



## ABC of Dilapidations

Michael Cox and Jess Slack



---

---

---

---

---

---

---

---

### ABC of Dilapidations



#### What are dilapidations?

- ▶ The terms "dilapidations" refers to any items of disrepair which are covered by the tenant's repairing covenants under a lease.
- ▶ Leases normally contain two kinds of repairing covenant:
  - ▶ An ongoing obligation to keep the premises in repair during the term of the lease.
  - ▶ An obligation to return the premises to the landlord in repair at the end of the lease.

UK-410291/075.3

---

---

---

---

---

---

---

---

### ABC of Dilapidations



#### Why dilapidations matter to the landlord

- ▶ During the term of the lease.
- ▶ At lease expiry.

UK-410291/075.3

---

---

---

---

---

---

---

---

**A is for...**



**Alterations**

- ▶ Has the tenant undertaken alterations to the premises?
- ▶ Is the tenant required to reinstate the alterations prior to lease expiry?
- ▶ Is notice to reinstate required?

UK-410291575.3

---

---

---

---

---

---

---

---

---

---

**B is for...**



**Betterment**

- ▶ Sometimes it will not be possible to comply with the covenant to repair without improving the premises to some degree, e.g. a rotten door.
- ▶ The landlord will therefore get back a new item in place of an old.
- ▶ The replacement may have an element of improvement.
- ▶ There is no discount for betterment.
- ▶ Leading case: *Harbutt's "Plasticene" Ltd v Wayne Tank & Pump Co Ltd*

UK-410291575.3

---

---

---

---

---

---

---

---

---

---

**C is for...**



**Carpets**

- ▶ Carpets can be an expensive item of disrepair.
- ▶ If the lease is silent on the issue, a tenant will want to establish whether it forms part of the demised premises or not.
- ▶ Whether a carpet forms part of the demised premises will depend on the degree of annexation.

UK-410291575.3

---

---

---

---

---

---

---

---

---

---

D is for...



Damages

- ▶ Damages at common law: this is generally the amount it will cost to put the property into the standard of repair required by the lease.
- ▶ But limited by section 18(1) Landlord and Tenant Act 1927
  - ▶ Damages for breach of the tenant's repairing obligations are limited to the amount by which the value of the reversion has been diminished.
  - ▶ The landlord cannot recover any damages at the termination of the lease if the premises would be demolished soon after, or structural alterations would be carried out which would render the repairs which the tenant would have carried out valueless.

UK-410781575.3

---

---

---

---

---

---

---

---

---

---

E is for...



Evidence

- ▶ What is the relevant standard of repair?
- ▶ Is there a schedule of condition?

UK-410781575.3

---

---

---

---

---

---

---

---

---

---

F is for...



Fair Wear and Tear

- ▶ *"The meaning is that the tenant ... is bound to keep the house in good repair and condition, but is not liable for what is due to reasonable wear and tear. That is to say, his obligation to keep in good repair is subject to that exception. If any want of repair is alleged and proved in fact, it lies on the tenant to show that it comes within the exception. Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces ..."*
- ▶ Haskell v Marlow [1928] 2 K.B. 45

UK-410781575.3

---

---

---

---

---

---

---

---

---

---

G is for...



Guarantors

- ▶ Is there a contractual guarantee of the tenant's obligations?
- ▶ Is there an AGA from a former tenant?
- ▶ Practical implications.

UK-410291/075.3

---

---

---

---

---

---

---

---

---

---

H is for...



Housing Disrepair Protocol

- ▶ The Housing Disrepair Protocol is concerned with residential property only, and deals with disrepair for which the landlord is responsible under the terms of the tenancy.
- ▶ It therefore proceeds upon the basis that it will be the tenant who is the claimant.
- ▶ It is in the nature of such claims that they will most commonly arise during the course of the tenancy, not at its end, and that the tenant's remedy will not be limited to a claim for damages only, but may also require works to be done.
- ▶ It is recognised in the Housing Disrepair Protocol that the potential claimant, being the tenant, may not have the professional advice of a solicitor or a surveyor, and the forms are drafted on the basis of alternative variants making provision for this.
- ▶ The tone, and degree of detail, to be found in the two Protocols also reflects the expectation that the Housing Disrepair Protocol will normally be used in relatively small cases, where the claimant may be a lay person, with relatively little knowledge of the law and practice of dilapidations.

UK-410291/075.3

---

---

---

---

---

---

---

---

---

---

I is for...



Insurance

- ▶ The general rule.
- ▶ Qualifications to the general rule.

UK-410291/075.3

---

---

---

---

---

---

---

---

---

---

J is for...



