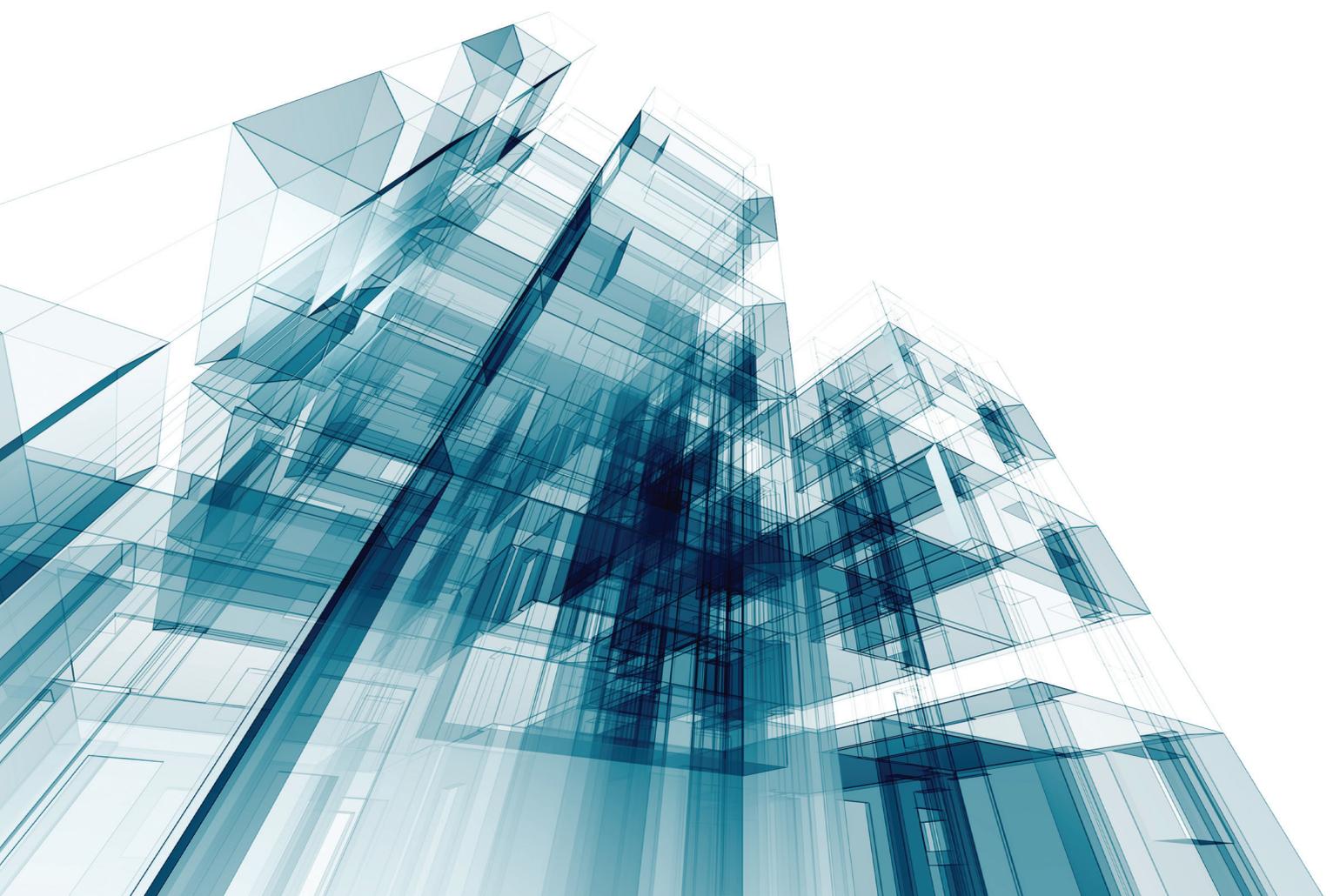




RICS professional guidance, Scotland

Dilapidations in Scotland

2nd edition



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Contents

RICS Professional guidance	1
1 Introduction.....	3
1.1 General	3
1.2 Areas covered	3
1.3 Naming conventions.....	3
2 Legal Framework in Scotland.....	4
2.1 Basis of legal interpretation	4
2.2 The obligations of a landlord at common law	4
2.3 The obligations of a tenant at common law	4
2.4 Transfer of common law liability	4
2.5 The principle of tacit relocation	5
2.6 Common terminology.....	5
3 Contract of lease.....	8
3.1 The definition of a lease	8
3.2 Types of lease	8
3.3 The essential ingredients of a lease.....	8
3.4 The contents of a lease.....	8
4 The principles of dilapidations	9
4.1 Definition of dilapidations and wants of repair.....	9
4.2 Essential ingredients of a dilapidations claim	9
4.3 Purpose of a schedule of dilapidations	9
5 The role of the surveyor	10
5.1 Introduction.....	10
5.2 Adviser/negotiator	10
5.3 Skilled witness.....	10
5.4 Independent expert	11
5.5 Technical Adviser.....	11
6 Taking instructions.....	12
6.1 Generally	12
7 The lease and other enquiries	13
7.1 Documentation.....	13
7.2 Other Useful Information	13
7.3 Typical lease obligations of the parties	13
7.4 Recovery of fees	13
7.5 Schedules of Condition	14
8 The inspection	15
8.1 Requirements for access.....	15
8.2 RICS guidance notes	15
8.3 Note taking	15
8.4 Measurements	15

- 8.5 Photographs 15
- 8.6 Specialist input..... 16
- 8.7 Further investigation 16
- 9 The schedule of dilapidations..... 17**
- 9.1 Layout and content..... 17
- 9.2 Description of work..... 17
- 9.3 Service..... 17
- 9.4 Format 18
- 10 Negotiation of a settlement 19**
- 10.1 General 19
- 10.2 Timetable 19
- 10.3 The Scott Schedule 19
- 10.4 Changing circumstances..... 19
- 10.5 Remedies open to landlord..... 19
- 10.6 Options open to tenant..... 20
- 10.7 Dispute resolution 20
- 11 Preparation of a claim for damages 21**
- 11.1 Introduction..... 21
- 11.2 Right to monetary settlement..... 21
- 11.3 Preparation of claim 21
- 11.4 Costing of the claim..... 22
- 11.5 Consequential losses 22
- 11.6 Settlement of the claim 22
- Appendices**
- A Blank schedule of dilapidations 24
- B Worked example of a schedule of dilapidations 25
- C Blank Scott Schedule..... 26
- D Worked example of a Scott Schedule..... 27
- E Blank summary of claim..... 29
- F Value added tax 31

RICS professional guidance

International standards

RICS is at the forefront of developing international standards, working in coalitions with organisations around the world, acting in the public interest to raise standards and increase transparency within markets. International Property Measurement Standards (IPMS – ipmsc.org), International Construction Measurement Standards (ICMS), International Ethics Standards (IES) and others will be published and will be mandatory for RICS members. This guidance note links directly to these standards and underpins them. RICS members are advised to make themselves aware of the international standards (see www.rics.org) and the overarching principles with which this guidance note complies. Members of RICS are uniquely placed in the market by being trained, qualified and regulated by working to international standards and complying with this guidance note.

RICS guidance notes

This is a guidance note. Where recommendations are made for specific professional tasks, these are intended to represent 'best practice', i.e. recommendations that in the opinion of RICS meet a high standard of professional competence.

Although members are not required to follow the recommendations contained in the guidance note, they should take into account the following points.

When an allegation of professional negligence is made against a surveyor, a court or tribunal may take account of the contents of any relevant guidance notes published by RICS in deciding whether or not the member acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this guidance note should have at least a partial defence to an allegation of negligence if they have followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

It is for each member to decide on the appropriate procedure to follow in any professional task. However, where members do not comply with the practice recommended in this guidance note, they should do so only for good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice.

Also, if members have not followed this guidance, and their actions are questioned in an RICS disciplinary case, they will be asked to explain the actions they did take and this may be taken into account by the Panel.

In some cases there may be existing national standards which may take precedence over this guidance note. National standards can be defined as professional standards that are either prescribed in law or federal/local legislation, or developed in collaboration with other relevant bodies.

In addition, guidance notes are relevant to professional competence in that each member should be up to date and should have knowledge of guidance notes within a reasonable time of their coming into effect.

This guidance note is believed to reflect case law and legislation applicable at its date of publication. It is the member's responsibility to establish if any changes in case law or legislation after the publication date have an impact on the guidance or information in this document.

Document status defined

RICS produces a range of professional guidance and standards documents. These have been defined in the table below. This document is a guidance note.

