

The logo for Bond Pearce, featuring the company name in a black, cursive script font centered within a solid lime green rectangular background.

THE RICS DILAPIDATIONS GUIDANCE NOTE

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1. Introduction

- 1.1. On 16 January 2003 the RICS launched its new Guidance Note on Dilapidations. The Note deals primarily with commercial and industrial property in England and Wales and whilst it is not intended to be a comprehensive guide to the subject of dilapidations, it does give both an introduction to and update on the subject. It is essential reading to any surveyor conducting a dilapidations case (be it for the landlord or the tenant) after that date.
- 1.2. The need for the RICS to produce this updated Note on dilapidations arises from the adjustments which have taken place over the last few years in the procedural rules of the civil courts in England and Wales. In consequence, I will look at those rules (albeit briefly) in so far as they relate to a claim for dilapidations.
- 1.3. A claim for dilapidations is of course based on the purported failure of one party to comply with its legal obligations contained within a lease. I have therefore a section on “the lease” under the heading “collecting information”.
- 1.4. I shall touch briefly on preparing the schedule and the claim and, where appropriate, the statutory requirements.
- 1.5. Finally, I have a section on the remedies available to a landlord both during and at the end of a lease, settling the action and finally venues for disputes.

2. The Civil Procedure Rules

- 2.1. The “new” Civil Procedure Rules (the CPR) came into effect in April 1999. They have had a major impact on the way in which civil litigation is conducted in the courts of England and Wales.
- 2.2. The ultimate responsibility for the control of litigation has been taken away from the parties and their legal advisers and given to the courts. In particular, the idea of so called “expert witnesses” lining up behind their clients and lawyers to go in to battle as a partisan advocate is now not only discouraged, any expert so doing will find himself severely criticised by the court (and indeed even found in contempt of that court – the punishment of which is a fine or imprisonment) and his client at the wrong end of a very unfavourable costs order (even if the case has apparently been won by that party).
- 2.3. The whole tone of the CPR is to encourage parties to a dispute to put all their cards on the table ahead of the proceedings even being issued and to take any path available to them to settle the case without the necessity of a trial. Parties seen to put

forward a fully explained, unexaggerated claim supported by all the necessary documentation (including where appropriate an expert report) will gain the support of the courts. Sensible offers to settle will also be taken in to consideration when the costs order is handed down by the judge.

- 2.4. I have no intention in dwelling too long on the CPR but would like to mention three matters in particular – pre-action protocols, statements of truth and costs. All give just a flavour of the way in which the civil procedure in courts has changed.

Pre-action Protocols

- 2.5. These aim to establish standards of communication and exchange of information between the parties in order that, if possible, disputes can be resolved without litigation. The courts have introduced a small number of protocols (for instance in relation to personal injury cases). The Department of Constitutional Affairs (the DCA) is presently considering a considerable number of draft protocols. The once suggested idea of having a general protocol has been abandoned.
- 2.6. One such draft protocol is that produced by the Property Litigation Association's Law Reform Committee and relates to a claim for dilapidations at the end of a lease. Circulated widely for consultation, the RICS adopted its contents as a guide to good practice and annexed it to its new Guidance Note on Dilapidations. However, use of this draft protocol highlighted some practical matters which required amendments to be made to this document and a new draft now sits with the Department of Constitutional Affairs awaiting its fate. Until such time as this is adopted, the original draft remains annexed to the Guidance Note.
- 2.7. The draft protocol is not intended to be mandatory but is intended to be, as stated in the Guidance Note, a guide to good practice. It encourages early exchange of all information regarding a claim. For instance, it states that a landlord should serve a terminal schedule of dilapidations within a reasonable time of the lease end. It suggests, that whilst "a reasonable time" will vary from case to case, it should generally not be more than two months after the determination of the lease. Not much time for the instructed surveyor in which to act!

Statements of Truth

- 2.8. Every claim form and every defence filed at court must set out the parties' case in full and must now be signed by the party itself (or by a director or senior manager of corporate body) and each must contain a statement of truth. It is hoped that this will prevent tactical play or exaggerated allegations.
- 2.9. It is simply worded "I believe that the facts stated in this [*name of document being verified*] are true."
- 2.10. The penalty for signing a declaration, knowing or believing that the facts supporting the claim or defence are untrue, is a fine or imprisonment. In consequence, a surveyor leading his client to believe that the facts set out in the claim or defence are

correct when the court finds that the claim or defence is in fact defective or exaggerated (and hence the statement of truth is thereby a lie) will not be thanked by the embarrassed client.

