

Dilapidations In Practice

Edinburgh

Glasgow

London

Manchester

pmp

building surveying
project management
cost consultancy

CONTENTS

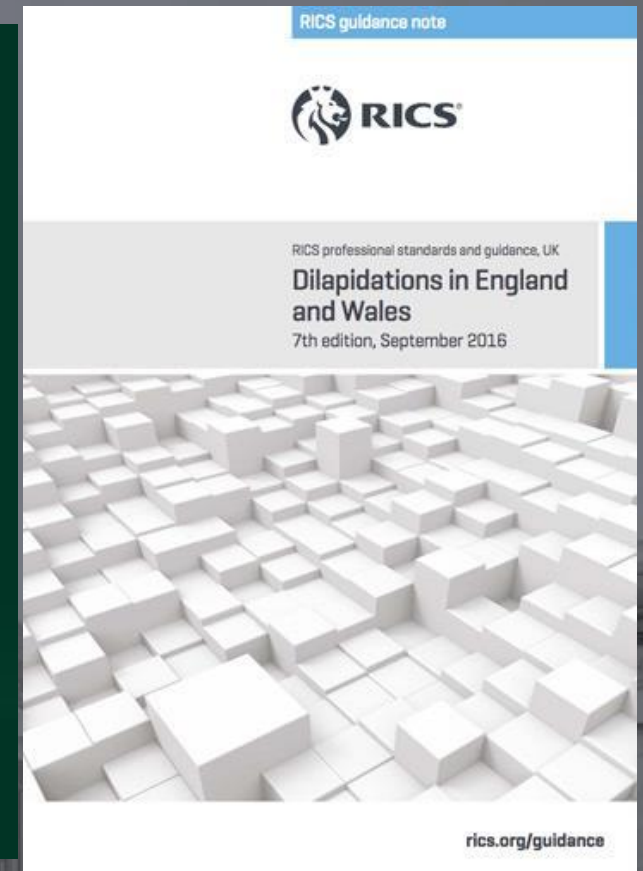
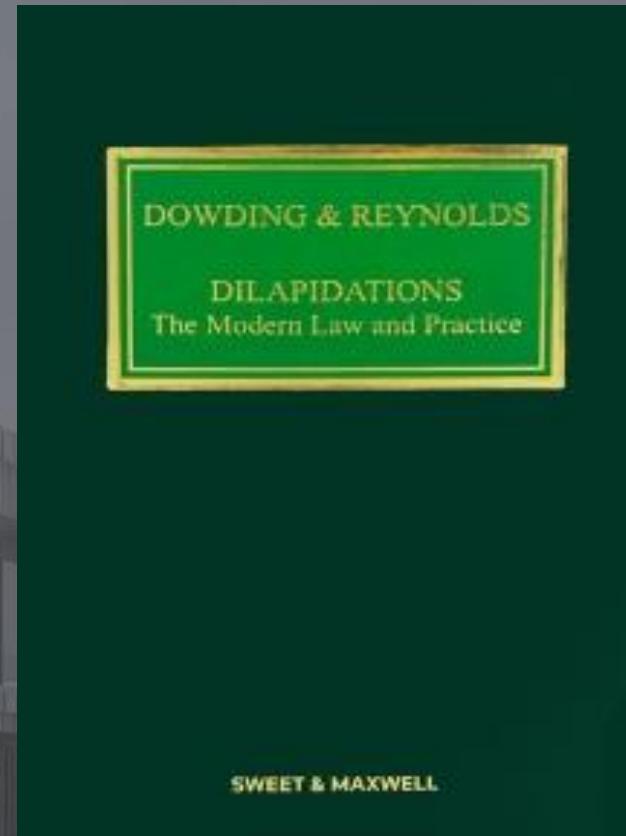
1. Sources of Information and Guidance.
2. Life Cycle of a Claim.
3. Relevant Clause / Statutory implications.
4. The Commercial Reality.
5. Q&A.



Dilapidations: *'a claim for damage for breach of covenant relating to a commercial lease in relation to the building fabric and use'*.

MAIN GUIDANCE & INFORMATION

- Dilapidations Modern Case Law 7th Edition.
- RICS Dilapidations Guidance Notes 7th Edition.
- PLA Dilapidations Protocol.



