PROPERTY SEMINAR
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Notes

1. **REPAIRING OBLIGATIONS: DRAFTING LEASE TERMS**

by KIM WALKER

2. **DILAPIDATIONS: STRATEGIES FOR LANDLORDS AND TENANTS**

by SIMON WINTER

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REPAIRING OBLIGATIONS:

NEGOTIATING AND DRAFTING COMMERCIAL LEASES

By Kim Walker

(A) INTRODUCTION

The question of repairs is relevant to all landlord and tenant relationships and it is an area where a landlord or tenant can find themselves at risk of being faced with significant unexpected costs.

Various provisions in a lease are relevant to and linked with the issue of repairs including:

- **Premises:** Often the repair clause says the tenant must repair "the Premises". How are the premises defined, what is included, is anything excluded?

- **Decoration:** Repairs and decoration are usually dealt with separately in a lease, but they are both relevant to the state of the premises and the question of dilapidations at the end of the lease.

- **Alterations:** There are usually restrictions on alterations that can be made. While a tenant may be under an obligation to carry out repairs, the tenant needs to make sure it does not go too far and venture into the territory of unauthorised alterations.

- **Compliance with laws:** Most tenants are happy to agree to comply with laws in relation to the premises. However, what if, for example, the Disability Discrimination Act requires changes to be made to the premises. Did the tenant intend to be responsible for these works?

- **Insurance**: Is damage excluded from the repairing obligation if it is covered by insurance put in place by the landlord (often at the cost of the tenant)?

- **Services and Service Charge:** If the tenant is taking a lease of part of a bigger building, it is likely there will be a distinction between those repairs to be carried out by the tenant and those to be carried out by the landlord (often included within specified "services" provided by the landlord). What are these services, how are they provided, and how are the costs dealt with?

- **Yield up:** At the end of the term of the lease, the tenant will give the premises back to the landlord, or "yield up" the premises. What condition should they be in?

- **Rights of entry:** Both parties may need rights to enter those premises either not included in the lease (i.e. tenant) or included in the lease (landlord) in order to comply with their obligations.

- **Break clause:** The tenant's right to terminate the lease at the specified break date is often dependent on compliance with its obligations in the lease. This would include the tenant's repairing obligations.

In addition to the provisions of the lease there are various statutory provisions that affect the rights and responsibilities of the parties, even if they are not expressly referred to in the lease, such as:

- Landlord and Tenant Act 1927
- Defective Premises Act 1972
- Landlord and Tenant Act 1985
- Access to Neighbouring Land Act 1992

This note will focus on the express provisions in the lease, but landlords and tenants should be aware of the statutory provisions that may apply.

This note will look at the issue of repairs by considering various key questions.

(B) WHO?

The lease should set out who is repairing what. The position will vary depending on the type of premises.

(1) Where there is a *"lease of whole"*, perhaps a unit on an industrial estate, the tenant is likely to be responsible for repairing the whole building. The landlord would often be responsible for repairing and maintaining common areas such as estate roads, perhaps car parking areas, and landscaped areas.

(2) In the case of a *"lease of part"* of a larger building, for instance a lease of one floor of an office block, it is usual for the tenant to be responsible for repairing some parts of the building, while the landlord is responsible for repairing other parts.

In the case of an *"FRI lease"* (meaning "full repairing and insuring"), the tenant will bear the cost of all repairs and insurance. This does not necessarily mean that the tenant actually carries out all of those repairs or actually puts in place the insurance. Commonly the landlord will insure the whole building and repair the common areas and structural parts of the building, recovering the costs from the tenants through the service charge. The landlord will want to ensure the work is carried out properly and that the value of its building is maintained. It is often more practical for one

person to be responsible for these structural works rather than several different tenants where it would be difficult to co-ordinate the works.

(C) WHAT?

It is not always clear from the definition of the premises what is included. For example, in the case of a lease of the top floor of an office block, does this include the roof, floors, joists, structural walls or windows?