- 2.11. An expert witness, too, must now sign a statement of truth at the end of his expert report. This is worded “I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and the opinions I have expressed represent my true and complete professional opinion.”

Costs

- 2.12. Costs’ orders do not now automatically “follow the event” although that might be the starting point for a judge exercising his discretion as to what order to make (see the Court of Appeal decision in *Johnsey Estates (1990) Ltd v Secretary of State for the Environment, Transport and the Regions [2001] 2 EGLR 128*). Hence, although one party might be found to have “won” the litigation, the court has a discretion as to how costs should be awarded. A party who exaggerates or understates its case will be penalised.
- 2.13. The CPR state that “In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including [*inter alia*] the conduct of the parties.”
- 2.14. The rules go on to explain that the “conduct of the parties” includes
- (a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;
 - (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
 - (c) the manner in which a party has pursued or defended his case or a particular allegation or issue;
 - (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated the claim.

How the CPR Particularly Relate to a Claim for Dilapidations

- 2.15. I can think of no other area of property law where exaggeration and/or understatement have been more used as tactics than that relating to dilapidations.
- 2.16. Most building surveyors acting for landlords draw up a schedule of wants of repair for the premises with no reference to the wording of the lease (and in particular to the extent of the demise or the repairing obligations). There is usually no valuer instructed to consider whether the claimant has in fact suffered any actual loss at all.

- 2.17. Most building surveyors acting for the tenants deny that there is any disrepair and if there is, leave it to the valuer to argue that the landlord has suffered no loss at all to its reversionary interest.
- 2.18. Surveyors are employed to present their professional view based upon their expertise (and I am not speaking here simply about expert witnesses) when drawing up or defending a schedule of dilapidations and/or in considering the landlord's actual loss caused by the tenant's default. It is time for surveyors instructed in cases of dilapidations to give only their true professional view and not to simply say what the client wants to hear.

3. The Differing Roles of Surveyors Involved in a Dilapidations Case

- 3.1. The guidance note sets out in some detail the four roles in which a surveyor may be instructed in a dilapidations case:
 - the expert witness
 - the expert
 - the adviser and
 - the negotiator

There is no point in my repeating the notes here.

- 3.2. I will however underline that whatever your role, professional objectivity must underline everything you do. First, because you are a professional. Second, because understatement and/or exaggeration will be penalised if the matter goes to court on the question of costs.
- 3.3. Remember that in deciding what order to make on costs the court will have consideration to all the circumstances of the case including the conduct of the parties before as well as during the court proceedings.

4. Collecting Information

- 4.1. The first port of call for any building surveyor must be the lease and other legal documentation. I return to this in a moment.

- 4.2. In addition, ask if anyone took any photographs at the time the lease was entered in to or at any time during the term. Was a schedule of repair annexed to any of the documentation?
- 4.3. Ask your landlord client what his intentions are in relation to the building. If it is to be pulled down or structurally altered, tell him about s18(1) of the Landlord and Tenant Act 1927 (and the common law rules relating to loss) before (not after) preparing what he wants ie a schedule of dilapidations. Might do you out of a job but your client will thank you.

The Lease

- 4.4. The lease sets out the legal agreement between the parties and must always be consulted (together with other relevant legal documentation, e.g. licences to alter) before a schedule of wants of repair or dilapidations is prepared.
- 4.5. A brief word too about the Code of Practice for Commercial Leases. The first ten recommendations relate to negotiating a new lease. Recommendation 7 refers to repairs and services. It states that the tenant's repairing obligations and any repair costs included in service charges should be appropriate to the length of the term and the condition and age of the property at the start of the lease. These factors should in any event be borne in mind by a surveyor negotiating a dilapidations claim.

The Demise

- 4.6. The premises demised may be extensively or only briefly described in the lease. The description (which may or may not refer to for instance a specified part of a building or development or to a plan) should be carefully studied as the repairing covenant will almost certainly make reference to it.
- 4.7. Even if part only of the building is demised, it should be remembered that both the interior and exterior are included unless specifically excluded. Further, if the part demised constitutes the whole of the top floor of the building, the roof might be included unless the roof void has been retained by the lessor. (See for instance *Hatfield v. Moss [1988] 2 EGLR 58*).
- 4.8. Further, it should be remembered that the demise could be of the internal parts of the building only. "Internal" could include everything within the demise e.g including internal walls. This will depend on other features within the lease e.g whether or not the landlord has the repairing liability for structural parts in which case load bearing walls (albeit internal) could amount to a structural part - although a partition wall would almost certainly not. In consequence, the lease must be read as a whole and one party's repairing covenant should not be taken in isolation.