**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)**

SURVEYOR APPOINTMENT

Typically 12 - 6 months before Lease expiry date - WHY?

- Service of notices.
- Break clause requirements.
- Gather information.
- Specialist Consultants.
- Prepare the Claim.
- Test and research.
- Form part of lease renewal negotiations.
- Terminal or Final with Quantified Demand

LEASE REVIEW

- Always read the whole lease.
- Highlight the relevant clauses.
- Note down salient information.
- Request further referenced documentation as necessary.

15. Costs

15.1 The Tenant shall pay the costs and expenses of the Landlord including any solicitors' or other professionals' costs and expenses (incurred both during and after the end of the term) in connection with or in contemplation of any of the following:

- (a) the enforcement of the tenant covenants of this lease;
- (b) serving any notice in connection with this lease under section 146 or 147 of the Law of Property Act 1925 or taking any proceedings under either of those sections, notwithstanding that forfeiture is avoided otherwise than by relief granted by the court;
- (c) serving any notice in connection with this lease under section 17 of the Landlord and Tenant (Covenants) Act 1995;
- (d) the preparation and service of a schedule of dilapidations in connection with this lease; or
- (e) any consent or approval applied for under this lease, whether or not it is granted [(unless the consent or approval is unreasonably withheld by the Landlord in circumstances where the Landlord is not unreasonably to withhold it)].

15.2 Where the Tenant is obliged to pay or indemnify the Landlord against any solicitors' or other professionals' costs and expenses (whether under this or any other clause of this lease) that obligation extends to those costs and expenses assessed on a full indemnity basis.

26. Repairs

26.1 The Tenant shall ^{de finition} keep the Property clean and tidy and in good repair [and condition] [and shall ensure that any Service Media within and exclusively serving the Property is kept in good working order].

26.2 The Tenant shall not be liable to repair the Property to the extent that any disrepair has been caused by an Insured Risk, unless and to the extent that:

- (a) the policy of insurance of the Property has been vitiated or any insurance proceeds withheld in consequence of any act or omission of the Tenant, any undertenant or their respective workers, contractors or agents or any person on the Property with the actual or implied authority of any of them[. OR ; or]
- (b) [the insurance cover in relation to that disrepair is excluded, limited, is unavailable or has not been extended, as mentioned in clause 9.2.]

26.3 [The Tenant shall keep the external areas of the Property ^{de fine} in a clean and tidy condition and not allow any rubbish or waste to be left there.]

26.4 [The Tenant shall clean all windows at the Property as often as is necessary.]

27. Decoration

27.1 The Tenant shall ^{includes elements not previously decorated?} decorate the outside and the inside of the Property as often as is reasonably necessary and also in the last three months before the end of the term.

FOLLOWING APPOINTMENT

- Gather and information.
- Desktop review of the site and lease documents.
- Add relevant dates to the calendar.
- Update client and arrange access.
- Liaise with consultants.
- Hire high level access / drone.



SITE INSPECTION

- H&S check.
- Check equipment.
- Access limitations.
- PPE.
- Record the site.
- Update the client.



SERVICE OF CLAIM

- Review and served by solicitor.
- Correct details.
- Who's chasing?
- Consider strategy - when to serve.
- Quantified Demand issued.



NEGOTIATION

- Introductions.
- Provide Scott Schedule.
- Provide realistic costs.
- Respond in 56 days from QD service.
- 28 days to meet on site after initial response.
- No recommended settlement time.

ITEM NO.	LEASE CLAUSE NO.	BREACH COMPLAINED OF	REMEDIAL WORK REQUIRED	LANDLORD'S COST FOR				TENANT'S RESPONSE	TENANT'S COSTING
				QUANTITY	UNIT	RATE	COST	[date]	[date]
EXTERNALLY									
		Roof							
1	3.14	The tenant has installed plant and equipment at roof level, to serve the premises.	Remove tenant installed plant and equipment comprising air conditioning condenser units, refrigerant pipework, dry air coolers, air handling plant, ductwork, back-up generator and TV / Satellite receivers. All Services and associated ancillaries to be removed in their entirety.	320.00	Hr	38.00	£12,160.00		
2	3.5	The access panel to the cold water storage tank housing is damaged.	Replace access panel to the cold water storage tank housing on a like for like basis.	1.00	Item	275.00	£275.00		
		External Elevations							
3	3.5	The wall mounted security flood lights were noted to have damaged / missing covers.	Replace wall mounted security flood lights on a like for like basis.	3.00	Item	125.00	£375.00		
4	3.14	The tenant has installed Services equipment to the external elevations of the premises.	Remove tenant installed Services comprising intruder alarm sounders, weather compensation sensors, feature / signage lighting and CCTV cameras. All Services and associated ancillaries to be removed in their entirety.	32.00	Hr	38.00	£1,216.00		
INTERNALLY									
		Utilities							
5	3.14	The tenant has installed a single new incoming	Following disconnection of the existing mains gas supply,	3.00	Sum	1,850.00	£5,550.00		