Type of document	Definition	Status
Standard		
International standard	An international high-level principle-based standard developed in collaboration with other relevant bodies.	Mandatory
Professional statement		
RICS professional statement	A document that provides members with mandatory requirements or a rule that a member or firm is expected to adhere to. This term encompasses practice statements, Red Book professional standards, global valuation practice statements, regulatory rules, RICS Rules of Conduct and government codes of practice.	Mandatory
Guidance		
RICS code of practice	Document approved by RICS, and endorsed by another professional body/stakeholder, that provides users with recommendations for accepted good practice as followed by conscientious practitioners.	Mandatory or recommended good practice [will be confirmed in the document itself].
RICS guidance note [GN]	Document that provides users with recommendations or approach for accepted good practice as followed by competent and conscientious practitioners.	Recommended best practice. Usual principles apply in cases of negligence if best practice is not followed.
RICS information paper [IP]	Practice-based document that provides users with the latest technical information, knowledge or common findings from regulatory reviews.	Information and/or recommended good practice. Usual principles apply in cases of negligence if technical information is known in the market.

1 Introduction

1.1 General

1.1.1 The purpose of this publication is to provide practical guidance to RICS members on the skills and approach required when instructed in connection with dilapidations matters in Scotland.

1.1.2 The guidance deals primarily with commercial and industrial property in Scotland and is not intended to be a comprehensive guide to dilapidations. It is also recommended that surveyors familiarise themselves with any additional documents that are cross-referenced herein.

1.1.3 The overall intent is to advise members on the factors they should take into consideration when:

- taking their client's instructions
- reviewing the lease and other relevant documents
- inspecting the leased premises, and
- producing and responding to schedules and other documentation for use by the client, the other party to the lease, third parties, the courts or other dispute resolution proceedings.

1.1.4 An item of dilapidations is an allegation of breach of contract and as such is actionable in law.

1.1.5 When advising a client on dilapidations matters, a surveyor should seek fully to understand the client's position, the reason why the surveyor's advice is sought and the use to which that advice might be put. The surveyor should try to ascertain the factual and legal background insofar as it will impact on that advice.

1.1.6 Often, after a surveyor has advised their client, a document is sent or disclosed to the other party to the lease, to third parties, or to a court or tribunal. That document can be held out as the product of the surveyor, applying their training, knowledge and experience of the matter. The surveyor, while complying with their client's instructions, must ensure that any such document does not contain statements or assertions that the surveyor knows, or ought to know, are not true or properly sustainable or reasonably arguable.

1.1.7 Surveyors should not allow their professional standards to be compromised in order to advance clients' cases. A surveyor should not allow a document that contains statements or assertions that they know, or ought to know, are not true or properly sustainable or reasonably arguable to be sent bearing their name or the name of their firm. A surveyor should give proper advice even though the client might choose to ignore it.

1.2 Areas covered

1.2.1 The situations in which surveyors can be asked to act or advise and that are covered by this guidance note are as follows:

- claims at the end of the lease term
- claims during the lease term
- irritancy situation
- break clause situations
- claims by tenants against landlords.

This notwithstanding, the remainder of this guidance note refers generally to claims by landlords against tenants.

1.3 Naming conventions

1.3.1 This text has been gender neutralised in accordance with RICS house style.

1.3.2 The word 'tribunal' is used to mean courts, tribunals, arbitrations, and independent experts.

2 Legal framework in Scotland

2.1 Basis of legal interpretation

2.1.1 In the absence of express repairing obligations in a lease, the obligations of the parties are governed by common law.

2.1.2 The wording of the lease can be critical in establishing the extent to which the landlord's common law obligations have been removed/passed on to the tenant.

2.1.3 In essence, in almost all cases involving the subject of dilapidations in Scotland, provided it is clear and unambiguous, the text of a lease of a commercial property can be interpreted as meaning what it says, subject to the overriding requirements of the common law position.

2.1.4 It is essential that the surveyor acting for either the landlord or the tenant examines the complete lease to identify all clauses that impose a relevant obligation on the tenant beyond their common law obligation. It may well be necessary to obtain the input of your client's legal adviser.

2.2 The obligation of a landlord in common law

2.2.1 The principal obligations of a landlord in common law can be summarised as follows:

- The landlord is obliged to give full possession of the leased premises at the date of entry.
- Once the tenant is in possession, the landlord must not do anything to deprive the tenant of their possession.
- The landlord warrants that the leased premises are reasonably fit for purpose at the outset of the lease.
- The landlord has a continuing duty to keep the leased premises in a tenable condition and wind and watertight during the currency of the lease, provided and once they are told of circumstances which require attention.

2.3 The obligations of a tenant in common law

- The tenant should enter into possession of the leased premises at the date of entry.
- The tenant should remain in possession of the leased premises for the duration of the lease.
- The tenant should only use the leased premises for the purposes for which they are let.

- The tenant should use reasonable care in the management of the leased premises as they are liable for any damage attributable to their negligence.
- The tenant is obliged to pay the rent when it becomes due.

2.4 Transfer of common law liability

2.4.1 The obligations outlined in common law are often altered by express provision in the terms of the lease between the parties.

2.4.2 The common law position is, however, of potential significance in situations where the lease is silent or where doubt or ambiguity exists concerning the meaning of a word or phrase contained in the lease.

2.4.3 A landlord's repairing obligations in common law can be displaced by incorporating appropriately worded clauses into the lease.

2.4.4 At commencement of the lease the implied warranty noted in 2.2.1 might be dealt with by incorporating words or phrases into the lease similar to:

'The tenant accepts the premises as being in good and substantial condition and repair and in tenable condition and in all respects fit for the purpose for which they are let.'

It is worth noting that the word 'accepts' has been interpreted as having the effect of setting the benchmark condition for the interpretation of any subsequent obligation to repair on the tenant.

2.4.5 There may also be additional wording in other clauses of the lease that has the effect of displacing the landlord's common law implied warranty at commencement. This would apply if there is a statement to the effect that:

'The landlord grants no warranty in respect of the premises being suitable or fit for purpose.'

2.4.6 To deal with the transfer of the landlord's repairing obligation to the tenant during the lease, the lease may include a phrase similar to:

'The tenant is obliged to keep the premises in good and substantial repair and in tenable condition at all times during the currency of the lease.'

The precise terms of a repairing clause will dictate the extent to which a tenant is obliged to repair.

2.4.7 It should be noted that express wording in a repairing clause is required if the tenant's repairing obligation is to extend to carrying out 'extraordinary' repairs (for a definition refer to section 2.7). Wording in a lease similar to:

'...irrespective of the cause of the damage necessitating such repair...'

has been regarded as effective in extending the tenant's repairing obligation in this respect.

2.5 The principle of tacit relocation

2.5.1 In simple terms, in a situation where a landlord or tenant fails to give an appropriate notice to quit within the appropriate timescale, then the lease may continue for a period of one year, or the period of the lease if it was for less than one year. All of the lease terms remain in force, including repairing obligations.

2.6 Common terminology

2.6.1 Because the legal system in Scotland differs from the rest of the UK, there is a significant difference in the terminology used.

2.6.2 The following table is not an exhaustive list of legal terms, but gives examples of different terms or phrases with broadly similar meanings.

Table 1: Glossary

Term	Meaning	Equivalent terms
Assignment	The transfer of rights to heritable and/or moveable property or the document by which such rights are transferred.	Assignment
Burden	A limitation or restriction affecting property.	Encumbrance
Common property	Property belonging to, or for the use of, two or more occupiers.	Tenancy in common
Conclusion of missives	Conclusion of offer and acceptance.	Exchange of contracts
Factor	The person who manages heritable property on behalf of the owner[s].	Estate manager or agent
Irritancy	The removal of a right, through negligence or contravention. It may be legal (implied by law) or conventional (the result of an agreement), enforcement may require a court decree.	Forfeiture
Irritancy clause	The provision in a lease providing a right to the landlord to terminate the contract if the clause is contravened, but subject to overriding statutory provisions.	Forfeiture clause
Irritate	To terminate a lease by irritancy.	Re-enter
Ish	The date of natural expiry of a lease.	Lease expiry date
Obligation	The requirement to perform a contractual duty.	Covenant
Parts privileges and pertinents	Everything connected with or forming part of lands conveyed that is not specifically reserved.	Appurtenances
Servitude	A legally enforceable and real right held by one person in his/her capacity as owner of one piece of ground (the dominant tenement) over another piece of ground (the servient tenement) in the vicinity, but in separate ownership by which some benefit is conferred on the dominant tenement.	Easement/ <i>profit à prendre</i>
Specific implement	The performance of a contractual obligation other than by payment of money.	Specific performance
Tacit relocation	In relation to leases, implied re-letting where no notice of termination is given. The renewal is for one year if the lease is for a year or more, or for the period of the lease if the lease is for less than a year.	Holding over