The Repairing Covenants

- 4.9. Other than in relation to residential property there is no liability upon either a landlord or a tenant to keep property in repair beyond that contained within the repairing covenants in the lease.

- 4.10. The extent of the specific covenant contained in leases varies considerably from a full repairing covenant (i.e. pursuant to which the tenant takes on the full repair liability for the premises throughout the term) or in which the landlord retains a full responsibility for repairs often clawing back the costs incurred pursuant to a service charge. A tenant's internal repairing covenant is however comparatively common. Care should be taken in such a case to ensure that the landlord has an external repairing covenant or problems arising on the exterior of the building could cause wants of repairing internally. These internal disrepairs will have to be remedied even though the tenant has no ability to put right the external disrepair or have the ability to call upon the landlord to do so.
- 4.11. It is not intended to go into any depth at this stage of today's talk upon the full extent and meaning of the repairing covenant. However, certain items as follows should be considered particularly if acting for the ingoing tenant.
- 4.12. "Keep", for instance, in good repair means not just a future commitment but an immediate requirement to put the premises into repair. An example may be seen in *Elite Investments Limited v. TI Bainbridge Silencers Limited* [1986] 2 EGLR 43. The roof of the property was deteriorating at the time of the grant of the lease. When it got to the stage where patching was no longer the answer, the Court held that the tenant must replace the roof in order to comply with a keep in good repair covenant even though the roof was in a poor state of repair at the time of the grant of the lease. In consequence, a full survey should be undertaken prior to the taking of a lease.
- 4.13. It should equally be remembered that a tenant is not obliged to create something which was never leased to it and there is a line between a repair and an improvement although it must be said that on occasions it is a thin one. Three tests to be applied were laid down in the case of *McDougall & Anor v. Easington District Council* 58 P&CR 201 when the court had to consider whether substantial works of renovation were or were not repairs, i.e:
- (i) whether the alterations went to the whole or part of the structure;
 - (ii) whether the effect of the works produced a wholly different building to that originally demised, and
 - (iii) the cost and effect on the life span of the building.
- 4.14. The wording of the covenant may of course go beyond merely repairing the premises. In *Credit Suisse v. Beegas Nominees Limited* [1994] 4 ALL ER 803 the landlord covenanted to "maintain repair amend renew cleanse repaint redecorate and otherwise keep the building good and tenantable condition". The Court held this went beyond repair and enabled the landlord (who could recover the costs of the works from the tenant by way of a service charge) to dismantle the aluminium cladding to the buildings as water was entering through it into the buildings and replace the

cladding with a newly designed system. This was so even though the problem had been identified prior to the tenant taking the lease.

- 4.15. It should be remembered that a repairing covenant is often in two halves. First, to keep the property in repair throughout the term. Second, for the tenant to yield up the premises in a state of repair compliant with the tenant's repairing obligations. Whilst not a covenant to repair, one should also not forget covenants to decorate and covenants to re-instate in this context. We will look later at the infamous *Jervis v. Harris [1996] 10 EG 159* case. It is my view (there is no definitive case law) that a covenant enabling a landlord to enter the premises and carry out works of repair if the tenant fails to comply with its repairing covenant does not enable a landlord to enter the premises to carry out works of mere decoration (unless of course the lease specifically so states).
- 4.16. One final problem in relation to yielding up covenants is what happens if there is not one? Does the covenant to repair carry on to the split second before the lease expires and enable a landlord to serve a terminal schedule of dilapidations? I had such a case not so long ago in which Kirk Reynolds QC advised that a terminal schedule could be served. We never had to test his theory in court as the case settled.

5. **Preparing the Schedule and the Claim**

- 5.1. The Guidance Note gives details about the layout, content and format of the schedule of dilapidations and I do not intend to repeat its contents in these notes. Suffice it to say that the schedule should be prepared in a form which is easily edited. This allows the building surveyors in particular to edit the originally served schedule but in such a way that third parties (and the court in particular if the matter gets that far) to understand how the items and/or the costs in the schedule were either agreed upon by the tenant's surveyor or disputed. It should identify against each numbered item the clause of the lease breached, the breach complained of, the remedy required and, if appropriate, the cost of the work required.
- 5.2. In addition to the schedule, the instructed surveyor will be expected to advise upon the quantum of the claim itself. In addition to the cost of the works listed in the schedule, the surveyor should give thought as to whether or not the claim should also include for instance fees, a sum equating to VAT if the landlord is unable to recover the VAT element on the cost of the works, loss of rent and rates whilst the landlord has the works carried out, etc. Again, some details are given in the Guidance Note and I, too, return to this subject when I talk on "damages" later in this talk.