Without a clear definition of the premises, the parties are heading towards potential arguments over what the tenant or landlord should or should not be repairing.

For example, a landlord may want to let out the internal parts of a building to the tenants, retaining the structural parts itself. The lease should include a full definition of “the premises” let to the tenant, stating which items are included (such as the surface of floors, plaster of walls etc) and which items, if any, are excluded (such as the exterior of windows or external walls). The description will depend on the intention of the parties, the type of premises and the length of the lease.

The lease should then describe the repairs the landlord will be responsible for. If these will include “structural parts” they should be defined as such words are open to interpretation. For example, the Courts have held that repairs of the “exterior” of second floor offices at the top of a building did not include the roof[1], and repairs to the “main walls” did not include the windows in those walls[2].

It should be clear from the lease exactly what the tenant repairs, what the landlord repairs, and there should not be any items that do not fall within the responsibility of either party.

(D) WHEN?

Often a lease will require the tenant to “*keep*” the premises in good repair.

One of the most important principles in relation to repairs is that an obligation to *“keep in repair”* means putting the premises in repair in the first place if they are not already in repair[3]. It is a mistake for a tenant to assume that because the premises were not in repair when the tenant took them it will not be responsible for carrying out the repairs.

The tenant would be responsible for carrying out any necessary repairs at the start of the lease, dealing with any repairs that are required throughout the term of the lease, and ensuring that the premises are returned to the landlord in good repair at the end of the lease. The tenant has an ongoing obligation

[1] *Rapid Results College v Angell* [1986] 1 E.G.L.R. 53 (CA)
[2] *Holiday Fellowship v Hereford* [1959] 1 W.L.R. 211.
[3] *Payne v Haine* (1847) 16 M. & W. 541; Proudfoot v Hart (1890) 25 Q.B.D. 42, CA

and if, at any time, the premises are not in good repair the tenant would be in breach of the lease.

(E) STANDARD OF REPAIR

Often a lease will require the tenant to keep the premises in "good and substantial repair", or some other variation such as "good and tenantable repair". There is a great deal of case law and commentary discussing what this actually requires.

(1) Meaning of "repair"

In order for the obligation to repair to arise, the Courts have held that there must be disrepair. This means the state of repair of the premises must have deteriorated.

If the state of repair of the premises has got worse since the premises were constructed, but there has been no deterioration since the date of the lease, an obligation to "repair" would probably not require the tenant to take action. However, as referred to above, an obligation to put or "keep" the premises in repair may require the tenant to carry out works even if the condition of the premises has not deteriorated since the date of the lease.

Case law has established that there is a difference between repair (within a repairing obligation) and either renewal or improvements (not falling with an obligation to "repair"). The Courts have, for example, held that:

- "repair" involves renewal of subsidiary parts, not the renewal of the whole[4]; and
- an obligation to "repair" is not an obligation to give back something different to when the tenant entered into the lease[5].

This may sound like good news to the tenant, but there are other considerations:

- What if renewal of something is actually required? This is outside the tenant's repairing obligation, but if the relevant item is within the premises, it is unlikely to fall within the landlord's obligation. The landlord could consider an obligation on the tenant to "renew" in addition to "repair". A tenant would want to restrict the situations when it can be required to renew. If a tenant is under an obligation to the landlord to carry out improvements they may not be disregarded on rent review. However, landlords should also beware of making a tenant's repairing obligations too onerous as this could also impact on the rent on rent review.
- Another problem is how to distinguish between "repairs" and "improvements". The following scenarios were considered by the Courts,

[4] *Lurcott v Wakely* [1911] 1 K.B. 905, 924
[5] *Brew Bros v Snax (Ross)* [1970] 1 Q.B. 612,640

who had to decide whether the works constituted "repairs" falling within the repairing obligation, or "improvements" outside of the repairing obligation:

- Rewiring the whole of a farmhouse[6]: **Repair**
- Replacement of an air-conditioning system, involving relocation of the pipe work and fan coils[7]: **Improvement**
- Replacing leaking wooden frame windows in a block of flats with maintenance-free double-glazed units[8]: **Improvement**
- Installing double-glazed units instead of rusted single-glazed windows[9]: **Repair**

It is not always easy to anticipate whether works would be a "repair" or an "improvement" and therefore the more clarification the lease can provide the better.

