put’ into repair, irrespective of the property condition prior to the lease being signed. Many leases also require that the Tenant renews an element which is beyond economic repair. Lease obligations can however be restricted prior to lease commencement providing both parties agree, as we see later.

The Tenant’s defence to a schedule will depend on the nature of the alleged breach and the timing and type of schedule service, however the position is broadly as follows:

<table>
<thead>
<tr>
<th>Lease start</th>
<th>Last three years of lease (or lease under seven years)</th>
<th>Last eighteen months of lease</th>
<th>Lease end</th>
<th>Statute bar</th>
</tr>
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<tbody>
<tr>
<td>Interim schedule</td>
<td>interim schedule - LPRA no longer applies.</td>
<td>Interim or terminal schedule - LPRA no longer applies.</td>
<td>Final schedule</td>
<td></td>
</tr>
</tbody>
</table>

Jervis and Harris Notice

Undertake works within given timescale

Or seek Court relief against landlord entering the premises.

S146 Notice

Or general service

Claim relief of the Leasehold Property Repairs Act 1938, within 28 days of schedule service, undertaking surviving works.

Or undertake works.

During the lease the landlord has limited control over the standard of the Tenant's works, though any repairs undertaken must be fit for purpose, and regulations, or accepted good practice, has changed.

Once a lease has expired the tenant does not have an automatic right to return to the property to undertake works (though this may be agreed with the landlord) and the Landlord can decide upon the nature and extent of repairs, however this may not necessarily be reflect the Tenant’s liability. Importantly as highlighted earlier the overall property condition need only be in accordance with its general type, and not necessarily ‘as new’. In either case a dilapidations specialist will be able to help confirm the level of repairs for which the tenant is liable.

With regards terminal dilapidations the Tenant’s liability is restricted by S18.1 of the Landlord and Tenant Act 1927 (and common law), and this depends upon the Landlord’s intent for the property at lease end, as well as the impact of the alleged breaches on the value of the property. The preparation of a Diminution Valuation may be worthwhile, but its benefit may be limited, and requires specialist advice.

In many lease the Landlord’s remain liable for some repairs, and a Tenant finding a Landlord in breach of such obligations has similar recourse to the landlord:
How can I protect my position?

The most common way both Landlord’s and Tenant’s look to protect their position with regards repairs, is by recording the property's state or repair prior to the lease commencement in a Schedule of Condition.

To be effective the Schedule of Condition must not only be agreed by both parties, but must also be cross referenced in the repairing and/or decorating obligations of the lease. Typically reference to a schedule will include terms such as ‘...excepting that the tenant is not obliged to put the property in any better state of repair than that evidenced in the schedule of condition...’ or ‘...the property is to be maintained in no worse condition than evidenced within the schedule of condition...’. Clearly the extent of liability depends greatly on the exact nature of the wording contained in the lease, and the two examples given may result in considerably differing liabilities.

Often Schedules of Condition include elements for which there remains a specific liability, and for which one or other party remains liable. A typical example is a restricted requirement for decoration, but lack of decoration may lead to deterioration of the decorated material, particularly exposed timber, which in turn may still require repair.

Further Guidance

The RICS has for many years published a Dilapidations Guidance Note for its practitioners to reference. The note is regularly reviewed and updated to reflect recent changes in both legislation and case law. Copies are available to members on line, or for non-members can be purchased from the RICS Bookshop, and other good bookstores.

In 2012, after a lengthy consultation period the Property Litigation Association ‘Pre-action Protocol for Claims for Damages in Relation to the Physical State of Commercial Property at the Termination of a Tenancy (The Dilapidations Protocol) was adopted. The Dilapidations Protocol provides guidance on the