6. **Statutory Requirements**

s146 Law of Property Act 1925

- 6.1. A right of re-entry or forfeiture pursuant to any proviso or stipulation in a lease for breach of any covenant contained in that lease (other than in respect of non-payment of rent) is not enforceable unless and until a s146 notice is served and the lessee has, within a reasonable time, failed to comply with the notice (see s146 (1) Law of Property Act 1925). A s146 notice is not valid if it does not contain a s1 notice pursuant to the Leasehold Property (Repairs) Act 1938 if that Act applies (see below).
- 6.2. Further, a right to damages for breach of covenant to keep or put property in repair is not enforceable in the case of any lease granted for a term of seven or more years of which three or more years remain unexpired unless a s146 notice has been served in which the tenant is notified that it may within 28 days from the date of the service, serve a counter-notice to the effect that it claims the benefit of the Leasehold Property (Repairs) Act 1938 (s1 of the 1938 Act as amended by the Landlord and Tenant Act, 1954).
- 6.3. In addition to times when a landlord must serve a s146 notice, there may be occasions when a landlord requires to do so for tactical reasons e.g
- to recover costs in the employment of a solicitor or surveyor or valuer in reference to the breach (see s146(3) of the 1925 Act) because the lease does not enable costs to be recovered;
 - when it is thought that the threat of forfeiture will prompt the tenant into action.

Contents of s146 notice

- 6.4. A s146 notice must
- specify the particular breach complained of,
 - if the breach is capable of remedy, require the lessee to remedy the breach and
 - in any case, require the lessee to make compensation in money for the breach.

It must also contain a notice pursuant to s1 of the 1938 Act, if that Act applies.

- 6.5. The common form of a s146 notice relating to wants of repair refers to the particular clause within the lease being breached and refers to the schedule of wants of repairs or dilapidations annexed. Such a breach is capable of remedy and therefore will require the lessee to remedy the breach within a reasonable time (see below) and to pay compensation in money for the breach. Finally, if s1 of the 1938 Act applies, notice must be added (see below).

- 6.6. The lessor cannot then actually forfeit the lease (be it by peaceable re-entry or by commencing and serving court proceedings) or seek damages until a reasonable period has gone by, during which the tenant has failed to carry out the works. As to what constitutes a reasonable period depends on the reasonable length of time required to carry out the works. That period cannot be less than the period stipulated in the lease as being the period during which the tenant has to carry out works following service of a notice of wants of repair (this period varies from lease to lease but is commonly three months).

s1 Leasehold Property (Repairs) Act 1938

- 6.7. A s1 notice pursuant to the 1938 Act is an integral part of a s146 notice. It is a statement to the effect that the lessee is entitled under the Act to serve on the lessor a counter-notice claiming the benefit of the Act within 28 days of service of the s146 notice. It must also state the manner in which a counter-notice may be served (see s196 of the Law of Property Act 1925) and the name and address for service of the lessor.
- 6.8. The s1 notice must be in characters “not less conspicuous than those used in any other part of the notice” (s1(4) of the 1938 Act).

s18(1) Landlord & Tenant Act 1927

- 6.9. It is essential to remember that s18(1) relates to repairing covenants. Other covenants (for instance to decorate etc.) are covered by the common law rule that a claimant cannot recover more than it has lost. The general concept is similar to the statutory requirement under discussion and very often the two ideas become known (strictly incorrectly) as a “s18 valuation exercise”.
- 6.10. S18(1) is in two parts. It places a ceiling on the amount recoverable as damages ie the diminution in the landlord's reversionary interest due to the breach. Secondly, it does not allow the landlord to recover any damages at all if the premises are to be pulled down at the end of the lease, or shortly thereafter or structural alterations would render valueless the works of repair.
- 6.11. Both areas have given valuation surveyors and letting agents in particular a licence to print money and even lawyers have been known to earn a crust or two in considering the effect of s18(1).
- 6.12. It is worth looking at the wording of that section in full.

“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; 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.”