(2) Qualification of repairs

A wide range of terminology is often used to qualify the obligation to repair such as:

- "Well and substantially repair"
- "Keep in good repair and condition"
- "Keep in habitable repair"
- "Keep in good and tenantable repair and condition"

It is widely thought that there is little difference between these terms[10], although this is not a hard and fast rule and it will depend on the circumstances.

In the case of *Proudfoot v Hart*, one of the most quoted cases on the topic of repairs, the Court had to consider what "good and tenantable repair" means. The Court held this means *"such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it".*

The tenant does not have to keep the premises in perfect condition, but in reasonable repair, and the age, type and location of the premises will be relevant.

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[6] *Roper v Prudential Assurance Co Ltd* [1992] 1 E.G.L.R. 5
[7] *Gibson Investments Ltd* v Chesterton plc [2003] All E.R. (d) 322 (May)
[8] *Mullaney v Maybourne Grange (Croydon) Management Co Ltd* [1986] 1 E.G.L.R. 70
[9] *Minja Properties Ltd v Cussins Property Group plc* [1998] 2 E.G.L.R. 53, [1998] 30 E.G. 114
[10] *Proudfoot v Hart* (1890) 25 Q.B.D. 42; *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 K.B. 716

(3) Is repairing different to keeping in good condition?

It has been held that there is a difference between a covenant to *"keep premises in repair"* and a covenant to *"keep premises in good condition"*[11]. Keeping in good condition could require works to be carried out when they would not be required under a repairing obligation. However, this again depends on the wording of the lease and all the circumstances.

The principles set out above in relation to the interpretation of the tenant's repairing obligation apply equally to the landlord's repairing obligations.

(F) EXCLUSIONS

There are various express exclusions to the obligation to repair for a tenant to consider. These should be raised as soon as possible during the negotiation stages.

(1) Damage by inherent / latent defects

"Inherent defects" (also referred to as latent defects) could lead to damage to the premises, such as damp, cracks in the walls or worse. An inherent defect is a defect that is not obvious at the beginning, but results from, for example, a defect in the design or construction of the building or the materials used. For example, it could be an incorrectly installed pipe, or failure to insert an appropriate damp course. This is more relevant in the case of new or recently renovated buildings than in the case of old buildings.

If this inherent defect does not cause any damage, there is nothing for the tenant to repair.

However, if this inherent defect does cause damage, without any express exclusion from the repairing obligation of the tenant, the tenant would be responsible for repairing that damage. The tenant may also be liable for remedying the inherent defect in order to prevent the disrepair from arising again or in order to do the job properly[12]. If the tenant is responsible for "*repairs*" only, rather than "*renewal*", it may not have to remedy the inherent defect if this would involve reconstructing/renewing substantially the whole of the premises or giving back to the landlord a wholly different thing. The tenant may not be so lucky if the lease refers to an obligation to "*repair and renew*".

Whether the tenant is only liable for repairs or renewal too, remedying an inherent defect could be very costly and disruptive to the business. Therefore a tenant may wish to expressly exclude from its obligation to carry out repairs damage by *"inherent defects"* (which should be defined), and also remedying the inherent defect itself. However, in order to avoid the position where no one is liable for this type of damage, a tenant would want the landlord to accept responsibility for the damage at its own cost (i.e. not recovering costs through the service charge).

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[11] *Credit Suisse v Beegas Nominees* [1994] 4 All E.R. 803, [1994] 1 E.G.L.R. 76
[12] *Ravenseft Properties v Davstone (Holdings)* [1980] Q.B. 12

If the landlord agrees, it should ensure that it obtains the necessary warranties and collateral warranties from the contractors who constructed the building or carried out the works. If the landlord does not agree to the tenant's proposals the tenant could request that these warranties are provided to the tenant directly, guaranteeing the quality of the works. If it then transpires that there are defects in the works or materials used the tenant could turn to the contractors for breach of warranty.

