

GUIDANCE NOTE Dilapidations - What do they mean for me?

Dilapidations is the area of Commercial Property dealing with breaches of leasehold obligations (either by a LANDLORD or, much more commonly, by a TENANT) specifically with regards to repair, reinstatement of alterations, decoration, statutory compliance and the costs associated with such breaches.

Due to the nature of the work involved, it is customary to engage the services of a professional Building Surveyor to assist a Landlord and/or Tenant because, whilst the general principle is not to enrich the Landlord or punish the Tenant (or vice versa), there exists a need to compensate for loss or damage.

This loss or damage has to be capable of calculation and the first step to establishing this is via a Schedule of Dilapidations which can be prepared by either a Landlord's or Tenant's surveyor and can be either an INTERIM SCHEDULE (i.e. prepared during the course of a lease) or the usual TERMINAL or FINAL SCHEDULE at the lease end.

The majority of Dilapidation disputes arise at the end of a lease and are initiated by a Landlord and will be in a form necessary to be enforceable in court, with a claim for damages being the recognised remedy.

Case Law and Legislation play a significant role in defining Dilapidations procedure, as does the RICS in their Guidance Note, the 5th Edition, which was published in June 2008. Appended to the Note is the Property Litigation Association Protocol (May 2008) as yet unadopted by the Civil Justice Council (CJC), and this is designed to set out a pre-action Protocol for damages claims.

Presently the Civil Procedure Rules (CPR) remains the principal basis for procedural steps in Dilapidations disputes.

From a Valuation perspective the most relevant test is that of Diminution in Value (reduction in value as a result of a Tenant not complying with their obligations) and is outlined under Section 18(1) of the Landlord and Tenant Act 1927 which provides that a Landlord's claim is limited to the amount by which the value of its interest has been diminished owing to the breach of Covenant to Repair.

Essentially there are 4 procedural steps taken in the resolution process, namely:

1. Preparation of Documentation, such as Leases, Licences to alter, schedules of condition, side letters, photographs, Fit Out details, agent's letting brochures, statutory notices served, deeds of variation, lists of fixtures and fittings, details of any outstanding service charges, rent deposit agreements...and perhaps more.
2. Inspection; to be undertaken with relevant professionals to hand and seeking to establish the condition at the lease start and the obligations that have been covenanted by the Tenant. Identify items of disrepair, check if the item falls within the Tenant's covenant and the extent of any remedial work needed. Take measurements where necessary for cost calculation.
3. Preparation of the Schedule of Dilapidations and Claim; there exists a format called a Scott Schedule which is used for detailing works and costs and is used in surveyor's negotiations. This is submitted with a claim letter setting out details of the Parties, facts, Schedule, documentation relied upon, meeting dates and attendees, response dates and a summary of the claim to include Cost Estimations, preliminaries, overheads, fees, loss of rent, loss of Service charge and Superior Landlord sums/fees. Serving such a Schedule on a Tenant should be done in a timely fashion giving the Tenant time prior to the end of the lease to make any reinstatement of alterations.
4. Response and Negotiations: A tenant is expected to respond within a reasonable timeframe and this is usually set as no later than 56 days after the original notice. Prior to such response it is advisable to set up meeting(s) between respective surveyors and also at the very least within 28 days of the Tenant's response.

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INTERIM CLAIMS

These occur during the lease and are usually as a result of a more serious breach by a Tenant. Remedies for a Landlord are either determination of the lease, damages or Specific Performance, or possibly a combination of these.

The timings and technicalities of the Service of Notice are complicated and Legal advice is recommended. In order to be successful a Landlord will need to satisfy one or more of 5 grounds:

- 1 IMMEDIATE** action is needed to protect the Landlord's value, or that it has already been affected.
- 2 LEGISLATION** dictates it's necessity.
- 3 WORK** is necessary to protect other occupiers.
- 4 WORKS** undertaken now are going to be cheaper than works done at a later date.
- 5 SPECIAL** circumstances exist.

OTHER MATTERS

Dilapidations are also to be considered in the light of Break Clauses and a Tenant needs to check on the conditions attached to the exercise of a break clause.

Also the area has relevance to Disability Discrimination and it may fall as a Landlord's issue when a Tenant has vacated, having installed D.D.A. compliant fixtures and fittings such that there is now no longer a "Service Provider" or "Employer" in those premises as defined by the D.D.A. 2005
Please call TAP for further Guidance in this complicated area.

Should you need to contact our advisers about anything contained in this note then please feel free to call us on 0800 865 44 50

This Guidance Note is not a substitute advice on specific matters and should not be seen as providing legal advice.