Part One of s18(1)

- 6.13. What is the diminution in the landlord's reversionary interest? Firstly, one has to decide upon the assessment date. If one is considering a terminable schedule of dilapidations it is the end of the term of the lease. There have been cases that consider what happens if an undertenant protected by the 1954 Act is in occupation (see for instance *Crown Estate Commissioners v. Town Investments Limited* [1992] 1 EGLR 61) where it was held such a fact did not alter the contractual termination date. I am in no doubt in my own mind however that it is altered if it is the tenant itself who is in occupation under the 1954 Act.
- 6.14. Secondly, how does one assess the diminution in the landlord's reversionary interest? This is where the fun starts of course. A valuer gives two valuations - both as at the relevant date. One represents the value of the premises in the state they were left by the tenant and the second represents the value of the premises in the state they should have been in if the tenant had complied with its repairing covenant. Both beg the question as to what repairs the tenant should have carried out in order to comply with its covenant.
- 6.15. In fact the reversionary interest will often not come to the market. Both valuations are therefore hypothetical. This was the case in the *Shortlands* case (*Shortlands Investments Limited v Cargill plc* [1995] 1 EGLR 51) and gave rise to considerable argument as to what was the basis of the hypothetical sale. Was it to be assumed that there was a willing seller and a willing purchaser? It was accepted that there was a willing seller. However, in the actual case, the transferor paid money to the transferee to persuade him to take on the burdens of the property. The argument was that there would be no willing purchaser if no money were paid to him. Judge Bowsher QC saw no problem in this. He stated that it cannot be assumed that once the value of a property gets down to nil there cannot be any further diminution in value. He stated

“That may be true in many or perhaps most cases of chattels. It is quite a different situation where an owner of a leasehold property has an onerous interest which he wishes to transfer. Such an interest is transferable on the market if not “saleable”. If one assumes a willing transferor and a willing transferee, there will be a point in negotiations for a payment from the transferor where the parties are willing to do a deal.”

- 6.16. Having decided the date of assessment, what works the tenant should have carried out in order to comply with its covenant and the approach to valuation (ie willing seller and willing purchaser), the valuers then have to consider the cost of the works and the length of time necessary to carry out the works. There is of course the potential for hours of fun in agreeing or arguing over these factors. It is worth a detailed look at the *Shortlands* case to see how all these factors are taken into consideration in the two valuation exercises.

Part Two of s18(1)

- 6.17. One must also look to see if the premises are to be pulled down or structurally altered at the end of the term or shortly thereafter thus rendering valueless the repairs the tenant should have done.
- 6.18. The relevant date is again the end of the term (or if the lease is forfeited, the date of forfeiture). In *Keats v. Graham* [1960] 1 WLR 30, Lord Evershed MR said

“What the court is required by the section to do is to reach a conclusion of fact: Aye or no, were these premises going to be pulled down as things were at the date of termination of the tenancy?”

- 6.19. This sounds easy but again difficult questions can arise. For instance
- does “the premises” relate to the whole or part only of the demised property? It seems from the case *T M Fairclough & Sons Limited v. Berliner* [1931] 1 CH. 60 that it can relate to part of the property;
 - what is a short time?
 - what amounts to structural alterations which render valueless the repairs within the covenant?
- 6.20. Finally one must consider the landlord's intentions. Would the demised premises be pulled down or structurally altered? In this regard, one might like to consider intention in relation to s30(1)(f) and (g) of the Landlord and Tenant Act 1954. In *Cunliffe v. Goodman* [1950] 2 KB 237, Asquith LJ stated

“An “intention” to my mind connotes a state of affairs which the party intending” - I will call him X - does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own action of volition.”

It is also worth remembering the case of *Dolgellau Golf Club v. Hett* [1998] 34 EG 87. On the evidence before the court, it seemed that the landlord's proposals would fail

financially. Nevertheless, the court held this was not relevant. If the landlord intended to go forward with his scheme that was a matter for him.

- 6.21. In *Salisbury v. Gilmore* [1942] 2 KB 38, the landlord did prove his intention, prior to the end of the lease, to pull down the demised premises. He continued with his plans at the end of the lease but abandoned his ideas after the termination date because of the outbreak of the war. Kirk Reynolds QC and Nick Dowding QC suggest in their book *Dilapidations* that what is sauce for the goose is sauce for the gander and in consequence, if the landlord does not make up his mind to demolish the premises until after the termination date he can recover damages even though he subsequently pulls down the property. If the landlord can prove when he formed his intention, I agree with the authors on their comment.

7. Landlord's Remedies

During the Term

- 7.1. Upon the tenant's breach of its repairing covenant, the landlord will have prepared a schedule of wants of repair or dilapidations and serve it upon the tenant (with or without a s146 Notice - see above). The landlord has four courses of action open to it if the tenant fails to comply with the schedule *but* must choose its course (or possibly courses) prior to serving the schedule. The four options are to seek
- forfeiture
 - damages
 - mandatory injunction
 - carry out the works and recover costs as a debt.