(2) Schedule of condition

Where the premises are old, the damage may not be the result of an inherent defect. A tenant could consider referring in the lease to a *"schedule of condition"*, providing that it does not have to put or keep the premises in any better state than as evidenced by the schedule.

A schedule of condition should be sufficiently detailed, contain good quality pictures, be agreed by both parties and preferably be attached to the lease; if the schedule cannot be found it is no more use than if there is no schedule.

(3) Insured risks

Whether the premises are old or new a tenant should consider a provision whereby it is not responsible for repairing damage to the premises caused by an insured risk. Here, we are talking about some major incident, such as damage by fire, lightning or things falling from the sky. The tenant usually contributes to the insurance premium, and would not want to be responsible for paying for and carrying out repairs resulting from damage by an insured risk.

The wider the definition of insured risks the more "exceptions" there are to the tenant's repairing covenant.

The landlord will want to make sure that there are limits imposed. If there is damage by an insured risk, but the insurance monies are not paid out by the insurer due to the default of the tenant, the landlord will want to make sure that the tenant does not avoid responsibility, and the repairing obligations should apply.

Another relevant question concerns *"uninsured risks"*. If the premises are damaged by a risk that the landlord does not insure against, will the tenant be responsible for repairing that damage or not? This is a matter of negotiation and best discussed early on.

In the case of *Jackson v Watson*[13] decided earlier this year, the tenant carried out repair works to his basement flat caused by leaks from some light wells which existed at the time the tenant took the lease. The tenant tried to recover from the landlord the money paid out.

The tenant argued that the landlord had breached its repairing covenant. However, the relevant covenant required the landlord to "repair" the building.

[13] [2008] E.W.H.C. 14

It did not require him to “put” or “keep” the building in repair. Therefore, the Court held that the landlord did not have to put the building in a better state of repair than at the time of the lease. There was no breach by the landlord.

The tenant also put forwards a novel claim in nuisance against the landlord, arguing that the landlord had adopted and continued the nuisance which existed when the landlord bought the building. This claim was dismissed since the principle of “caveat lessee” (“tenant beware”) applies. The tenant knew of the danger when he signed the lease.

This case shows just how important the drafting of the lease is.

(G) LANDLORD’S REPAIRS

There are special factors to consider where the landlord is carrying out repairs.

Take, for example, the situation where repairs are required to the roof. The landlord instructs roofing specialists to inspect the roof. They say that the landlord could either carry out patch repairs to the roof or it could replace the entire roof. The specialist says it looks like patch repairs were probably carried out a few years ago, and it is likely that they would be needed again in the not too distant future. The landlord decides to replace the roof.

(1) How soon must the landlord carry out the repairs?

The landlord may not occupy the premises, but the tenants do. Does the landlord have to wait for notification of the disrepair? Since the landlord has “control” over the roof (it has not let it out to anyone else) there is no requirement for the tenant to notify the landlord before the landlord is in breach of its covenant.

The landlord does not benefit from a “reasonable time” from the happening of the disrepair in which to carry out repairs. There is a breach of this covenant as soon as the roof is no longer in repair. This means the landlord should be taking action to prevent the roof from being in disrepair because as soon as it is, the landlord is in breach.

(2) Recovering costs

Generally, a landlord will be under an obligation to provide certain services. It is common for the lease to provide that at the start of each service charge year the landlord will estimate the amount it will spend in providing those services. The tenants will each pay the relevant proportion of these costs, the payments usually being made periodically throughout the year. At the end of the year the landlord calculates how much was actually spent in providing these services and the tenant either pays more, or is credited with any over-payment.

