



**NEIL WOTHERSPOON AND JON ROWLING, FEBRUARY 2018**

**DILAPIDATIONS NORTH OF THE BORDER:  
THE NEW SCOTTISH ENLIGHTENMENT?**





To celebrate the continued success of our Edinburgh office, and the increase in dilapidations instructions we are managing north of the border for our clients, we present a paper on recent changes to Scottish dilapidations law and procedure, and we identify the main differences between Scotland and England and Wales:

- The common law differs either side of the border
- Legal terminology and technical phraseology differs
- There is no Dilapidations Protocol north of the border
- There is no Quantified Demand north of the border
- The two jurisdictions have different RICS Dilapidations Guidance Notes
- The Landlord and Tenant Act 1927 does not apply north of the border
- Scots law includes the concept of ‘extraordinary repairs’
- Scots law includes an implied warranty from the landlord that the premises are fit for purpose
- Interim dilapidations claims have more impact north of the border
- The way in which chattels / moveable items and fixtures are classified differs either side of the border
- ‘Payment clauses’ have, in some circumstances, been enforced north of the border
- The court structures differ but the jurisdictions share the Supreme Court

#### Payment clauses

Partly as a result of the way in which a Supreme Court ruling affected judgements relating to payment clauses in Scotland, there is now a debate south of the border as to whether the English Courts should or could follow Scotland’s lead if and when the question of the validity of a payment clause is presented to an English Court.

Payment clauses are drafted so as to allow the landlord to claim back from the tenant a sum of money equivalent to the cost of the remedial works the tenant failed to complete; as a debt rather than as damages. In so doing, landlords probably are able to side-step any adverse consequences of the measure of damages. The cost of the works is the cost of the works and that is the sum to be paid.

An example of a payment clause is as follows:

“PROVIDED ALWAYS that the Landlord shall have the option (in lieu of requiring the Tenant to carry out the work in this sub-clause provided to be done by the tenant during the last year of the Period of this Lease) of requiring the Tenant to pay to the Landlord the sum certified by the landlord as being equal to the cost of carrying out such work and if the Tenant shall pay to the Landlord the sum as certified together with any surveyors’ fees incurred by the Landlord in connection with such Certificate within fourteen days of demand the Landlord shall accept the same in full satisfaction of the Tenant’s liability under this sub-clause quoad the work referred to in this proviso.”

In some ways, these payment clauses can be thought of as equivalent to end-of-lease repairs notice (Jervis v Harris) clauses, but without necessarily there being any requirement for the work to be completed.

South of the border, the main potential stumbling blocks to following Scotland’s lead are the presence of s18(1) of the Landlord and Tenant Act 1927 and concerns about whether the clauses would be classified as penalty clauses.

As things stand north of the border, in very broad terms, payment clauses which refer to the ‘value’ of a schedule of dilapidations (or words to that effect) may well not be enforceable (Grove Investments Limited v Cape Building Products Limited [2014] CSIH 43) but payment clauses which refer to the cost of remedial works (or words to that effect) might well be enforceable (@SIPP Pension Trustees v Insight Travel Services Limited, [2015] CSIH 91 and



Tonsley (Strathclyde) Limited and Tonsley (Strathclyde no.2) Limited v Scottish Enterprise [2016] CSOH 138). Consequently, tenants who are a party to a lease with a payment clause which refers to paying the landlord the cost of the remedial works should be very aware of the risk that their landlord might not be constrained by alternative measures of loss and there might just be a simple contractual obligation to pay up.

#### Other differences

English surveyors acting north of the border and Scottish surveyors acting south of the border should be cautious; remember Donald Rumsfeld's 'unknown unknowns'?

The most notable traps for English surveyors (quite apart from unfamiliarity with the enforceability of payment clauses) are the differences in the common law and the need to find contractual references in the lease which mean that the landlord contracts-out of its common law obligations. If those clauses are not there the landlord's obligations will appear to be unusually onerous.

A tenant receiving an interim schedule of dilapidations in England will, in most cases, ignore it. A tenant receiving an equivalent document in Scotland should not. The English courts have been reluctant to order specific performance of contractual obligations under these circumstances, but specific implement in Scotland is more readily available to landlords via the courts. Scottish tenants beware.

Scottish tenants don't even have the same statutory protection afforded to English tenants by s18(1) of the Landlord and Tenant Act 1927. That section of the statute limits English landlords' dilapidations claims (for disrepair) to the reduction in value caused by the breaches. There is no such statutory protection north of the border and Scottish landlords are not even expected to acknowledge that any measure of loss other than the cost of the remedial works is the correct measure.

That said, Scottish case law has established that alternative measures of loss (potentially including the reduction in value of the premises caused by the breach) can be presented by tenants (Duke of Portland v Wood's Trs [1926] S.C. 640 and Prudential Assurance v James Grant [1982] S.L.T. 423).

English surveyors who present a Quantified Demand to a Scottish tenant are (whilst not breaking any rules by so doing) probably demonstrating to the tenant that they don't have the correct level of knowledge of the Scottish law of dilapidations or of established Scottish procedures.

#### Extraordinary repairs

If, in Scotland, a landlord fails to transfer its common law obligations on to the tenant (but using a phrase equivalent to "irrespective of the cause of damage") then the landlord will be responsible for extraordinary repairs and the tenant will not.

So, what are these extraordinary repairs? The answer to that will only ever be based upon the facts of any particular case but guidance can be found within the case of Co-operative Insurance Society Limited v Fife Council [2011] CSOH 76 in which the judge identified that three tests should be considered when trying to establish what constitutes an 'extraordinary repair'. He referred to "(i) the origin of the damage, (ii) its extent and (iii) its nature". At paragraph 18 of the judgement he stated:

"The first head refers to how the damage came about. If it was caused by a fortuitous event, something unanticipated



and outwith the control of either party, that would be a pointer to the repair being an extraordinary repair for which the tenant was not liable... The second head relates to the extent or seriousness of the damage, and the likely cost of repairs - thus, if a wall or roof collapses, it may point to the necessary repair being an extraordinary repair for which the landlord is liable... The third head relates to the nature of the damage and the necessary repair. Does it amount to total reconstruction?"

In England and Wales, a reasonably similar concept can be found at stage five of Dowding and Reynolds' "Five Part Analysis of Liability Under the General Covenant to Repair" whereby works which 'go beyond' repair can, based on a fact and degree test, be held not to be the responsibility of the tenant.

#### Fitness for purpose

This is another concept which does not appear south of the border. Landlords provide a common law warranty that the premises are reasonably fit for purpose. This means the premises must be wind and watertight, habitable and tenable. However, usually, landlords remove that warranty by the wording in the lease, and words such as "the tenant accepts the premises as in good condition" would be typical.

Absent these words the landlord would have an ongoing obligation throughout the term of the lease to keep the premises wind and watertight, habitable and tenable. The landlord would not be in breach though unless and until the tenant advises the landlord of the issue (in circumstances whereby the landlord would not otherwise know about the breach)

#### Conclusions

Law and procedure either side of the border differs; surveyors should cross the border with caution.

And, based purely on dilapidations considerations, if Scottish and English leases are each drafted in a standard modern form:

- Where would we rather be a landlord? Scotland
- Where would we rather be a tenant? England or Wales

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<sup>1</sup>Chapters 6 to 11 of Dowding, N. Reynolds, K Oakes, A (2018) Dilapidations The Modern Law and Practice, Sweet and Maxwell, London

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