Forfeiture

- 7.2. A pre-requisite is that the lease contains a forfeiture clause - one will not be implied for breach of a repairing covenant. Further, on a practical basis, the lessor must seriously consider whether it wishes to forfeit the lease. Loss of a good covenant in a recessionary market may not be what the lessor intended.
- 7.3. As stated above, following service of a s146 notice, the lessor must wait until the lessee has failed to comply with it within a reasonable period before forfeiting the lease either by peaceable re-entry or by commencing and serving court proceedings.
- 7.4. However, if the 1938 Act applies and the lessee has served a valid counter-notice, the lessor cannot either peaceably re-enter or commence forfeiture proceedings without the leave of the court.

- 7.5. On an application for such leave, the lessor must prove one of the following grounds applies:
- (a) that the repairs must be carried out immediately to prevent substantial diminution in the value of the reversionary interest or that the breach has already caused a substantial diminution in the value;
 - (b) that the repairs are required in order to comply with statute, a court order or requirement of any authority;
 - (c) the lessee is not in occupation of the whole of the property and the repairs are required in the interests of the occupier;
 - (d) the cost of the repairs is relatively small in comparison with the much greater expense if the works were postponed;
 - (e) special circumstances apply which in the opinion of the court render it just and equitable that leave be given.
- 7.6. To obtain leave, the landlord must prove its ground on the balance of probabilities (see *Associated British Ports v. C H Bailey [1990] 2 AC 703* - a House of Lords decision). It must also show that there is a breach of the repairing covenant. The evidence to be presented is effectively the same as the substantive hearing and in consequence is a high hurdle to jump.

Waiver of the right to forfeit

- 7.7. A breach of covenant entitles the lessor (assuming a forfeiture clause to exist) to elect to forfeit or to acknowledge that the lease is continuing. He cannot do both. If he indicates to the lessee that the lease is continuing (eg by demanding or accepting rent) he cannot then forfeit the lease.
- 7.8. If the breach is a once and for all breach (eg breach of the alienation clause), waiver is fatal. However, if the breach is one which continues from day to day (ie a continuing breach) the landlord can acknowledge the lease one day but (assuming the breach still exists) forfeit the next. Breach of a repairing covenant is a continuing breach.
- 7.9. What happens, however, if a lessor serves a s146 notice with a schedule of wants of repair annexed, then collects rent. Can he rely upon the original notice or does he need to serve a new one? The answer appears to be that if the property is in the same state of repair or worse the landlord can rely on his notice (see *Greenwich London Borough Council v. Discreet Selling Estates Limited [1990] 2 EGLR 650*). However if the landlord allows "months or years to pass by without giving any further notice and then suddenly seeks to forfeit the premises to the surprise of the tenant, relying on his old notice long ago [*then*]" in such a case the long delay would no doubt be taken into account in exercising the discretion to grant relief against forfeiture, or it

may be that some doctrine of acquiescence or estoppel at common law or equity would come to the aid of the tenant” (Staughton LJ in the Greenwich case).

- 7.10. There is a further problem. What happens if after service of the s146 notice and demanding of rent, the tenant carries out some repairs ie the property is not in the same state or worse? Here the decisions of the courts differ. In *New River Co Limited v. Crumpton* [1917] 1 KB 762 the court held a new notice was not necessary. In *Guillemard v. Silverthorne* (1909) 99 LT 584, it held it was. I generally advise clients to play safe and not acknowledge the existence of the lease after serving a s146 notice. It is after all a long hill to climb if one has to start again having come to court on the question of waiver and loses.

Relief from forfeiture

- 7.11. It is not intended to look at this subject in any depth. Suffice it to say that the Court has a very wide discretion as to whether or not to grant relief from forfeiture.
- 7.12. Under s146 of the Law of Property Act 1925 a lessee may apply for relief pursuant to s146 (2) as may an under-lessee pursuant to s146 (4). Further, any person with an interest derived from a lease or underlease can apply for relief or for an order vesting the lease in the applicant (eg a mortgagee).