In the case of the replacement of the roof, the landlord looks to recover the additional costs from the tenants.

i) It is in the interests of both parties to ensure that the building is adequately maintained. Whatever the parties decide about the allocation of costs, it would be unsatisfactory for the roof to be allowed to fall into disrepair.

ii) The general principle is that it is for the person required to carry out the repairs to decide how to do them. The landlord had two viable options and, without specific provisions in the lease, the tenant cannot force the landlord to take the cheapest option.

iii) A tenant could consider various ways of reducing its repairing liability.

a) Incorporation of an express provision requiring the landlord to act reasonably in incurring costs. In the absence of express provisions it is not clear whether a term would be implied into the lease requiring the landlord to act reasonably in incurring costs[14].

b) Reference to a schedule of condition, not only in relation to the premises but also in relation to the building in general, so that the tenant does not have to pay towards the premises being kept in any better condition than as shown in the schedule. This is quite unusual and can be difficult to administer.

c) Exclusion of certain specified costs from the service charge payable by the tenant.

d) Reference to a service charge cap. This could be dealt with in various ways, for example:

- An overall service charge cap limiting the annual sums payable by the tenant;
- A service charge cap for a specified period; or
- A service charge cap in relation to specified items, such as the roof and main structure of the building.

(H) CONCLUSION

The drafting of the repair provisions in a lease is of great importance to both landlords and tenants. One word can make a huge difference to the responsibilities of the parties. Both parties should ensure they fully appreciate the significance of the wording used in the lease, and any amendments or exclusions should be raised as soon as possible during the negotiation stages.

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[14] *Finchbourne v Rodrigues* [1976] 3 All E.R. 581 (implied requirement for reasonableness in service charge provision); However, *Bandar Property Holdings v J.S.Darwen (Successors)* [1998] 2 All E.R. 305 and *Havenridge v Boston Dyers* [1994] 2 E.G.L.R. 73, CA (requirement for reasonableness not implied into insurance provisions)

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Woodfall on Landlord and Tenant (2008 update)

Practical Law Company Limited: Various Practice Notes and Commentaries including: “Lease of Whole: Drafting Note”; “Extent of tenant’s obligation to pay for repairs and services”; “Effect of delay on recovery of repair costs under service charge provisions (High Court)” and “Effect of delay on recovery of repair costs under service charge provisions (Court of Appeal)”.

Halsbury’s Laws of England

Encyclopaedia of Forms and Precedents: Landlord and Tenant (Business Tenancies) Vol. 22(1) 2003

New Law Journal: “Tenants’ repair despair” by Anthony Judge

Lexology: “Landlord’s digging holes” by Miss Noon of Brodies LLP

COMMERCIAL PROPERTY: DILAPIDATIONS

A Note by Simon Winter

(A) INTRODUCTION

1. This note confines itself to the common situation in practice where a landlord seeks monetary compensation from a tenant of commercial premises, either at the end of the term or close to it[15], for breach of repairing covenants in a lease[16].

2. The law in this area is not simple and it appears that responsibility for disrepair affecting premises – or to give the topic its time-honoured name, "*dilapidations*"[17] – is an issue which neither landlords nor tenants appear to grasp in the way that they do understand other aspects of the landlord and tenant relationship. It further appears, since heads of terms rarely refer to them in any detail, that little thought is given to these obligations at the time most commercial leases are granted. Hopefully, the first talk tonight will have helped in that respect.

3. Tenants, in fact, seldom carry out any repairs during lengthy terms. They are nevertheless surprised to be presented, when their term runs out, or even during the term, with demands for large amounts of money: the writer of this note has seen over £80,000 demanded in respect of one business unit on an industrial estate outside London.

4. Landlords, on the other hand, sometimes give the impression that they believe tenants are obliged to renovate their premises for them, free of charge, when their leases come to an end. They also too often present claims for items which seem designed simply to provoke arguments with tenants: the writer has seen a claim for an item of £33.50, which was described as the cost of painting one hinge. Research carried out by the Royal Institution of Chartered Surveyors ("RICS") suggests that a substantial number of landlords' claims are settled for half the amount claimed, which could be taken to suggest that claims are being consistently and seriously inflated. The writer of this note has settled a claim for £100,000 brought against his client, the former tenant of a small office outside London, for £18,000.

