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HOW DILAPIDATIONS DIFFER ACROSS THE UK

AN OUTLINE OF THE REGIONAL VARIATIONS



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INTRODUCTION

Dilapidations in Scotland, Republic of Ireland, Northern Ireland and the Channel Islands are, at face value, similar to those in England and Wales; the basic procedures are the same throughout. However, whilst England and Wales have had an RICS Guidance Note on the subject that spans six editions, and a Dilapidations Protocol by the Property Litigation Association (PLA), Scotland and Republic of Ireland are only now seeing the introduction of a guidance note. Northern Ireland and the Channel Islands still use the RICS Dilapidations Guidance Note for England and Wales as a general good practice guide.

ABSTRACT

Despite the differences in dilapidations outside England and Wales, and contrary to some speculation, the burden of proof across the UK in the first instance always falls upon the landlord, and this forms the basis of any dilapidations claim. As in England and Wales, this is typically demonstrated at lease expiry by the cost of returning the property to the state demanded by the lease. However, in Scotland and the Channel Islands, a claim for damages is not capped by statute. In some circumstances, the arguments of agreeing what a like-minded tenant would expect from the property can be legitimately used by tenants in order to limit a claim. As in England and Wales, input from specialist valuation surveyors may be necessary in order to substantiate loss, such as the diminution in value of the landlords reversionary interest.

There are lots of potential pitfalls for commercial property occupiers unfamiliar with dilapidations law outside England and Wales. As always, the devil is in the detail, but occupiers and their advisers must understand the differences in law around the British Isles before taking such leases. Assumptions based on experience in England and Wales can often lead to expensive and time consuming misinterpretation. Of course, the most important aspect is to take experienced expert advice. Such advice is recommended both before signing a new lease, such as instructing a condition survey of the premises, or at lease end by planning in advance of the termination or break date in a bid to mitigate any loss.

THE PROBLEM

Less experienced dilapidations surveyors have found dilapidations claims outside England and Wales a daunting minefield given the absence of the need to comply with the PLA protocol, and the use of many different definitions such as “conclusion of missives” (exchange of contracts), “extraordinary repairs” (inherent, latent, wear and tear defects), “irritate” (re-enter) and “ish” (lease expiry date) in Scottish law, for example. A broader understanding is required to effectively deal with dilapidations claims on a nationwide basis.

OUTLINING THE DIFFERENCES

SCOTLAND

Under Scottish common law, the tenant has different obligations to repair a property under the terms of a lease. In fact, the tenant’s obligations are largely limited to liability for fair wear and tear, and repairs needed due to their negligence. However, it is only in the express lease clauses that obligations of common law transfer from the landlord to the tenant, and this is the first stumbling block for the uninitiated.

Tenants taking a new lease in Scotland are likely to be faced with a clause such that they “accept the property in good repair” or they “accept the property in a tenantable condition”. Both of these clauses transfer the liability for certain common law obligations from the landlord to the tenant in different ways; for example, accepting the property in good repair implies that it must be returned to the landlord in such a condition at lease expiry. Accepting a property in tenantable condition is not as clear cut, and age, character and locality issues could be considered as a defence here.



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The importance of understanding the meaning of the clauses in the lease recently became very evident to a client who came to TFT having taken on a short lease of only three years, entering into what they thought was a reasonable repairing obligation. The client quickly learned that this was not the case. Due diligence was not undertaken by a building surveyor prior to them taking a lease of the property, and it transpired that the building had major structural problems that could only be resolved by the taking down and rebuilding of an entire elevation. The original dilapidations claim was ten times the annual rent, and although successfully negotiated by TFT, could have been reduced further (or struck out completely) had the client taken due diligence advice prior to lease commencement.

“Interim” and “Terminal” dilapidations terminology is used in Scotland, having been adopted from the UK common practice, although the courts do not recognise a difference between the two types of schedule. It is common place for a landlord to serve a tenant what in England and Wales would be deemed an interim schedule at, say, mid-term of the lease to prompt the tenant to undertake repairs where they are in breach of their lease obligations. But, unlike in England and Wales, there is no limit to what can be included in this. Given the economic climate, we anticipate a rise in the number of schedules being served during the term of leases, in order to protect the landlord from having an empty property in poor condition, should the tenant become insolvent.