Table 2: Useful definitions

Term	Meaning
Dilapidations claim	The overall process associated with an allegation of a breach of contract in relation to a lease/tenancy in respect of the condition and/or use of the premises, typically as identified in a schedule of dilapidations.
Diminution valuation	A valuation prepared in order to calculate the difference in value between the premises in its present condition by comparison to a condition consistent with the lease/tenancy, so as to arrive at a measure of [usually] a landlord's loss. In Scotland this has no statutory significance.
Extraordinary repairs	Generally accepted as an extension to a tenant's obligations for 'ordinary' repairs. For the tenant to have responsibility for 'extraordinary' repairs, then the lease requires to be specific in its terms. The main considerations to be taken into account in establishing whether a particular alleged breach and want of repair is an 'extraordinary' repair are – the origin of the damage; the extent of the damage/remedial work; and the nature of the damage/remedial work – and is generally considered to be the substantial and/or extensive replacement or renewal required as a result of a significant defect caused by the passage of time, natural decay, as a result of latent or inherent defects, or an extraordinary event.
Improvements	Repair, replacement or renewal that is normally beyond the 'ordinary' or 'extraordinary' obligation of a tenant. Improvement may however be unavoidable in fulfilling an obligation e.g. statutory compliance.
Ordinary repairs	This is the normal repair and maintenance required to keep the premises in the appropriate condition and wind and watertight.
Repair	Restore to good condition; renovate or mend by replacing or re-fixing parts.
Renewal	Restoration [often to the original state].
Response	A document prepared [usually] by the tenant in response to [usually] a landlord's schedule of dilapidations. See definition of Scott Schedule below.
Schedule of dilapidations	A document which typically identifies relevant lease/tenancy obligations, alleged breaches of those obligations; any wants of repair/remedial works suggested, or proposed, or completed in order to rectify each alleged breach; and, in certain circumstances, the estimated or actual cost incurred in rectifying those breaches. The document is usually prepared by a building surveyor.
Scott Schedule	A schedule of dilapidations with additional columns to allow the parties to set out their respective views. [See <i>Response</i>]
Tenantable condition	Case law suggests that in assessing this standard, regard should be had to the age, character and locality of the building and whether the condition of the subjects would be reasonably acceptable to a reasonably minded tenant, of the kind likely to take on a lease of the building or part thereof on similar lease terms.
Wants of repair	The remedy required to correct a breach of a non-monetary obligation.

3 Contract of lease

3.1 The definition of a lease

3.1.1 A lease can be defined as: a contract between a landlord and tenant whereby the landlord grants to the tenant a right of occupancy and possession of a property for a period of time, in return for the payment of a consideration, usually a periodic monetary payment, in other words a rent.

3.2 Types of lease

3.2.1 There are two most common forms of commercial lease:

- (a) The 'full repairing and insuring' lease:
While there is no 'industry standard' this normally attempts to transfer the obligation to repair fully onto the tenant for the whole of the leased premises.
- (b) The 'internal repairing only' lease:
By contrast this attempts to transfer the obligation to repair only the internal fabric of the leased premises over to the tenant. Very often there may also be an additional obligation on the tenant to pay service charge contributions to the landlord for the repair of the 'common parts' of the building.

3.3 The essential ingredients of a lease

3.3.1 There are four essential ingredients of a lease at common law in Scotland. These are that:

- (a) there are two parties, properly identified as the landlord and the tenant
- (b) there is identification of the premises which the tenant is entitled to occupy
- (c) there is an obligation on the part of the tenant to pay rent and
- (d) there is an identifiable expiry date (the 'ish').

Note: A lease of one year or less can be concluded orally.

3.4 The contents of a lease

3.4.1 Most modern leases are fairly lengthy documents. A typical 'full repairing and insuring' lease may cover the following matters in order to assist the dilapidations assessment:

- the name of the parties to the contract, i.e. the landlord and the tenant
- a definition of the premises to be let, which may make reference to a plan or title
- the duration of the lease or contract with a start and finish date
- the rent payable
- a statement detailing the condition the tenant accepts the leased premises as being in at the date of entry
- a statement detailing the condition the leased premises are to be maintained in by the tenant
- the frequency of decoration that the tenant must adhere to
- a statement detailing the condition that the leased premises are to be left in at expiry of the lease by the tenant
- the insurance provisions
- the process the tenant needs to go through in order to obtain the landlord's consent to carry out any proposed alterations
- reinstatement provisions in respect of any permitted alterations carried out
- where relevant, details of the landlord's repairing obligations
- statements regarding statutory compliance and who is responsible
- the landlord's right of entry to the premises during the term of the lease to view the state of repair
- how disputes are to be handled
- most modern leases will include a fees clause; this may allow the landlord to recover fees incurred in the preparation and service of a schedule of dilapidations, along with any costs incurred in remedying any breach on the part of the tenant.
- restrictions on the tenant's use of the premises
- the extent, if any, of the landlord's and/or tenant's fixtures and fittings and may refer to a schedule
- responsibility for compliance with any title provisions
- requirements for the service of notices
- Where relevant, a definition of common parts and the larger building, reference may be made to a plan or title
- Where relevant, a definition of service charge costs in relation to common parts and the larger building, reference may be made to a schedule of services to be provided by or on behalf of the landlord and to which service charge costs relate.

4 The principles of dilapidations

4.1 Definition of dilapidations and wants of repair

4.1.1 In the context of property, 'dilapidations' might be defined as:

'The breach of a non-monetary obligation under the terms of a lease such as an obligation to repair, reinstate, redecorate or to comply with statute.'

4.1.2 'Wants of repair' might be defined as:

'The remedial action reasonably required to correct a breach of a non-monetary obligation.'

4.2 Essential ingredients of a dilapidations claim

4.2.1 For a dilapidations claim to be successful there must be three essential components:

- (a) A lease or contract must exist between the parties.
- (b) The premises or the part to which the alleged dilapidations refer must be included in the description of the premises as contained in the lease or contract.
- (c) There must be an identifiable breach of obligation, which results in a want of repair, which has caused, or is likely to cause, the other party (usually the landlord) to suffer loss or expense.

4.3 Purpose of a schedule of dilapidations

The purpose of a schedule of dilapidations is to identify the nature and extent to which a party is in breach of their obligations (usually the tenant) and to identify the wants of repair arising.

It is also, typically, the first step in a legal process to prove a breach of contract which has or may result in loss or expense to the other party.

There are a number of reasons why a landlord may serve a schedule of dilapidations:

- (a) During the currency of a lease, to remind a tenant of their obligations, or to specifically require that repair or maintenance works are carried out.
- (b) To define the work that ought to have been completed by the date of lease termination.
- (c) To define the breaches to substantiate the wants of repair and to quantify and pursue a claim for damages for the works the tenant has failed to carry out.

5 The role of the surveyor

5.1 Introduction

5.1.1 Surveyors can be requested to undertake a number of roles in relation to dilapidations, including:

- adviser/negotiator
- skilled witness
- independent expert
- technical adviser.

5.1.2 Care is required from the outset as the roles can overlap. In many instances surveyors will be asked to advise a client on the issue of dilapidations, but if the matter is not settled they may subsequently be called on as a skilled witness. If so, the surveyor's duty is to give objective professional advice/opinion to the tribunal.

5.1.3 In all cases it is incumbent on the surveyor to provide sound professional advice based on the evidence of condition prevailing and the obligations of the parties to the lease and to guard against exaggeration, understatement or unfounded opinion.

5.1.4 Prior to accepting instructions the surveyor must be satisfied that they are suitably competent in this area of work and have the resources to complete the task and that there are no conflicts of interest that would prevent the surveyor from fulfilling their responsibilities. When considering whether a conflict of interest exists, the surveyor must have regard to the current edition of the RICS guidance note 'Conflicts of Interest'.

5.1.5 Having ensured there is no conflict of interest and having agreed their terms and conditions of engagement, the surveyor should carry out their duties in an objective, honest and professional manner.

5.2 Adviser/negotiator

5.2.1 The most common role that a surveyor will be asked to fulfil is as an adviser to their client who may be either the landlord or the tenant of the lease.

5.2.2 Surveyors appointed as advisers have an obligation to act in accordance with the RICS Rules of Conduct and their own professional responsibility to their clients.