RELEVANT CLAUSES

Statutory compliance

Repair

Decoration

Reinstatement/Yielding Up

Professional Fees





REPAIR

- Consider Dowding and Reynolds 5 Stage Analysis.
- Schedule of Condition - Word of Warning.
- Age, character & location.
- Least onerous works.
- Improvements Vs unavoidable or consequential.
- Value affective works / Commercial benefit.
- Superseded by any reinstatement works.
- Inherent defects

REINSTATEMENT / YIELD UP

- Often largest impact on the claim.
- What is the demise?
- Check Landlord's Notice to Reinstate early!!
- Lease renewal referenced?
- Check age of fittings.
- Compliance with former lease?
- Permitted or unauthorized alterations?
- Chattel / Fixture and fitting / Landlord's demise.
- Impact on other dilapidations items.
- Check how the building is connected.
- Consider concealed elements.



REDECORATION

- Less contentious but sometimes silent.
- Number of coats.
- Timings.
- Check demise descriptions

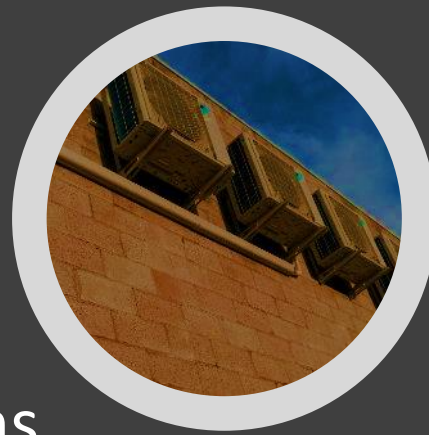


- Treatment included.
- Decoration or redecoration.
- Workmanship.
- Materials.



STATUTORY COMPLIANCE

- Request test certification for Mechanical & Electrical installations.
- Asbestos surveys.
- Commission testing where necessary.
- Affects on reinstatement.
- Law or guidance?
- Who negotiates?
- Statutory fees recoverable?
- Review documents before sending.



DESCRIPTION OF THE PROPERTY

- Lease plans – demise or for reference only.
- Description commensurate with the building.
- Example - Roof lights – Windows or roof?

PROFESSIONAL FEES

- Specific wording.
 - Negotiating.
 - Remediating.
 - Monitoring.
 - Valuation.
 - Reasonable?



LANDLORD'S INTENTIONS / EVIDENCE OF LOSS

- Ask in advance of responding
- Letter of intent / contractor appointment.
- Tendered in line with JCT.
- Re-let - incentive for occupation.
- Sold - Loss in sale.
- Retain fit out?



SETTLEMENT AGREEMENT

- **Various forms of offer.**
- **Complete Form of Release / Deed of Settlement.**
- **Raise invoice.**
- **No requirement to perform works.**

Case Study

Scenario: Terminal Dilapidations Claim

In each scenario, we'll use:

- Same Building: Terrace retail unit, Old Swan, Liverpool
- Same Lease: Full repairing and insuring, 25-year lease ending August 2023.
- Same Landlord and Tenant: Moores Investment v Topshop Ltd
- Same acting surveyors and Claim: £155,500.00
- Tenant fails to undertake any dilapidations works.

We'll look at xx different outcomes where the landlord's intentions with the building differ.