Proposed changes in the law

- 7.13. Forfeiture of leases has been much criticised over the years for being unnecessarily complicated and uncertain.
- 7.14. The Law Commission proposed changes in the law in its first report and in the Termination of Tenancies Bill published in February 1994. If adopted the existing law would be totally abolished and replaced by a new statutory system.
- 7.15. It was proposed that the lessor apply to the courts for a termination order if a termination order event occurred. This would include a breach of covenant. No notice would be necessary although the lessor could serve a notice in the hope the lessee would comply. However notice would have to be given in the case of breach of a repairing covenant and the lessee would then have the right to serve a counter-notice. If a counter-notice was given, the lessor would have to seek the court's leave to commence proceedings for a termination order.
- 7.16. The property market was much concerned by the passing of peaceable re-entry. In consequence, the Lord Commissioners revisited this subject in its second report published in January 1998.
- 7.17. The Law Commission considered whether to retain the present law on peaceable re-entry or replace it with a new statutory right. The Commissioners favoured the latter but sought views from the market and we await their findings. This particular area of law relating to forfeiture is worth watching with care and considerable interest.

Damages

- 7.18. As stated above, in any claim for damages for wants of repair, if the lease is for a term of seven years or more of which three years remain unexpired, a s146 notice pursuant to the 1925 Act must be served incorporating a s1 notice pursuant to the 1938 Act.
- 7.19. A claim for damages will be based upon the landlord's loss which must be proven. Further, and in very general terms only, the loss is effectively "capped" to the loss to the reversionary interest and valuation is of the reversion subject to the leasehold interest.
- 7.20. It must also be remembered that we are speaking here about a repairing covenant. There must therefore be disrepair to be a breach. Whilst there is often a thin line between a repair and an improvement, it is a distinction which must be made. The classic case is *Post Office v Aquarius Properties Ltd* [1985] 2 EGLR 105. In that case, a wall in the property was porous allowing water to seep through into the basement. The landlord called upon the tenant to remedy it pursuant to its repairing covenant. It was held that the wall had always been porous - the required works would not remedy a disrepair - they amounted to an improvement.
- 7.21. If it is the landlord's real intention to get the works of repair done, this is not the remedy to choose. Further, the damages awarded during the term may prove to be limited.
- 7.22. It must be noted that although s18(1) of the Landlord and Tenant Act 1927 only applies to repairs, it is a general rule at common law that a claim damages can never exceed the claimant's actual loss and loss must be proven.

Mandatory Injunction

- 7.23. The courts have been historically reluctant to grant a mandatory injunction in relation to enforcing a covenant within a lease. However, that climate might be changing as gradually judges are ordering tenants to comply with their covenants.
- 7.24. An example may be seen in the case of *Rainbow Estates Limited v Tokenhold Limited and another* [1998] 24 EG 1213. Giving judgment, Mr Lawrence Collins QC stated:

"In my judgment, a modern law of remedies requires specific performance of a tenant's repairing covenant to be available in appropriate circumstances, and there are no constraints of principle or binding authority against the availability of the remedy."

He ordered the tenant to comply with its repairing covenant.

- 7.25. A caveat. The facts of this case were very unusual and in the reading of judgments granting mandatory injunctions, judges still appear nervous in applying the remedy

too readily. Nevertheless, it is certainly an option to consider when attempting to enforce a repairing covenant.

Carry out Works and Recover Costs as a Debt

- 7.26. A lease clause enabling a landlord to enter the demised premises and carry out repair works in the default of the tenant and then to recover the costs from the tenant is common.
- 7.27. Historically, such a covenant was rarely used as the courts were undecided whether the costs were recovered as a debt (and hence were not limited by statute) or as damages (and were therefore subject to s1 of the 1938 Act and s18(1) of the 1927 Act).
- 7.28. However, the matter came before the Court of Appeal in 1996 and that court clarified the position. The costs could be recovered as a debt (see *Jervis v Harris* [1996] 10 EG 159). It ordered the tenant to cease trading, vacate the premises for a period to enable the works to be carried out by the landlord's workmen and repay the costs as a debt. The case sent shock waves through the world of dilapidations.
- 7.29. A word of caution for landlords, however. Before having the works carried out, make absolutely certain that all the works fall within the tenant's repairing covenant. If they do not, the landlord will be unable to recover all the costs and might lay itself open to a claim for trespass by the tenant or even that entry to be property amounts to forfeiture.