5.2.3 The role of 'adviser' can encompass surveyors using their expertise to identify or comment on breaches of obligations and appropriate remedies, prepare schedules of dilapidations or responses, negotiate with other parties with the aim of achieving a settlement, and provide advice

on strategy and tactics in relation to a dilapidations claim or potential dilapidations claim.

5.2.4 Schedules of dilapidations or responses should not contain allegations of breaches that do not exist, remedies that are inappropriate (for instance, replacement of components when repair would be sufficient to comply with the lease), or costs that are knowingly exaggerated or understated. The tenant should be entitled to assume that a dilapidations claim is being put forward with integrity, in good faith and on sound advice. A landlord should be able to assume likewise in respect of the tenant's response.

5.2.5 Surveyors should guard against exaggeration or understatement, whether in terms of the content of the schedule of dilapidations or in preparing a statement of claim.

5.2.6 A surveyor who is appointed solely to prepare a response to, or comment on, a schedule of dilapidations is not a skilled (expert) witness. The current edition of the RICS practice statement and guidance note *Surveyors acting as expert witnesses*, will therefore not apply until the surveyor is considering accepting instructions as a skilled witness. Nonetheless, the surveyor should be influenced by the considerations relating to skilled witnesses in advising their client, particularly to provide objective advice. It is important for the surveyor to keep in mind that their credibility as a skilled witness at a future hearing may be undermined by any failure to follow the guidance in paragraphs 5.2.3 to 5.2.5 when acting as an adviser.

5.2.7 It is important that surveyors do not formalise settlements without the consent and authority of clients. Indeed, in some situations it might be appropriate, or even a client requirement, that the settlement is formalised via solicitors.

5.3 Skilled witness

5.3.1 A surveyor acts as a skilled witness (otherwise known as an expert witness) once they accept a formal instruction from a client to give or prepare evidence for the purpose of proceedings. A skilled witness can only give evidence before a tribunal by direction of that tribunal. The appointment of a skilled witness can only be made after such direction is given. In practice, however, this is often done in anticipation of such direction at the request of the client/legal adviser and surveyors should sensibly treat themselves as acting as a skilled witness from the date of accepting any such instruction, even if no formal direction has been made.

5.3.2 The role of the skilled witness is dealt with in the current edition of the RICS practice statement and guidance note, *Surveyors acting as expert witnesses*. The guidance note has been prepared against the background of the comments emanating from the courts regarding the duties and responsibilities of skilled witnesses.

5.3.3 The duties of a skilled witness can be summarised as follows:

- The primary and overriding duty of the surveyor is to the court or judicial body to whom evidence is given.
- The duty is to be truthful as to fact, honest as to opinion, and complete as to the coverage of relevant matters.

5.3.4 The surveyor's evidence must be independent, objective and unbiased. In particular, it must not be biased towards the party responsible for instructing or paying the surveyor.

5.3.5 A skilled witness should be able to demonstrate full knowledge of the requirements when giving evidence, including the need for objectivity.

5.3.6 It is therefore important when a surveyor is preparing a schedule of dilapidations, or a response to a schedule of dilapidations, that they understand that it may subsequently be submitted as evidence in a dispute resolution proceeding, and that they must accordingly act with objectivity and professionalism, bearing in mind that they may be called on to justify their opinion.

5.4 Independent expert

5.4.1 Where a dilapidations dispute has arisen, the parties to the lease may decide that the dispute should be settled by referring the matter for independent expert determination, rather than pursuing the matter through the courts or tribunal. The RICS Dilapidations Dispute Resolution Scheme can be used for this purpose. In the event that parties in dispute are unable to agree upon the identity of the independent expert, they may wish to apply to the Chairman of RICS Scotland to make an independent appointment on their behalf.

5.4.2 The independent expert in this context is appointed to deal with the specific issues raised, based on the investigations, knowledge and experience of the independent expert who will be liable for damages if either party can demonstrate negligence.

5.4.3 It is conceivable that an independent expert may be appointed by a tribunal in which case the same considerations apply.

5.5 Technical adviser

5.5.1 Where the parties, assisted by their respective surveyors (acting as advisers), have failed to settle the dilapidations dispute, and this is referred to the courts, or other tribunal, there can be occasions due to the technical nature of the dispute where the tribunal requires impartial, professional advice on the claim and counterclaim.

5.5.2 In these circumstances the court or tribunal may appoint a technical adviser to assist in reviewing and commenting on the evidence submitted by the parties.

5.5.3 The role and responsibility of the technical adviser is normally set out by the tribunal and agreed by the parties.

6 Taking instructions

6.1 Generally

6.1.1 Instructions relating to dilapidations should be taken in accordance with RICS Rules of Conduct. Particular regard should be paid to notification of terms and conditions of engagement to be provided in writing to the client. Instructions in dilapidations matters are no different in this respect from any other instruction.

6.1.2 Surveyors should predict and advise their clients whether or not other consultants are required, or may be required, to advise on specialist areas during the course of the instruction (for example valuers, letting agents, services engineers, structural engineers, etc.).

6.1.3 Fees for undertaking dilapidations instructions are a matter for contractual agreement between surveyors and their clients.

6.1.4 Surveyors have an obligation to set out the basis of their fees in such a way that the client is aware of the financial commitment being made by instructing the surveyor.

7 The lease and other enquiries

7.1 Documentation

7.1.1 The surveyor should be aware of their client's interest in the property, i.e. whether they are the head landlord, mid-landlord, tenant, or sub-tenant.

7.1.2 It is essential that the surveyor attempts to obtain all relevant information prior to conducting their inspection. Surveyors must properly understand the terms of all lease agreements that affect their client's interests and, if necessary, follow advice from the client's legal adviser on any ambiguities or uncertainties.

7.1.3 Additional documents that should be considered and that may be vital in establishing the obligations of the parties, in advance of the survey, are noted as follows:

- assignments of lease
- minutes of variation or extension to lease
- licenses or other consents for alterations, with plans and specifications
- any agreement for lease (if intended to survive the grant of the lease)
- side/back letters or other written agreements
- schedules of condition annexed/referred to in the lease together with all relevant photographs, reference drawings, etc.
- schedules of landlord's fixtures and fittings
- any planning or other notices attached to the property
- plans/drawings showing general arrangement of the subjects at lease commencement and thereafter.

7.1.4 Surveyors should satisfy themselves that the documentation obtained is sufficient for them to discharge their instructions. Any questions of authenticity need to be addressed to the client or the client's legal adviser. Ambiguities in the documents or in the instructions should be clarified as they arise.

7.2 Other useful information

7.2.1 The surveyor should be familiar with the landlord's intentions for the property and the potential impact that may have on the tenant's liability in respect of dilapidations, for example:

- Does the landlord intend to demolish or substantially alter or refurbish the premises following lease expiry or do they intend re-letting the building immediately?
- Does the landlord wish all, some or none of the tenant alterations be reinstated at lease expiry, if such matters are at their discretion?

7.3 Typical lease obligations of the parties

7.3.1 Surveyors should understand the documentation to the extent that enables them to discharge their instructions. While surveyors do not give legal advice, they should be mindful of the court's approach to the interpretation of contractual provisions generally, as well as the more specific treatment of lease clauses which apply in dilapidations claims. Surveyors who are uncertain about any item contained in a document, such as the interpretation of a particular obligation or the extent of the property, should bring the matter to the attention of the client and, if appropriate, the client's legal adviser.

7.4 Lease clauses of interest

Whilst the whole of the lease documentation should be read, particular clauses to which the surveyor will refer include those listed below:

7.4.1 Leased premises

Generally a tenant's non-monetary obligations are limited to the property that has been let to them. Further, a landlord's obligation to repair, if there is one, will usually be limited to those areas not required to be repaired by the tenant. The surveyor should ensure that he fully understands what constitutes the physical subject matter to be considered.

7.4.2 Repair

Repairing obligations vary widely. Some leases state nothing more than the property is to be kept in 'good repair'. Others, prepared using the 'torrential' form of drafting, contain a list of requirements, such as to uphold, repair maintain, rebuild, renew, amend, etc. In whatever manner the obligation is drafted, its scope should be understood thoroughly. The surveyor should have specific regard to the nature of the express obligations (i.e. good and substantial condition, tenantable condition, etc.) against which the nature and extent to which a party is in breach should be assessed.

7.4.3 Decoration

If there is an obligation to decorate, it might be contained in a separate lease clause or might be included as part of the repair clause. It is usual, but by no means universal, for there to be an obligation to decorate at specific intervals or on particular dates during the lease period, as well as within some period (usually specified) shortly before lease expiry.

