

## RICS Dilapidations & Interim Repair of Commercial Property

Gillian Craig, Partner



### Dilapidations:

- New developments;
- Schedules of condition;
- Diminution in value- where are we now; and
- Structuring a settlement- pitfalls and tax.

### Interim Repair:

- Enforcing interim dilapidations- implement and damages.

South Essex Partnership University NHS Foundation Trust v Laindon Holdings

Court of Appeal (19<sup>th</sup> April 2016)

Landlord's carpet:



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SIXTH (Alterations):The Tenants shall not without the previous written consent of the Landlords, which consent shall not be unreasonably withheld or a decision thereon delayed, make any structural or exterior alterations or additions to the Premises unless and until plans of such alterations or additions and details of the materials to be used in the construction have been submitted to and approved by or on behalf of the Landlords, which approval shall be granted, if so granted, in writing and may be granted subject to such conditions as the Landlords may consider reasonably appropriate.

FIFTH (Repair).....to repair or replace from time to time the Landord's fixtures and fittings in the Premises as may be or become necessary at any time during or at the expiration of the Term."

(a) "the Premises" means the office premises situated on the first floor of the Building as shown outlines in red in the plan annexed at Schedule 1

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FIFTH (Repair).....to repair or replace from time to time the Landord's fixtures and fittings in the Premises as may be or become necessary at any time during or at the expiration of the Term."

(a) "the Premises" means the office premises situated on the first floor of the Building ... and shall include so far as contained within the Premises:-  
(i) the decorative finishes applied to the interior of the exterior and the load bearing walls of the Building but not any other part of such walls, the floor finishes including screeds so that the lower limit of the Premises shall not extend to anything below the screeding

### RICS Guidance Note

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

### Common Problems?

Dem-Master Demolition Ltd v Healthcare Environmental Services Ltd (Outer House 31<sup>st</sup> January 2017)



Dem-Master Demolition Ltd v Healthcare Environmental Services Ltd

*“The Tenants accept the Premises as being in such condition as shown in the attached Photographic Schedule and in all respects fit for the Tenant’s purposes and shall....repair and maintain and renew (and if necessary for the purposes of maintenance and repair, to replace and rebuild) and decorate and keep the Premises and all permitted additions and new buildings, if any, in like condition as evidenced on the Photographic Schedule...”*



Dem-Master Demolition Ltd v Healthcare Environmental Services Ltd

- a) *“keep in good and tenantable condition and not worse than the Schedule of Condition”*
- b) *“keep in good and tenantable condition and not better than the Schedule of Condition”*
- c) *“keep the Premises in like condition as evidenced on the Photographic Schedule...”*
- d) *Keep the Premises in the condition shown in the Schedule of Condition*

Dem-Master Demolition Ltd v Healthcare Environmental Services Ltd

Standard of Repair:

*On a straightforward reading of this Clause, and giving the words used their ordinary meaning, the state of the Premises which the tenants accepted at the outset and in which state they were obliged to keep them for the duration of the Lease was the actual state of the Premises at the outset, as shown in the Photographic Schedule. The actual state of the Premises at that time was the measure of the parties' obligations. The Photographic Schedule served to evidence the state of the Premises as accepted by the tenants (for the purposes of (i)) and to which they were to be kept (for the purposes of (ii)). That evidential function is apparent from the words used: to accept the Premises "... as shown on the Photographic Schedule" and to keep them "in like condition as evidenced on the Photographic Schedule".*

**Dem-Master Demolition Ltd v Healthcare Environmental Services Ltd**

Who does the SoC protect?

*“in any event, I do not accept that the reference to the Photographic Schedule in Clause 6 of the Lease operated solely to confer a benefit on the tenants. In my view, the reference to the Photographic Schedule in Clause 6 serves to secure a degree of certainty as to the actual standard to be achieved in relation to the Premises. It precludes arguments as to what, precisely, a notional or objective standard would dictate, and which may be problematic in relation to an aging industrial building of unique architectural merit and of which the Premises form only a small part... Analysed in this way, the stipulation of the acceptable standard of the Premises by reference to their state, as evidenced in the Photographic Schedule, confers benefits or protections on both parties. Both parties benefit from the measure of certainty achieved in agreeing the standard to be applied (being the actual state of the Premises at a certain point in time) and the reduction in the scope of arguments as to what, precisely, that is (eg because it is evidenced by the Photographic Schedule).”*

**Moor Row v DWF**



Tarn Crag



Moor Row



DWF

Landlord's claim:

- (a) £906,294.35 amount to pay to head landlord re dilapidations;
- (b) the indemnity clause in the sub-lease applied.

