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# RICS CPD Foundation Dilapidations: The Law & The Reality

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## What are we going to cover?

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- **General dilapidations principles**
  - **What issues may affect a tenant's dilapidations liability?**
  - **Practical Considerations**
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## What are Dilapidations?

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- **Damages for breach of tenant covenants following expiry of a lease.**
  - **Generally a failure to yield up in repair, decorate or reinstate alterations.**
  - **Identify the key documents (normally the Lease and Licences for Alterations)**
  - **Identify the tenant's obligations in those documents:**
    - Contractual obligation
    - Definition of Premises under the Lease – what is in, what is out?
    - Requirement for reinstatement notices?
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**What issues may affect a tenant's dilapidations liability?**

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- **Section 18, Landlord and Tenant Act 1927**
  - **Supercession**
  - **Betterment**
  - **Loss of Rent**
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**Section 18, Landlord and Tenant Act 1927**

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- **Two limbs:**
    - **Limb 1** – *Damages for breach of repairing covenant shall in no case exceed the amount (if any) by which the value of reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant...*
    - **Limb 2** – *in particular, no damage shall be recovered...if it is shown that the premises in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down or such structural alterations made therein as would render valueless the repairs covered by the covenant...*
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**Section 18, Landlord and Tenant Act 1927**

- **Limb 1 - Objective Test**
- Requires a comparison between two imaginary sales:
  - Sale 1: Premises “in repair”; and
  - Sale 2: Premises “in condition” / “out of repair”
- Assume reasonable period of marketing and negotiation
- Hypothetical purchaser will be assumed to be highest bidder in market at relevant date – i.e. can be occupier, development, investor etc.
- Limb 1 is a cap on damages not a guide as to value

**Section 18, Landlord and Tenant Act 1927**

- **Limb 2 - Subjective Test (burden of proof on tenant) - Rare**
  - Contrast with supercession – Limb 2 is a complete disregard of damage
  - Intent – “zone of contemplation” contrasted to “valley of decision” – critical date is date on which lease expires (*Salisbury v Gilmore [1932]*)
  - Section 30(1)(f) of Landlord and Tenant Act 1954 (test in *Cunliffe v Goodman [1950]*)

## Supercession

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- **Extension of the common law rule that damages for disrepair are subject to test of reasonableness, taking into account the diminution in value (i.e. is it commercially worthwhile doing the work?)**
  - **Applies where there has been an upgrade to part of a building such that its pre-existing state of repair may be irrelevant, or relevant but only to a limited extent**
  - **Important to distinguish between repair/renewal and upgrade/improvement**
  - **Unlike Limb 2 of s.18, may result in a % deduction in damages rather than complete disregard**
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## Betterment

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- **Sunlife v Tiger [2014] 1 EGLR 30**
    - 35 year lease of office and retail premises expired in 2008 – premises and equipment in total disrepair or removed entirely
    - Landlord undertook extensive works to install new equipment prior to trial
    - Tenant argued that works amounted to betterment as new equipment was improvement upon specification in original lease
    - Landlord allowed full cost of works – demonstrated that if tenant had complied with covenants and carried out repairs to 35 year-old kit, the total costs would have been greater than replacement cost, therefore landlord was only doing what a reasonable tenant would have done
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## Loss of Rent

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- **Must be a genuine and causal link between dilapidations and loss of rent – delays to re-letting for other reasons will not count**
  - **Time – duration that it would reasonably take to carry out works to put premises back into repair**
  - **Amount – can include service charges and rates**
  - **Mitigation**
  - **Section 18, Landlord and Tenant Act 1927 will apply to loss of rent**
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## Loss of Rent

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- **Consortium Commercial Developments Ltd v ABB Ltd [2015] EWHC 2128 (TCC)**
    - Tenancy expired in 2011 when letting and investment markets were weak
    - Works would take 12 weeks to complete – landlord claimed loss of rent for whole period
    - Claim refused by Court – evidence that letting in this market would take 15-18 months in any event, prospective tenant was unlikely to be influenced by works period so no link between delay and works
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## Practical Considerations

- **Burden of Proof**
- **Events after Lease expiry date**
- **Timing of Valuation**
- **Pre-Action Protocol**
- **Quantified Demand**

## Burden of Proof

- **Burden of Proof where...**
  - Works not yet done - on Landlord
  - Works completed – generally, shifts burden of proof onto tenant
  - Intention to Carry Out Works – damages based on cost of works
  - No Intention to Carry Out Works – damages limited to reduction in value (*Ruxley Electronics Ltd v Forsyth [1996]*)



## Relevance of Events after Lease Expiry Date

- Usually not relevant
- But some later events can provide evidence of diminution in value – i.e. reverse premium offered to new tenant based on disrepair (*Shortlands Investments Ltd v Cargill plc [1995]*)



## Valuation after Lease Expiry

- **South Essex Partnership University NHS Foundation Trust v Laindon Holdings Limited [2016] EWCA Civ 377**
  - Court allowed valuation of damages on date 3 years after expiry of lease on basis that landlord could not commercially do works until it received damages from tenant
  - Court also disallowed landlord's loss of rent claim on appeal because landlord continued to delay commencing works after damages paid



**Dilapidations Pre-Action Protocol**

- *Pre-Action Protocol for Claims for Damages in Relation to the Physical State of Commercial Property at Termination of a Tenancy - the 'Dilapidations Protocol'*
- Part of CPR - costs sanctions for failure to comply with protocol



**Dilapidations Pre-Action Protocol**



## Quantified demand

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- **Separate requirement (Para 4) in Dilapidations Protocol from service of Schedule**
  - **Contents of Quantified Demand**
    - Set out all aspects of the dispute, and set out and substantiate the amount sought as damages
    - Confirm that Landlord will attend a negotiation meeting
    - Set out legal basis for the recovery of losses
  - **Timescales – within 56 days of termination of lease**
  - **Recoverable losses**
    - Where sum sought is based on the cost of works, should be quantified and substantiated by invoice or a detailed estimate.
    - If Quantified Demand includes any other losses, they must be fully substantiated and quantified
    - Figures should be restricted to the landlord's likely loss.
    - Exclude items that are likely to be superseded by the Landlord's intentions for the property.
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## Q&A

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Questions?

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