The provisions of these obligations should be carefully studied as they do vary. The number of coats of paint may be specified. Reference may be made to surfaces that 'previously', 'usually' or 'ought to be' decorated. There may also be additional obligations to 'paper', 'treat', 'polish' or 'restore' certain surfaces.

7.4.4 Alterations and reinstatement

The surveyor should have regard to both the lease and any licences for alterations when considering alterations and reinstatement. Either, or both documents, may contain provisions relevant to the tenant's obligations to reinstate. An obligation to reinstate lawful alterations will only arise if there is express provision in the lease or licence stating this to be the case. In addition, it may also be incumbent upon the landlord to serve prior notice timeously and in compliance with any associated conditions if the obligation is to be enforceable.

It may be evident to the surveyor, either from inspection of the premises or from the documentation, that the premises have been subjected to unauthorised alterations. In such circumstances enquiry may be made of the client and/or their legal adviser as to the extent to which the tenant is to be obliged to reinstate.

In seeking to identify alterations, the surveyor may also have regard to:

- obvious differences in construction and materials
- materials which are inconsistent with the age of the building
- parts of the property which directly relate to the trade or occupation of the tenant (i.e. an extension constructed to store chemicals)
- plans, photographs or other documentary evidence
- the existence of partitions and fitting out
- plans attached to the lease (although these very often are referred to as 'demonstrative' and not 'taxative' and so cannot always be relied on fully).

7.4.5 'Yielding up' (or 'redding up') clause

The 'yielding up' clause might simply require the property to be yielded up by the tenant in accordance with the obligations of the tenant under the lease. It might, however, impose specific obligations, or the requirement to reinstate or not and the removal of tenant's fixtures and fittings, and to make good damage arising. If the clause is relevant to the surveyor's instruction, i.e. the lease is shortly to end or has ended, the clause should be considered carefully.

7.4.6 Statutory obligations

Leases normally include obligations requiring the tenant to comply with and carry out works required by the provisions of any relevant statute or regulation. Many statutory obligations are specific to the use and occupation of the premises. The actual requirements of statutory provisions should be carefully interpreted relative to the obligations of the parties in terms of their lease obligations. If necessary, legal advice should be sought.

7.4.7 Recovery of fees

Modern leases of commercial property commonly contain an express provision enabling the landlord to recover from the tenant the reasonable costs and fees incurred in the preparation and service of a schedule of dilapidations. These express provisions may go further, for example, by including the fees incurred in negotiating a settlement of the landlord's claim. In consequence, when considering the recovery of fees, the first point of reference should always be the lease.

In default of a contractual right to recover fees, the landlord may be entitled to recover such costs as part of its claim to damages, but should seek appropriate legal advice before attempting to do so.

Surveyors should keep an adequate record of time spent and any other costs incurred to enable possible recovery by the client.

7.5 Schedules of condition

The usual purpose of a schedule of condition, when annexed to a lease, is to modify or clarify the repairing obligation. The surveyor preparing a schedule of dilapidations, or a response, where a schedule of condition is relevant, should carefully consider the content of the schedule of condition. They should also consider the terms under which the schedule of condition should be interpreted when assessing the extent to which there is a breach of the repairing obligation.

8 The inspection

8.1 Requirements for access

8.1.1 Whenever an inspection is to be undertaken before the lease expires, whether the tenant is in occupation or not, it is prudent to comply with any requirements of the lease regarding arrangements for access.

8.1.2 When arranging access, the surveyor should always request information relevant to compliance with control of asbestos legislation.

8.2 RICS guidance notes

8.2.1 The surveyor should be acquainted with all RICS professional guidance relevant to carrying out inspections and surveys of property. These guidance notes are available at www.rics.org/guidance.

8.3 Note taking

8.3.1 During the carrying out of an inspection, sufficiently detailed notes and sketches should be taken and kept. The surveyor should bear in mind that these may be relied on at some point in the future to substantiate a claim.

8.3.2 Inspection of the property should follow a logical and systematic sequence and is likely to be similar in detail to that needed in the preparation of a schedule of condition.

8.3.3 Prior to progressing with the survey it is useful to record the following information:

- the property being inspected
- date of inspection
- surveyor carrying out inspection
- weather conditions at the time of inspection (and if they vary)
- orientation of the property
- general description of the property
- occupation of the property.

8.3.4 Inspection of the property should then progress to ensure that all of the required information is collected. Individual surveyors have generally developed their own specific methodology in this regard, although it is essential that, on completion, the location, nature and extent of all breaches can be clearly identified.

8.3.5 Although not exhaustive, a typical checklist on a space-by-space basis might be:

- removal works
- reinstatement works
- breaches of the repairing obligation covering ceilings, cornices, walls, skirtings, floor and floor coverings (if relevant), windows, doors, lighting, heating, power, ventilation, fixtures and fittings, etc.
- redecoration works
- statutory compliance issues.

8.3.6 At the time of the initial inspection, it is advisable that the surveyor notes the general standard of repair in the locality and whether similar properties are vacant or boarded up. It is also advisable to note any changes to the nature of the area since the lease was granted. The information might be relevant to the assessment of the scope and standard of repair. It also has relevance to the diminution in the value of the subjects in the event that alternative measures of loss become a consideration following lease expiry.

8.3.7 The surveyor should also take note of documentation available on site, for example:

- health and safety files
- asbestos management documentation
- O&M manuals
- gas safety certificates
- electrical test certificates
- building services information
- drawings/plans.

8.4 Measurements

8.4.1 During the carrying out of an inspection for the purpose of preparing a schedule, sufficient measurements should be taken to enable the wants of repair to be quantified and subsequently costed when required.

8.5 Photographs

8.5.1 During the course of an inspection, photographs should be taken by the surveyor. These should include general reference photographs and also photographs of specific defects.

8.5.2 The purpose of taking and retaining photographs is not only for your own records, but as a record to illustrate the actual condition at the time of inspection. Photographs can also be utilised in discussions/negotiations with other parties and/or to assist in future dispute resolution proceedings.

8.6 Specialist input

8.6.1 Further specialist input may be required, e.g. from a building services consultant or structural engineer. It is for the surveyor to advise the client of the need to engage any specialist required and then to incorporate the information provided by the specialist(s) into the schedule.

8.6.2 The surveyor may be required to provide guidance to the specialist on the extent of the advice sought, as well as the form and context of the information to be provided.

8.7 Further investigation

8.7.1 Surveyors are expected to use the skills developed in carrying out inspections to determine the extent of disrepair, but there will be occasions when the full extent of the disrepair can only be determined by opening up the structure, or by carrying out specialist sampling and testing.

8.7.2 It is for the surveyor to advise the client of the need to carry out such further investigations and then to incorporate any such findings into the schedule.

8.7.3 It should be borne in mind that there might be circumstances prevailing, prior to the expiry of the lease, where it is more appropriate for the tenant to carry out such further investigations.

8.7.4 At or about lease expiry, it is incumbent on the landlord, usually via their surveyor (and any appointed specialists) to establish the nature and extent of any breaches of the tenant's obligations through further inspection, investigation, sampling, testing, etc.

9 The schedule of dilapidations

9.1 Layout and content

9.1.1 A schedule of dilapidations is a statement of the items of dilapidation that exist and the wants of repair consequently arising.

9.1.2 Irrespective of how it is presented, a schedule of dilapidations should be set out in a logical manner and must identify the breach of lease terms and conditions, i.e. the defect, dilapidated condition or physical state that fails to achieve the standard required by the lease. The deficiency must be clear and concise in its terms if the remedy arising from the defect is to stand up to interrogation, i.e. a statement of the actual physical state is what is required.

9.1.3 The terms 'interim' and 'terminal' schedule of dilapidations have become widely used in Scotland, however, these are borrowed from England and have no legal relevance under Scots Law.

9.1.4 Although the title of the schedule is not critical, there are in practice differences between what ought to be considered when preparing a schedule of dilapidations served during the term of a lease and a schedule served at or near lease expiry.

9.1.5 It is important that each item of a schedule has a unique reference to aid identification.

9.1.6 In theory, a schedule of dilapidations need only set out the nature and extent of a tenant's breach with the suggested remedy and cost being added later.

9.1.7 Where a schedule of dilapidations has been served before the end of the term, surveyors should be mindful of the following:

- The clauses of the lease alleged to have been breached will depend on when the schedule of dilapidations is served. Different obligations can apply during the term and at the end of the term.
- The property should be re-surveyed at the end of the lease. The condition of the property set out in a schedule of dilapidations served before the end of the term might not be the same as the condition at the end of the term.