At the End of the Term

- 7.30. Both parties should consider their positions vis a vis their repairing covenants contained in the lease during the last year of the term - not as so many parties do, just as the tenant is packing its boxes to leave.
- 7.31. If the tenant has covenanted to reinstate the premises to the state they were in prior to carrying out improvement or fitting out works it might be worth asking the landlord if it indeed wants the works removed. Further, the landlord may have the option as to whether or not reinstatement works should take place if that is the case, the tenant should push the landlord to elect or it may find that its repairing works are severely disrupted by the landlord suddenly requiring reinstatement works to be carried out at the very last moment.
- 7.32. The tenant of course has the option whilst the lease exists of carrying out works to comply with its covenants or to leave the property in disrepair and run the risk of a claim for damages. That option goes at the expiry of the term.
- 7.33. A landlord may serve a terminal schedule of dilapidations early in the last year in the hope the tenant will carry out the works. If it fails to do so, the options are, so long as the lease continues, the same as during the term BUT if applying a "Jervis v Harris"

clause the landlord must take considerable care that it will complete its works during the term. It cannot enforce such a clause after the term has ended.

7.34. The most common claim on the termination of the lease is one of damages.

Damages

7.35. We have of course already looked at a claim for damages during the term of the lease and the possibility of the pre requisite service of a s146 notice pursuant to the 1938 Act. No such notices are necessary in relation to a terminal schedule.

7.36. Having said that, the lessor may choose to serve a s146 notice with the terminal schedule annexed. For instance, if the term is to continue pursuant to the Landlord and Tenant Act 1954 the landlord may have tactical reasons for serving such a notice. I am of the view that a s146 notice can be served at any time during the term. There is a view however that the tenant should have time to remedy the breach before the end of the term after service of the notice. There is no case law one way or the other.

7.37. The level of damages has of course given rise to much more debate over the years. Judge Bowsler QC sitting in the Official Referee's Court confirmed in the *Shortlands Investments Limited v. Cargill plc* [1995] 1 EGLR 51

“At common law, the proper measure of damages is the difference in value of the reversion at the end of the lease between the premises in their then state of unrepair and in the state in which they would have been if the covenants had been fulfilled. Matters happening after the lease came to an end do not affect the matter except that there may be evidence of what was in prospect at the time the lease came to an end. In most cases the cost of repairs is a good guide to the difference in value of the reversion.”

7.38. At common law, this “good guide” would be a reasonable and proper amount enabling the lessor to put the premises into the state in which the tenant ought to have left them to comply with its repairing covenant.

7.39. In addition to the cost of the works, one may be able to include

- professional fees in for instance preparing a specification and supervising the works (see for instance *Culworth Estates Limited v. Society for the Victuallers* [1990] 2 EGLR 36) but not for drawing up the schedule of dilapidations (see for instance *Lloyds Bank Limited v. Lake* [1961] 1 WLR 884),
- a sum equating to VAT if the landlord cannot itself reclaim it,
- loss of rent for period reasonably necessary for carrying out the repairs if the landlord cannot let due to the need to carry out the works. In *Scottish Mutual Assurance Society Limited v. British Telecommunications plc* in a judgment given in 1994, Mr Recorder Butcher QC sitting as a Deputy Official Referee stated

"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 obligations 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."

- if a claim for loss of rent is sustainable, then other costs of occupation eg rates may also be claimed.

7.40. Matters do not of course stop there. One has again to consider s18(1) of the Landlord and Tenant Act 1927.

7.41. Finally, do remember that the draft protocol annexed to the RICS Guidance Note relates to a terminal schedule of dilapidations.

8. Settling the Action

8.1. Most actions involving dilapidations settle before the matter reaches court or any other venue for dispute.

8.2. The court rules and the RICS guidance note encourage the parties to meet in any event before and after any claim is formulated.

8.3. The building surveyor plays a crucial part in negotiations. Arguing about repairs item by item is time consuming and exceedingly expensive if left to the court room. The best job you can do for your client is reach agreement on the items even if the quantum of loss argument still has to be hammered out on another occasion.

9. Venues for Disputes

9.1. As stated above, a lease will often contain a dispute resolution clause – usually by way of arbitration or an independent expert. The courts will generally not intervene in a case where, in the light of the existence of such a clause, one party wishes to use this specified route (even if the other party has issued proceedings and sought the court's assistance in a dispute). In consequence, a lease should always be consulted before any venue for the dispute is selected or costs will be wasted.

9.2. Most dilapidations disputes are resolved by simple negotiation between the parties and/or their advisers. Nevertheless, the parties and their advisers should always approach the case as *if* the case were going to court. That includes not exaggerating a claim or a defence.

- 9.3. If negotiation does not succeed then the parties can consider the courts, arbitration, an independent expert or mediation to resolve their dispute. Every method carries a costs' penalty.
- 9.4 The RICS has recently trained some surveyors thoroughly versed in the practice of dilapidations as independent experts. A list of these may be obtained through the dispute resolution faculty at the RICS.

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