[15] It will not therefore be necessary to consider the effect of the restrictions imposed by the Leasehold Property (Repairs) Act 1938.

[16] Nor will this note go into the areas of residential property, forfeiture for breach of covenant or other remedies (such as injunctions) available to landlords or tenants.

[17] The term is Latin, formerly loved of lawyers, and means 'taking away stones'. Taking away parts of rented buildings, however, might well fall into the criminal law of England and Wales and so forms no part of this note.

5. The purpose of this note is therefore to set out the basic structure of the law[18], before suggesting some practical strategies for both landlords and tenants who find themselves in disputes over compensation for alleged dilapidations either at or near the end of their leases.

(B) THE LAW

(1) The Basic Principle

6. A landlord whose tenant has broken a repairing covenant in a lease is entitled to compensation.

(2) The Common Law Approach

7. The Courts will take the view that a lease is a commercial document which should be interpreted in a commercially-sensible way, or according to the "*good sense of the agreement*"[19]. Provided that the words used clearly impose some kind of obligation to repair on a tenant, the Courts will very likely find that a tenant has agreed to keep the premises in a state of repair which make them suitable for occupation by commercial tenants likely to take a lease of those kinds of premises. The Courts are particularly likely to take account of the state of repair of the premises at the time the lease was taken and also of the location of the premises, for (as the Court held in the 1890s in *Proudfoot v. Hart*[20]), what is repair in Spitalfields is not repair in Grosvenor Square.

8. The Courts will also generally be slow to find that a tenant who takes a short-term lease is obliged to carry out significant works for the landlord's benefit but at its own expense, because that would make no obvious commercial sense.

9. The amount of damages at the end of a term was established during the nineteenth century as *the cost of putting the premises into the state of repair required by the lease*, regardless of whether the landlord had spent the money claimed or would ever spend it, whether the premises would shortly be demolished, whether the value of the landlord's reversion had been affected and whether the landlord had found an alternative tenant.

(3) Statutory Intervention

10. The Landlord and Tenant Act 1927 ("the Act") removed a landlord's right to claim damages where the premises will either:

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[18] This is a large and complicated area and so this note can do no more than suggest the basic outlines of the topic.
[19] Tindal CJ in *White v. Nicholson* (1842) 4 Man. & G. 95, 98, cited with approval by Sachs LJ so late as *Brew Bros. v. Snax (Ross)* [1970] 1 QB 612, 640.
[20] (1890) QBD 42.

(a) be demolished; or

(b) be substantially altered at or shortly after the end of term,

so that the value of any repairs carried out by a tenant would be non-existent. (Damages are, of course, supposed to compensate the landlord for the value of those repairs.) The Act also imposed a cap on the amount which can be claimed in *any* case.

11. That cap is the diminution in value of the premises caused by the lack of repair[21]. In the case of rented commercial premises, this will mean a valuation surveyor estimating the loss of rental income likely to result from the premises' current state of repair and valuing it as a capital sum.

12. The Act is more limited in its effect than might appear to be the case. It only applies to covenants to *repair* and will *not* cover any other kind of obligation, such as an obligation to reinstate alterations carried out under a licence to alter. It was thought that it had no application to decorating covenants but the Court has held that the cap also covers claims for breach of the very common covenant to carry out periodic decorative works at premises[22].

13. More fundamentally, it simply restricts claims for *damages* and not claims brought on other grounds, such as for the recovery of costs (for example, solicitors' and surveyors' costs) which is commonly provided for in leases because these are claims for *debts*.