9.1.8 Given the likelihood of defects deteriorating through time and the relevance of timing to the date of lease expiry, it is good practice to identify the appropriate quantified remedy within the schedule of dilapidations.

9.1.9 The surveyor should be mindful that certain obligations, such as requirements to reinstate, may require sufficient notice to be given in advance of lease expiry.

9.1.10 Ideally, a statement of breach should be made separate to a statement of remedy as the two can vary independently to each other as circumstances change and negotiations progress. It is also good practice to be clear from the outset as to the basis of the alleged breach. There can, of course, be more than one lease clause where the tenant is in breach. It is therefore considered good practice to identify the relevant lease clause or clauses against each item for which the tenant is in breach of their obligation.

9.1.11 Schedules of dilapidations normally contain the following columns:

- itemised numbered reference
- the relevant clause(s) of the lease or other document
- the breach alleged
- the remedy required
- the cost of the remedy (when relevant to its purpose).

9.1.12 The recommended layout of a schedule of dilapidations is shown in Appendix A. A worked example of a schedule of dilapidations is shown in Appendix B.

9.2 Description of work

9.2.1 If a schedule of dilapidations is prepared in the form of a description of works then extreme care must be taken to ensure the nature and basis of a defect or alleged breach is stated, as well as the extent of any remedy.

9.2.2 The nature of a description of works is such that it may create a tendency simply to state what work the tenant is obliged to do, without substantiating why by reference to the state of condition of the item in question. In such an event, a landlord's claim for damages can be undermined if the basis of claim cannot be shown to be time relevant to the period of the lease.

9.3 Service

9.3.1 A schedule of dilapidations can be served at any time during the period of the lease, or after expiry of the lease, although the latter may prove disadvantageous to the landlord. As stated above, the surveyor should be mindful that certain obligations, such as requirements to reinstate, may require sufficient notice to be given in advance of lease expiry.

9.3.2 The schedule should be served by way of formal notice on the tenant, by the means prescribed in the lease, often to the tenant's registered office or premises. It is advisable that the client's solicitor serves the schedule. It is prudent to request acknowledgement of receipt.

9.3.3 Unless otherwise stated in the lease, the landlord is not obliged to serve a schedule of dilapidations at or shortly before expiry of the lease. A breach of contract may exist without any schedule – the schedule is, however, a useful record of this.

9.4 Format

It is important that the format of a schedule of dilapidations is such that it can be edited and expanded. Nowadays, this usually means a digital format, preferably one that is commonplace, readily capable of being edited and which carries out calculations automatically. A systematic method of maintaining versions of the document, and exchanging edits is recommended.

10 Negotiation of a settlement

10.1 General

10.1.1 Negotiations will normally follow the service of a schedule of dilapidations. This will usually involve each party stating their case in claim and answer by exchanges of correspondence, supporting documentation, developing a Scott Schedule and holding meetings. The negotiation process will depend on the particular circumstances, but is likely to be concerned with whether, or to what extent, there is a claim for dilapidations to answer. The competence and validity of the technical aspects of the schedule and the legal principles involved are further matters to consider. The burden, at law/in court of proving factual condition and quantum rests with the pursuing party (usually the landlord).

10.1.2 The surveyor should be mindful of the expenses associated with any dispute resolution process when advising the client.

10.2 Timetable

10.2.1 The timing for the surveyors' responses in relation to a schedule of dilapidations, and subsequent correspondence between the parties, should at all times be reasonable, to facilitate the effective progression of negotiations taking account of the circumstances of the case.

10.3 The Scott Schedule

10.3.1 To facilitate the exchange of comments during negotiations a Scott Schedule can be utilised, as it sets out for the parties (and, if necessary, a tribunal) the nature and extent of the dispute on the contractual claim, on an item by item basis.

10.3.2 The suggested structure of a Scott Schedule is set out in Appendix C and is a useful method of keeping track of negotiations between the parties. A worked example of a Scott Schedule is shown in Appendix D.

10.3.3 Such schedules allow the respective surveyors to comment against each item of alleged breach and remedy, as well as the quantum.

10.3.4 The Scott Schedule is a tabulated document setting out the basic ingredients of the claim with additional columns added to record the tenant's responses, changes to costs and any changes to the basis of claim. Further columns can also be added to reflect the outcome of negotiations in the event of a dispute, or to reflect various

possible circumstances against each item where the breach, remedy or quantum can be accepted or otherwise.

10.3.5 This layout will be very helpful to a tribunal in dealing with a claim enabling them to see the history, progress and effect of any negotiations. It also assists in focusing on the true nature of the remaining items in dispute between the parties.

10.4 Changing circumstances

10.4.1 During negotiations, whether before or after lease expiry, both surveyors should be mindful of any change in circumstances where the validity of an item may be over-riden by the actions of one or other of the parties.

Examples of such circumstances are given in section 11.4.2 Alternative measure of loss.

10.5 Remedies open to landlord

10.5.1 In circumstances where a tenant fails to comply with the obligations of the lease agreement, the question then arises as to what remedies are open to the landlord. The landlord's principal options are noted below and the landlord's surveyor should work with the landlord's solicitor as appropriate if invoking these remedies.

10.5.2 Decree of specific implement

Where the lease expressly states that an obligation exists, in the event of a breach of that obligation a court order can be sought requiring due performance of that obligation. This remedy is for enforcement of a tenant's non-monetary obligation and can only therefore be sought during the currency of the lease (unless the lease expressly provides otherwise).

10.5.3 Instigate repair works

The lease may make provision, upon default of the tenant, that the landlord can lawfully enter the premises, usually after a stipulated time period and carry out the necessary works himself. Thereafter, he will seek to recover all reasonable and valid costs incurred which the lease might provide for as a debt due from the tenant. This option must often be balanced against the tenant's right of peaceful possession.

10.5.4 Terminate lease

The landlord may terminate the lease by invoking the irritancy clause for failure by the tenant to comply with their lease obligations, provided adequate notice has been given. They may then be entitled to seek recovery of

damages from the tenant for breach of contract. Further legal guidance must be sought if seeking to invoke this remedy.

10.5.5 Claim for damages

On the natural or earlier termination of the lease, if the tenant has failed to comply with their lease obligations then the landlord may seek damages from the tenant for breach of contract. Such damages are a measure of the loss suffered by the landlord as a result of the tenant's failure to comply. The appropriate measure of loss is discussed in section 11.4.

10.6 Options open to tenant

10.6.1 Prior to expiry of the lease the tenant will have various options open to them. It is the sole responsibility of the tenant to decide how the obligations are to be properly discharged prior to the end of the lease, and to take appropriate action regardless of whether a schedule is served or not. It should be appreciated that when the lease expires, the tenant has no right to remain in occupation unless there is specific provision or agreement to the contrary. Taking account of prevailing circumstances, the surveyor acting for the tenant should advise their client on the available options for dealing with their liability for dilapidations.

10.6.2 The options open to the tenant may include the following:

- to carry out only those works they consider appropriate
- to carry out all works contained in the schedule
- to seek to offer a monetary settlement in lieu of carrying out works
- to do nothing if the likelihood is that the landlord's claim will fail by virtue of the schedule as prepared, or prevailing/changing circumstances.

10.7 Dispute resolution

10.7.1 In the event of a breakdown of negotiations, the surveyor should be aware of the various methods of resolving disputes. The most common are listed as follows:

- litigation
- arbitration
- mediation
- expert determination.

10.7.2 Reference should be made to the lease to determine whether there is any prescribed means for determining disputes.

10.7.3 Further information on ADR, including the RICS Dilapidations Dispute Resolution Scheme, can be obtained through the RICS Dispute Resolution Service in Scotland.

11 Preparation of a claim for damages

11.1 Introduction

11.1.1 In terms of dilapidations, a claim for damages typically only arises once the lease has expired or is terminated. A claim for damages can only be sustained where loss is suffered. Prior to lease expiry the tenant still has obligations with which to comply and although a tenant may be in breach of contract, it may be unlikely that the landlord will have suffered loss at that stage.

11.1.2 The surveyor acting for the landlord should be familiar with the options open for recovery or avoidance of loss.

11.1.3 It should be understood that a claim for damages in the context of this guidance note refers to the information set out in the schedule of dilapidations, and not the preparation for, and issuing of formal proceedings for dispute resolution.

11.2 Right to monetary settlement

11.2.1 The remedies open to a landlord to seek reparation for a tenant's breach of contract can vary depending upon the terms of the lease and the timing of any alleged breach. Refer to section 10.5 of this guidance note for the various remedies that are open to the landlord.