Jervis v Harris

- ▶ This is a clause in the lease entitling the landlord to enter the premises to inspect, give the tenant notice of works that need to be carried out and if the tenant does not carry those works it gives the landlord the right to enter the premises, carry out the works and recover the cost from the tenant.
- ▶ Service of an interim schedule of dilapidations during the term of the lease should be served under the Jervis v Harris clause in the lease.
- ▶ The monies spent by the landlord are recoverable from the tenant as a debt. The statutory cap on damages does not apply.

UK-410281575.3

---

---

---

---

---

---

---

---

---

---

K is for...



Keys

- ▶ Hand them back!
- ▶ Potential consequences.

UK-410281575.3

---

---

---

---

---

---

---

---

---

---

L is for...



Latent Defects

- ▶ *"[I]t is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised."*
- ▶ Ravensett Properties Ltd v Davstone (Holdings) Ltd [1980] Q.B. 12

UK-410281575.3

---

---

---

---

---

---

---

---

---

---

**M is for...**



**MEES**

- ▶ What is MEES?
- ▶ When does it take effect?
- ▶ Exemptions.
- ▶ Practical considerations.

UK-410291575.3

---

---

---

---

---

---

---

---

**N is for...**



**Notice**

- ▶ Where a notice is required to engage the obligation e.g. a notice to reinstate, it is important that the service requirements of the lease are adhered to.
- ▶ Do not rely on service by email.

UK-410291575.3

---

---

---

---

---

---

---

---

**O is for...**



**Original Tenant**

- ▶ Is it an "old" or "new" lease?
- ▶ Privity of contract.

UK-410291575.3

---

---

---

---

---

---

---

---

P is for...



Pre-Action Protocol

- ▶ Applies to terminal dilapidations claims.
- ▶ Requires the landlord to give notice to a tenant of a claim for dilapidations within a reasonable time after lease expiry, which will not generally be more than 56 days.

UK-410281575.3

---

---

---

---

---

---

---

---

---

---

Q is for...



Quantified Demand

- ▶ The Protocol.
- ▶ What should the Quantified Demand include?
- ▶ RICS Guidance Note on Dilapidations.

UK-410281575.3

---

---

---

---

---

---

---

---

---

---

R is for...



Repair (standard of)

- ▶ The age of the building is of particular importance in ascertaining the required standard of repair.
- ▶ An old building still has to be kept in repair, but only to a standard appropriate to a building of its age.
- ▶ The covenant will not generally be construed so as to require the covenanting party to bring dated premises up to latter day standards of construction or specification.
- ▶ *Pgfl II S.A. v Royal & Sun Alliance Insurance Plc* – concerned an office building in the heart of London’s financial centre which had been built to a high specification in 1973 and let for 35 years from June 1973):
- ▶ *“The lease is dated 1973. The building is in the heart of the City of London close to the Lloyd’s Building. It was in 1973 and is now, a prestige block in the heart of the financial area. The standard of repair is that which is required to put such a 1973 building in repair. The tenant is not required to improve a 1973 building to the standard of 2008.”*

UK-410281575.3

---

---

---

---

---

---

---

---

---

---

S is for...



Silence

- ▶ What if the lease is silent on the liability to repair?
- ▶ Is there an implied term to repair the property?

UK-410291575.3

---

---

---

---

---

---

---

---

T is for...



Termination Date

- ▶ Does this mean the date on which the lease actually terminates (e.g. by a break) or only the contractual expiry?
- ▶ Most institutional leases include within the interpretation section words that indicate that references to the end of the term are to the expiry, whenever that may be.
- ▶ Without this wording, term means the expiry of the lease.
- ▶ On break options this could cause landlords difficulty as obligations to e.g. repaint in the last year of the term would only apply at the end of the term and not at the break date.

UK-410291575.3

---

---

---

---

---

---

---

---

U is for...



Undertenants

- ▶ What is the scope of the undertenant's obligations?
- ▶ Is there a cap on the tenant's liability?
- ▶ Privity of contract.

UK-410291575.3

---

---

---

---

---

---

---

---





Y is for...



Yield Up

- ▶ What does it mean?
- ▶ When?
- ▶ What is the purpose of a yield up covenant?

UK-410781575.3

---

---

---

---

---

---

---

---

---

---

Z is for...



Zero rating

- ▶ VAT on dilapidations claims is often misunderstood.
- ▶ Where the landlord has already done the work by reference to which damages are to be assessed, or there is a realistic possibility he will do so in the future, there must be added to the cost of the work any VAT which the landlord is or will be liable to pay on the repair work and which he cannot reclaim as input tax.
- ▶ Where works have not been undertaken and a dilapidations payment is made by way of damages then no VAT is payable.

UK-410781575.3

---

---

---

---

---

---

---

---

---

---

Questions & Contact Details



 Jessica Slack  
Associate  
T +44 20 7367 2142  
E jessica.slack@oms-cmo.com

 Michael Cox  
Associate  
T +44 20 7524 6554  
E michael.cox@oms-cmo.com

UK-410781575.3

---

---

---

---

---

---

---

---

---

---