Breakdown of the Claim

- Reinstatement – remove the shop fit out.
- Repair – General minor repairs including: provisional sum of 100 slates for the pitched roof, treat rot to timber windows, new finishes internally to the dated fit out in the upstairs staff room.
- Decoration – both externally and internally where previously decorated.
- Statutory compliance – tenant fails to produce or provide any statutory compliance documents, such as NICEIC fixed wire electrical testing, asbestos management report, fire alarm test certificate or emergency light certificate

Outcome One

- The tenant serves their response within 56 days and negotiations progress.
- No works are undertaken. No Section 18 valuation commissioned.
- During this time, premises is relet. New tenant takes FRI lease with no reduction in rent and no Schedule of Condition.
- Tenant becomes informed of the new letting, reviews HoTs and confirms all liability has been transferred to the new tenant.

Final Settlement: £0.00 (+ landlord's surveyor fees)

Outcome Two

- The tenant serves their response within 56 days and negotiations progress.
- No works are undertaken. No Section 18 valuation commissioned.
- During this time, premises is relet (so far, same scenario as Outcome One).
- New tenant takes FRI lease with no reduction in rent however takes a robust Schedule of Condition, showing the premises being in very poor repair.
- Tenant becomes informed of the new letting, reviews the new lease and new tenant's schedule of condition.
- Loss considered to be suffered consequential to the landlord not being able to recover dilapidations from the new tenant, at the end of their term.
- New lease has expressed covenant for decoration and statutory compliance, therefore these are removed from the claim.

Final Settlement: £80,000 (+ landlord's surveyor fees)

Outcome Three

- The tenant serves their response within 56 days and negotiations progress.
- No works are undertaken. No Section 18 valuation commissioned.
- During this time, premises is relet (so far, same scenario as Outcome One).
- New tenant takes FRI lease however takes a rent free period / monetary contribution from the landlord (valued at £50,000) with reference in the HoTs for the poor state of the premises.
- Tenant becomes informed of the new letting, reviews the HoTs to confirm incentive for occupation granted by the landlord to the new tenant.

Final Settlement: £50,000 (+ landlord's surveyor fees)

Outcome Four

- The tenant serves their response within 56 days and negotiations progress.
- Landlord's surveyor confirms that the tenant will not undertake the works in the short term.
- Parties negotiate the claim and appoint Section 18 specialist valuers.
- Tenant's Section 18 Report caps the recoverability of the claim (value of the premises in full repair v current condition) at £40,000.
- Landlord's Section 18 Report values the loss at £100,000. Parties agree at £55,000

Final Settlement: £55,000 (+ landlord's surveyor fees. In addition valuation fees)

Outcome Five

- The tenant serves their response within 56 days and negotiations progress.
- Landlord's surveyor confirms that the tenant will not undertake the works in the short term.
- Landlord sells the premises.
- Section 18 valuers appointed to assess any loss based on the value of the premises and the perceived value had the premises been compliant with the lease.
- Tenant's Section 18 Report caps the recoverability of the claim (value of the premises in full repair v current condition) at £0.00.
- Landlord's Section 18 Report estimates the tenant could have received an additional £40,000 more had the premises been in full repair.

Final Settlement: £15,000 (+ landlord's surveyor fees. In addition valuation fees)

Outcome Six

- Landlord tenders the works to three contractors. Minimal negotiations take place while the landlord's surveyor tenders the works.
- Cost generally increase as part of the tender process.
- Strip out of the ship fit out uncovers loose / damaged ACM.
- Roof is found to be beyond repair and wholesale replacement is the only form of repair.
- Windows found to be beyond economical repair and replacement is required.
- Electrical testing finds the wiring to be unsafe and replacement of the electrical installations is instructed.

Final Settlement: £180,000.00

Thoughts:

- It's obvious which scenario worked out best for the tenant, as their main ambition is to keep the settlement as low as possible, but which worked out best for the Landlord?
- The landlord is under no obligation to use the settlement money to improve the premises.
- The tenant does hold the right during the term to undertake the works, however this is uncommon, given the scenarios discussed.
- Sometimes there is a combination of each scenario. The landlord might want to part perform works and negotiate the remaining as a settlement.

THANK YOU FOR LISTENING!!

ANY QUESTIONS?

For any dilapidation's assistance, please feel free to get in touch:

Manchester

Ben Walker

07384116137

benwalker@pmpplc.co.uk

Bristol

Mark Humphries

07791610634

markhumphries@pmpplc.co.uk

pmp

building surveying
project management
cost consultancy

Edinburgh

Glasgow

London

Manchester