11.2.2 In order for a claim for damages to succeed, the landlord, through their surveyor, must establish, firstly that the tenant is in breach and secondly, substantiate the true measure of loss arising from that breach. The claim for damages is settled by a monetary payment to the party suffering loss, equivalent to the true measure of that loss. If there is no loss, there is no claim.

11.3 Preparation of the claim

11.3.1 Substantiating a breach

It is essential in the preparation of the claim to set out the nature of the breach, the relevant clause that the tenant is in breach of and the quantum of the alleged breach. It is essential that these factors are recorded time relevant to the lease period, as circumstances can change after lease expiry.

11.3.2 Identifying the appropriate remedy

Only by recording the alleged breach can the appropriate remedy be identified and substantiated. The surveyor should detail the appropriate remedy based on the alleged breach. This will form the basis for determining the true measure of loss.

11.3.3 The true measure of loss

It is often not until after lease expiry that the true measure of loss can be determined or assessed. Unless circumstances are evident to the contrary, the surveyor acting for the landlord should assume the measure of loss as being the cost of carrying out remedial works necessary to return the leased premises to the state of repair and condition, had the tenant complied with their obligations throughout the duration of the lease.

Consideration is given to alternative measures of loss when costing the claim in section 11.4 of this guidance note.

11.3.4 Taking account of the time factor

It is essential that the breach identified existed during the lease period. The surveyor must bear this in mind when preparing the schedule of dilapidations and should take photographs or refer to any other documentation to be able to substantiate that the breach existed during the lease period. This is particularly important in order to satisfy the evidential requirement that will arise when facing court action, or other forms of dispute resolution.

If a breach or cause of a breach cannot be shown on balance to have existed during the lease period, it is unlikely that a claim for that alleged breach will succeed, or it is likely that the claim for such items could be compromised.

11.3.5 Substantiating the claim

Bearing in mind the relevance of timing, it is best practice for the schedule of dilapidations to be prepared so as to properly substantiate the basis and nature of the breach, and to also confirm the appropriate remedy. The true measure of loss cannot be conclusively measured until about or after lease expiry. If the schedule does not detail the nature and extent of the breach to support the appropriate remedy, it leaves the landlord in a weaker position in the event that the tenant contests the schedule. In some cases, this can be well after lease expiry. At worst, poor preparation of the schedule of dilapidations can leave the landlord with no proper basis on which to pursue a tenant for damages.

11.4 Costing of the claim

11.4.1 Typical measure of loss

As detailed in section 11.3.3, the typical measure of loss, when raising a dilapidations claim at or about lease expiry, is the cost of carrying out those works necessary to put the premises into the state of repair and condition necessary as if the tenant had complied with their obligations under the lease. In practice, the pursuer in a claim may be entitled to damages whether such remedial works are carried out or not. The surveyor acting for the landlord must be able to substantiate the cost of repair as reasonable. This could involve justification of costs by reference to the RICS Building Cost Information Service (BCIS), published cost data, i.e. price books, or by reference to competitively tendered costs or rates obtained from relevant projects, or invoices for works reasonably carried out.

11.4.2 Alternative measure of loss

If the defender in the claim (typically the tenant) wishes to challenge the measure of loss, it is incumbent upon them to substantiate that an 'alternative measure of loss' is justified. It still remains incumbent upon the pursuer (typically the landlord) only to claim for the true measure of loss, as their position could be significantly compromised in the event that an alternative measure of loss is deemed to be the appropriate remedy.

In Scotland, a claim for damages relating to a dilapidations dispute is not capped by statute. This differs from the position in England/Wales.

For example, offices located within a much larger development where much of that larger development is vacant and desolate may be a case in point. Regardless of whether the offices within the development are in good condition or not, there may be no market and therefore little value attached to the premises. In such a case, the true measure of loss may be much lower than the value of the remedial work required to put the offices into the condition required by the lease.

In the event that the premises are sold, re-let, refurbished, redeveloped or demolished, etc. following lease expiry, to the extent that post-lease events are considered relevant, such events can negate all or part of any loss suffered and therefore seriously compromise or prejudice the claim. These are examples of changes in circumstances as referred to in section 10.4.

Input from other surveyors specialising in lettings, investment or property valuation may be necessary in order to substantiate an alternative measure of loss particularly where diminution in value is being considered.

11.5 Consequential losses

11.5.1 Relevant professional fees

Whether the pursuer in a claim is entitled to recover the cost of professional fees for the preparation and service of a schedule of dilapidations, and/or negotiation of a settlement is dependent on the terms of the lease agreement between the parties.

Depending on the scale and/or complexity of the remedial works, it is normally appropriate to include, as a separate head of claim, the cost of professional fees involved in specifying, administering and managing the works.

11.5.2 Further investigation

It may be reasonable to include the predicted cost of further investigation that may become necessary as negotiations progress in order to determine the true liability of the tenant, provided such liability can be seen to have existed during the lease period. Such further investigation may include specialist surveys and reports, concrete testing, etc. The pursuer may require to show merit in carrying out further investigation if the cost of doing so is to be recovered.

11.5.3 Other considerations

Where relevant, the following consequential losses may be added to the claim:

- loss of rent
- rates
- insurance premiums
- service charge payments
- finance cost (including interest).

These losses will only be relevant where an actual loss has been suffered by the pursuing party, or there is express provision in the lease giving entitlement to the pursuer to recover such costs. The burden of proof, as always, is with the pursuer.

11.5.4 Legal costs

The costs involved in dealing with matters in dispute, whether at litigation, arbitration or otherwise, could result in considerable expense to one or both parties. The client should be advised to take legal guidance on such matters.

11.6 Settlement of the claim

11.6.1 Most claims do not end up in a court judgment. They are normally settled by negotiation. Those negotiations will often be undertaken by the surveyors who act as adviser and who prepared, or responded to, the original schedule. When advising their client about possible settlement of the dispute, the surveyor should consider the dispute as a whole, including the time and cost of pursuing the claim. He or she should bear in mind that the total cost to both parties in relation to a claim, taken through to some form of dispute resolution procedure, will often

exceed the value of the claim. It is therefore important that the surveyor provides objective advice on the merits of a proposed settlement.

11.6.2 If a claim is determined by a dispute resolution procedure (e.g. court proceedings, arbitration or independent expert determination), the successful party will have a court order, award or determination which can be enforced by a court.

11.6.3 If court proceedings are settled 'out of court', the terms of the settlement can be recorded at the court by way of a court order. In this way, the proceedings are disposed of, and again, the successful party has a court order, which can then be enforced.

11.6.4 If a claim for dilapidations is settled between the parties (and most are) without court proceedings being used, the parties must record the terms of the agreement precisely in order that, if necessary, the agreement can be enforced by commencement of court proceedings in the event of breach of the agreement.

11.6.5 In Scotland (unlike in England/Wales) if an agreement is documented in such a way as to be registrable (in the Book of Council and Session) 'for preservation and execution' then one can go to immediate enforcement on breach without the need for court, with the resultant potential cost saving.

11.6.6 A settlement agreement should:

- preferably be in writing, identifying:
 - the parties (i.e. the landlord and the tenant)
 - the relevant lease
 - the schedule and the claim to which the settlement applies
- be open, i.e. not marked 'without prejudice'
- be stated to be in full and final settlement of the claim (if it is)
- deal with each and every part of the claim, including, where appropriate any interest and costs
- state the date by which:
 - if appropriate, any payment pursuant to the agreement is to be paid, and by whom, and/or
 - if appropriate, works are to be carried out and completed, inspected and signed off (including, if appropriate, a procedure for agreement and signing off of any snagging items)
- be dated, and
- be signed by each party, or signed for and on behalf of each party by a duly appointed surveyor, lawyer, or agent authorised to bind the party for whom they sign.