Tenant:

- (a) lease required works to have been completed before the cost of them could be claimed;
- (b) Property marketed as a redevelopment opportunity- the head landlord had not prepared a tender, appointed a contractor or agreed a price for the works- action was premature. The head landlord did not intend to do the works at all; and
- (c) indemnity not triggered as the works had not been carried out and the head landlord has no intention of carrying them out.

**Moor Row v DWF:**

*The defender is of course liable in the sense that it is admittedly in breach of the contractual repair obligation; the pursuer has sustained a legal injuria. It does not necessarily follow, however, that the pursuer has sustained a loss (or damnum) as a consequence of that breach, or that there is automatically, and without more, a liability incumbent upon the defender to make any payment in respect of its breach of obligation.*

*It remains the case, in my view, that, as with any common law claim for damages for breach of contract, in the absence of a payment or liquidated damages clause in the contract, it is still incumbent upon the pursuer in such a case to prove the fact and quantum of the actual loss flowing from the defaulting party's breach of contract. This compensatory principle lies at the very core of the Scots law on damages, .....*

1. What are you settling?

- (a) “remediation of yard” v. “removal of refuse in yard”
- (b) “all sums due under TSOD” v. “all damages flowing from breach of repairing obligation” v. “all sums due under the lease”



2. Tax Considerations:

- (a) VAT?
- (b) Income or capital?

- (a) When are interim repairs relevant?
- (b) Methods of enforcement:
  - (i) Access for inspection?
  - (ii) Access to carry out the works?
  - (iii) Forcing the tenant to carry out the works?
  - (iv) Damages?
  - (v) Irritancy?





**Irritancy – Law Reform (Miscellaneous Provisions)(Scotland) Act 1985**

**Section 5 Irritancy clauses etc. not relating to monetary breaches of leases.**

(1) Subject to subsection (2) below, a landlord shall not, for the purpose of treating a lease as terminated or terminating it, be entitled to rely—

(a) on a provision in the lease which purports to terminate it, or to enable the landlord to terminate it, in the event of an act or omission by the tenant .. if in all the circumstances of the case a fair and reasonable landlord would not seek so to rely.

.....  
(3) In the consideration, for the purposes of subsection (1)(a) or (b) above, of the circumstances of a case where—

(a) an act, omission or change is alleged to constitute a breach of a provision of the lease or a breach of contract; and

(b) the breach is capable of being remedied in reasonable time, regard shall be had to whether a reasonable opportunity has been afforded to the tenant to enable the breach to be remedied

Irritancy:

(HMV Fields Property Limited v Skirt ‘n’ Slack Centre of London Ltd 1987 SLT 2)

*Condition 6 imposes certain obligations of repair and paintwork upon the tenants which are to be performed ...in the last year of the lease (howsoever determined). I find it difficult to see how that obligation can be performed in the event of an irritancy since it cannot be discovered until the irritancy happens that the last year of the lease has not only arrived but come to an abrupt end. ...The lease of course could be determined at least by agreement of the parties at a date prior to its expiration so that sufficient content can be given to the phrase "sooner determination" if it does not include the eventuality of an irritancy. While the phrase is prima facie wide enough to include that eventuality it seems to me that despite the apparent width of the phrase in the circumstances of this lease it has to be construed as not including the eventuality of an irritancy.*



1. Don't forget the impact of permitted alterations on dilapidations
2. Schedules of condition- other evidence may be admissible
3. Diminution in value- always a potential argument
4. Be careful in drafting settlement agreements
5. Interim repair- may not be as easy as you think

## Gillian Craig, Partner



Gillian is a Partner in MacRoberts' Commercial Dispute Resolution team and has a particular interest in property litigation, including lease disputes, rectification, variation of title conditions and CPO compensation claims. She regularly appears in sheriff courts and instructs Court of Session actions, in addition to Lands Tribunal work.

She is a lecturer at Glasgow University and is also chair of the Scottish branch of the Property Litigation Association (SPLA).

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