(4) Working Around the Act

14. This aspect of the law was emphasised by the Court of Appeal's decision in *Jervis v. Harris*[23], which upheld the effect of a clause now very frequently found in commercial leases. If a lease grants the landlord the rights to:

(a) inspect the premises for lack of repair,

(b) demand that any lack of repair observed is remedied within a reasonable amount of time,

(c) (where a tenant does not comply with that demand) to remedy that lack of repair at its own expense, and

(d) recover all the costs incurred as a debt (often they will be deemed to be arrears of rent),

the Act (again) has no application. It is limited to claims for damages and does not affect claims for reimbursement of costs. Landlords can

[21] Section 18(1), Landlord and Tenant Act 1927
[22] *Latimer v. Carney* [2006] 3 EGLR 13
[23] [1996] Ch 195

simply carry out the works they see fit (subject to the practical concerns raised later in this note) and charge the cost back to the tenant.

(C) EVIDENCE AND PROCEDURE

15. Obtaining the evidence and working the details of claims through this complex of legal provisions can present very real difficulties not only for landlords and tenants but also their professional advisers.

(1) Evidence

16. First, the evidence will very often not be contained in simple records of facts: all too often there is little evidence of fact. Instead, the evidence will be in detailed schedules of building works and valuation reports prepared by professionals according to standards of repair, which are logically implicit in every word or figure used – but might *never* be stated explicitly. It is essential to give clear instructions to your own experts and to demand to know what instructions were given on this front to an opponent's expert.

17. In particular, valuation reports relied upon in support of the statutory cap on damages, can be difficult to understand. They are impossible to challenge effectively without an opposing valuation surveyor who can challenge the comparables used in the report and the methodologies used in arriving at valuations.

18. The situation will be complicated further if works have in fact been carried out because few landlords who carry out works will wish simply to put the premises in the state required by a former tenant's lease. If they carry out substantial works, they may in fact be obliged to carry out substantial improvements either as a result of legislation, such as the Disability Discrimination Act 1995[24], or because tenants in the market at the time expect better premises. They may only be able to recover, however, the amount they would have spent if they had carried out the repairs which were required by the lease, which may be far less significant. It may be necessary to produce essentially theoretical schedules – of the works the tenant *should have done* as opposed to what the landlord in fact did.

(2) Procedure

19. Further difficulties can arise, quite apart from the obvious pitfalls in such a highly technical area, because one party insists on adopting – or refuses to adopt – a pre-action protocol.

20. The pre-action protocol produced by the Property Litigation Association ("PLA") in conjunction with RICS is not official, so far as lawyers are concerned, because it has not been adopted by the

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[24] This Act can mean that substantial works to a building are treated as creating a new building and so engaging the obligation on the landlord to make premises accessible to disabled people which might not have been so accessible previously.

Ministry of Justice or the Civil Procedure Rules Committee[25]. However, many lawyers dealing with this field use it, because they are PLA members, and RICS has adopted the pre-action protocol as a guidance note, which means that RICS members are obliged to follow it.

21. The process envisaged by that protocol is as follows:-

(a) the landlord serves a costed schedule of dilapidations,

(b) the tenant serves a counter-schedule, giving detailed comments on the items claimed (usually within 56 days),

(c) negotiations take place followed by what is described as a "stocktake";

(d) (if no settlement is reached by this point) both parties produce formal valuations of their claims, including (in the case of a tenant which relies upon the statutory cap on damages) evidence of any damage to the value of the landlord's reversion; and

(e) only if the case cannot be settled then, are the parties free to take the matter to Court.

22. Landlords find this process, which requires proper evidence to be presented and site visits to take place before any proceedings are issued, a frustration and might well suspect it is simply a delaying tactic enshrined in practice by the tenants' lobby and professionals anxious to increase their fees. For tenants, however, it offers the only real chance they may have before proceedings are issued of understanding what their landlords' claims are about and what their prospects of success are.

(D) TACTICAL CONSIDERATIONS

(1) For Landlords

23. The principal concerns for a landlord are timing and the decision whether to sue for damages or (if the lease permits it) to carry out works and claim the costs as a debt.