Appendix B: Worked example of a schedule of dilapidations

Item	Clause no.	Breach	Remedial work required	Landlord cost			
				Unit	Quantity	Rate	Cost
1.0	1st	External areas	Rake out and repoint.	m	2	£7.50	£15.00
1.1		Pointing fallen out between gate post and wall					
1.2	1st	Roughcast is boss, off-key and bulging with vegetarian growth and cracking; all to right hand end of front elevation.	Cut out, prepare and patch repair roughcast in lime based render. 2m ² @ £79.37 (BCIS reference noted if appropriate).	m ²	2	£79.37	£158.74
1.3	1st	Several lengths of concrete copes to garden wall are loose.	Lift and re-bed (BCIS reference noted if appropriate).	m	4	£46.03	£184.12
1.4	1st	Base of timber facing both sides of rear door are decayed.	Take off and remove, prepare and supply and fit new to match existing.	m	4	£15.00	£60.00
1.5	1st	External steps causing damp penetration through rear wall.	Lift and lay aside steps, cut out render and supply and fit damp proof membrane, metal lath and re-render an reinstated steps. Allow labourer and tradesman 1 day. 8 hours @ £18.00 plus 8 hours @£22.50 plus £60 for materials.	Sum	Sum	Sum	£384.00
1.6	1st	Cement skew fillet to west raking rear parapet has become detached and broken resulting in gaps at junction with wall full length of roof slope and at base.	Erect tower/staging and remove defective fillet and debris and prepare, supply and apply new cement fillet to full length of parapet. 6m@ £25.00 plus £150 for staging.	Sum			£300.00
1.7	1st	Joints between parapet copes are open and mortar is cracked and missing both front and rear slopes both sides.	Rake out and repoint.	m	22	£7.50	£165.00
1.8	13th	Tenant's fitted aerial to west chimney to be removed at lease expiry or surrender.	Remove aerial and associated fixings and fittings and make good damage arising.	Sum			£30.00

Appendix D: Worked example of a scott schedule

Item	Clause no.	Breach	Remedial work required	Landlord cost				Tenant's comments on 2 January 2014				Landlord's response to tenant on 3 January 2014			
				Unit	Qty	Rate	Cost	Breach	Remedy	Cost	Breach	Remedy	Cost		
1.1	1st	Pointing fallen out between gate post and wall.	Rake out and repoint.	m	2	£7.50	£15.00	Agree	Agree	£15.00	Agree	Agree	Agree	£15.00	
1.2	1st	Roughcast is boss, off-key and bulging with vegetarian growth and cracking; all to right hand end of front elevation.	Cut out, prepare and patch repair roughcast in lime based render. 2m ² @ £79.37 (BCIS Reference noted if appropriate).	m ²	2	£79.37	£158.74	Agree	Agree but only extends to 1 m ²	£79.37	Agree	Agree	Agree	£79.37	
1.3	1st	Several lengths of concrete copes to garden wall are loose.	Lift and re-bed. (BCIS Reference noted if appropriate).	m	4	£46.08	£184.12	Not accepted as garden wall is not part of the leased premises.	No works therefore accepted	£0.00	Disagree, garden area included in Minute of Agreement dated 1 January 2005.	Works called for therefore competent and justified.	Works called for therefore competent and justified.	£184.12	
1.4	1st	Base of timber facing both sides of rear door are decayed.	Take off and remove, prepare and supply and fit new to match existing.	m	4	£15.00	£60.00	Agreed	Extent of work called for not accepted. Allow splice repairs both sides only.	£30.00	Agreed	Splice repairs accepted but cost not sufficient.	Splice repairs accepted but cost not sufficient.	£40.00	
1.5	1st	External steps causing damp penetration through rear wall.	Lift and lay aside steps, cut out render and supply and fit damp proof membrane, metal lath and re-render and reinstatement steps. Allow labourer and tradesman 1 day, 8 hours @ £18.00 plus 8 hours @ £22.50 plus £60 for materials.	Sum	Sum	Sum	£384.00	Not accepted as steps detail is as existing and damp penetration is therefore an inherent defect for which the tenant is not liable in terms of the ordinary repairing obligation.	Works called for not therefore accepted.	£0.00	Acknowledged step detail is as existing, however gaps exist between steps and wall thereby resulting in greater damp retention.	Accepted works called for not therefore the tenant's liability. Therefore reduce scope of work to point gap between steps and wall. Allow 2m @£7.50.	Accepted works called for not therefore the tenant's liability. Therefore reduce scope of work to point gap between steps and wall. Allow 2m @£7.50.	£15.00	

Item	Clause no.	Breach	Remedial work required	Landlord cost				Tenant's comments on 2 January 2014			Landlord's response to tenant on 3 January 2014		
				Unit	Qty	Rate	Cost	Breach	Remedy	Cost	Breach	Remedy	Cost
1.6	1st	Cement skew fillet to west raking rear parapet has become detached and broken resulting in gaps at junction with wall full length of roof slope and at base.	Erect tower/staging and remove defective fillet and debris and prepare, supply and apply new cement fillet to full length of parapet. 6m@ £25.00 plus £150 for staging.	Sum			£300.00	Agreed	Agreed	£300.00	Agreed	Agreed	£300.00
1.7	1st	Joints between parapet copes are open and mortar is cracked and missing both front and rear slopes both sides.	Rake out and repoint.	m	22	£7.50	£165.00	Agreed	Agreed	£165.00	Agreed	Agreed	£500.00
1.8	13th	Tenant's fitted aerial to west chimney to be removed at lease expiry or surrender.	Remove aerial and associated fixings and fittings and make good damage arising.	Sum			£30.00	Disagree. Aerial not fitted by tenant.	Not accepted	£0.00	Disagree. Refer to Licence for Works dated 1 June 2005.	Removal of the aerial is therefore justified.	£30.00

Appendix E: Blank summary of claim

HEAD OF CLAIM							Landlord's Costs
Cost of Works							
Total Cost Building Works, excl. Prelims, Overheads and Profit							£
Contractor's Preliminaries							£
Contractor's Overheads and Profit			@		0.0%		£
Total Cost of Building Works							£
Professional Fees for Design/Contract Administrator			@		0.0%		£
Professional Fees for Mechanical and Electrical Engineer			@		0.0%		£
Professional Fees for Quantity Surveyor			@		0.0%		£
Professional Fees for CDM Coordinator			@		0.0%		£
Total Cost of Construction							£0.00
Professional Fees for Preparation of Schedule of Dilapidations							£
Solicitor's Fees for Serving the Schedule							£
Loss of Rents	?	Weeks	@		£0.00		£
Loss of Service Charge	?	Weeks	@		£0.00		£
Cost of Additional Insurance	?	Weeks	@		£0.00		£
Loss of Rates	?	Weeks	@		£0.00		£
Loss of Interest	?	Weeks	@		£0.00		£
Quantum of Claim (exc. VAT and fees for negotiation or monitoring)							£
Damages in Lieu of VAT (if relevant)			@		??%		£

Appendix F: Value Added Tax

The question of whether a landlord can properly claim VAT as part of a damages claim often arises.

A sum equivalent to the VAT a landlord has incurred (or is likely to incur), on the costs associated with the works that the tenant failed to do, is recoverable as damages where the landlord is unable to reclaim that VAT as input tax from HMRC.

Generally, the services required by a landlord from contractors and professional advisers to deal with dilapidations will be standard rated 'supplies'. So those contractors and advisers will, unless they are very small businesses, have to add VAT to the charge for their services. A VAT charge will therefore be incurred by the landlord.

Whether the VAT incurred can then be recovered by the landlord from HMRC as input VAT depends on their own tax position and the nature of the property. The precise circumstances in which a landlord will be able to recover VAT incurred on their costs is beyond the scope of this guidance. However, it should be noted that if the landlord is unable to recover (in part or whole) the VAT incurred, then an amount equivalent to the irrecoverable VAT incurred can properly be added to the damages claim. Conversely, if a landlord can fully recover the VAT incurred as input tax from HMRC, then they will not have suffered a loss as a consequence of VAT incurred. In this latter

situation, the landlord cannot properly reclaim an equivalent amount as damages from the tenant.

It is for the landlord to demonstrate that they cannot recover the VAT incurred for whatever reason.

A further question that often arises is whether a tenant can require the landlord to provide a VAT invoice in respect of the dilapidations payment made to the landlord.

HMRC has clear guidance (see *Land and property, Notice 742*, paragraph 10.10) that a bona fide dilapidations claim represents a claim for damages by the landlord against the tenant and that the payment involved is not the consideration for any 'supply' for VAT purposes and so is outside the scope of VAT. Thus, a VAT invoice for dilapidations must not be raised by the landlord. As a consequence, the tenant, even if VAT registered, cannot recover from HMRC any 'embedded' VAT element of the damages payment to the landlord equal to the landlord's irrecoverable VAT.

In view of this, if the landlord cannot recover VAT incurred, there could be a financial advantage to a VAT registered tenant in undertaking dilapidations works before the end of the term. The tenant might then be able to recover the VAT that their contractors and professional advisers charge, as overhead VAT incurred on the tenants business. By doing the works themselves, the tenant would avoid liability for any proportion of damages equivalent to the landlord's irrecoverable VAT.



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