24. Suing for damages has the considerable benefit of not involving carrying out any expensive works but the disadvantage of being time-consuming and risky. Carrying out works and reclaiming the costs as a debt can be very simple, from a legal point of view, but will involve the time and cost of carrying out what might be substantial works.

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[25] Following a change of policy in the Ministry of Justice, it is now unlikely that it ever will be, since there will be no new pre-action protocols.

25. The first step, however, is always to serve an aggressive schedule *before* the end of the term. Timing is important here: a prudent landlord will serve the schedule late enough to avoid problems with the Leasehold Property (Repairs) Act 1938 (which is generous in this respect, giving a landlord a reasonably free hand provided the lease has fewer than three years left to run) but early enough to put the tenant under realistic pressure to carry out the works.

26. If your lease contains a *Jervis v. Harris* clause, serve that schedule so that the tenant has just enough time to carry out the works before the lease ends. The tenant may carry out some or all of the works required at its own expense, thus leaving you with a marketable (or more marketable) property. Alternatively, the tenant may wish to settle quickly in the knowledge that you could carry out the works and charge the costs back.

27. Bear in mind that some tenants will not know (or be advised) about the existence of a statutory cap on damages and will simply try to negotiate on the basis of the costs given in a schedule without reference to the loss in value of your reversion. Even the PLA/RICS pre-action protocol does not envisage valuation evidence being obtained until *after* schedules of costed works have been obtained, so it is possible that this whole stage of the assessment of likely damages might be missed out by a tenant who is under pressure to settle.

28. Generally speaking, the quicker a landlord acts and settles a claim, the better the likely result. The longer the process goes on, the more likely the outcome for a landlord will be worse in cash terms.

(2) For Tenants

29. Tenants should, of course, pursue a directly contrary strategy. However, this note does *not* advocate simply delaying matters, which the Court will probably penalise in recovery of costs if the dispute should reach Court.

30. Tenants in the process of negotiating claims have to make a judgement how far they can take their arguments before (if the time is available) their landlord decides to cut through what can be a frustrating technical debate by simply carrying out the work and charging the costs to the tenant. A prudent tenant therefore adopts the pre-action protocol and ensures that negotiations progress steadily, with his or her surveyor attending the premises and preparing detailed comments on the landlord's schedule, but further ensures that negotiations progress beyond the termination date of a lease.

31. Tenants' greatest weakness in disputed cases tends to be a lack of evidence. Tenants will assert that premises are no worse than when they moved in (which, as we have seen, can be the starting point of a

good argument over liability) but very rarely produce any evidence in support of that assertion. This leaves them arguing over the amount of a claim rather than whether they should pay anything at all.

32. It is therefore vital to obtain and keep good evidence (most importantly, comprehensible colour photographs) of the state of repair of the premises at the beginning of and throughout the term and ensure that a building surveyor preparing a counter-schedule has access to that evidence.

33. Finally, if the amount of the claim will bear the costs, a well-advised tenant invests early in a valuation report – and certainly does not wait until the stage envisaged by the PLA/RICS pre-action protocol. The loss of value estimated by a valuation surveyor is almost always likely to be far less than the cost of works estimated by a building surveyor. Accordingly, producing a strong report, which suggests that the value of any claim is significantly lower than it first appeared to be, may well have a significant impact on a landlord's willingness even to pursue a claim seriously.

CONCLUSION

34. In dealing with all these issues, both landlords and tenants need the advice and guidance of professionals. All commercial landlords and tenants should engage a professional team to deal with these claims from the outset. The successful pursuit or defence of any claim for dilapidations needs a solicitor and a surveyor who have knowledge and experience of the field.

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LEGAL ACKNOWLEDGEMENTS

Property Litigation Association, *Pre-action Protocol for Claims for Damages in relation to the Physical State of Commercial Property at the Termination of a Tenancy* (3rd ed., 12 May 2008)

Various (ed.), *Woodfall on Landlord and Tenant* (2008 update)