In Scotland, aside from shops covered by the Tenancy of Shops (Scotland) Act 1949, there is no law regarding “holding over” or such an equivalent as the security of tenure found in the Landlord and Tenant Act 1954, that applies in England and Wales. However, “tacit relocation” provides that, in the absence of the correct notice being served at the appropriate time, a lease continues on a rolling 12 month basis until terminated. In some cases, this can be useful for a tenant but in areas where the tenant wants to vacate and the uptake of a property is slow, failure to terminate a lease effectively is the perfect opportunity for the landlord to keep a tenant for at least another 12 months.

We have seen an increase in dilapidations disputes both north and south of the border over the last few years, and our experience is consistent with that of the legal profession.

Colin Archibald, a Partner in Edinburgh law firm Shepherd and Wedderburn who specialises in dilapidations disputes, comments:

“The economic downturn has seen an increase in the volume of instructions Shepherd and Wedderburn have received on dilapidations issues. As landlords seek to enforce lease obligations, and tenants seek to minimise their liabilities, more disputes have arisen.

The starting point in any dispute will be the scope of the repairing obligation, in particular whether the common law position has been displaced. A key issue in some major dilapidations disputes argued before the Scottish courts recently has been whether the landlords’ common law liability for extraordinary repairs has been transferred to the tenant. Resolving this issue can require careful analysis of the wording of the repairing obligation, and its outcome can have significant implications for the respective liabilities of the parties.”

CHANNEL ISLANDS

Whereas Scotland saw the introduction of the ‘RICS Dilapidations in Scotland’ Guidance Note in January 2011, nothing has been produced to aid serving a Schedule of Dilapidations in the Channel Islands. The most notable difference with English dilapidations law in the Channel Islands is the lack of diminution in value statutory protection limiting a landlord’s claim. Section 18(1) of the Landlord and Tenant Act 1927 in England protects tenants by limiting the amount of damages a landlord can claim in the reversionary value of the property. A very recent case, *Jersey Sports Stadium v Barclays Private Clients* (2013) was passed in the Jersey Royal Court that reinforced the whole diminution argument.



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This case saw the court considering the cost of works and the diminution in value, and preferring the guidance given in *Ruxley v Forsyth* (1996) over that in *Joyner v Weeks* (1891) in that the measure of damages to be awarded must be reasonable and proportional to the reinstatement required, and also reflect the actual loss to the landlord. The Arbitrator in this case awarded damages based on the cost of works rather than the diminution in value.

REPUBLIC OF IRELAND

In the Republic of Ireland, the representative body is the Society of Chartered Surveyors (SCS), unlike the Royal Institution of Chartered Surveyors (RICS) in the UK. In September 2011 they produced the first edition of their Dilapidations Guidance Note to Best practice, although it is not linked with a legally binding document such as the Property Litigation Associations Dilapidations Protocol, as in England and Wales. It is aimed to reduce the wide variety of techniques previously used in the preparation and negotiation of terminal schedules in Ireland.

The Republic of Ireland refers to Section 65 of the Landlord and Tenant (Amendment) Act 1980, the second limb of which limits the damages recoverable from the tenant by the reduction in the reversionary value of the property as a result of the alleged breaches. This of course draws parallels with Section 18(1) of The Landlord and Tenant Act 1927 in England and Wales. It is this statute that will allow Landlords and Tenants in the Republic of Ireland to use Section 65 to uphold or defend a dilapidations claim.

NORTHERN IRELAND

In Northern Ireland, as in the Republic of Ireland, the fundamentals of dilapidations law is the Conveyancing Act 1881 and the Business Tenancies (Northern Ireland) Order 1996. They have no equivalent to The Law of Property Act 1925, Landlord and Tenant Act 1927 or the Leasehold Property Repairs Act 1938. In general, the current RICS Dilapidations Guidance Note sets the protocol in Northern Ireland. The lack of dilapidations case law throughout the Republic of Ireland and Northern Ireland means that English dilapidations law cases may be referred to. However, when a dispute arises they will not be treated as binding precedents.

SUMMARY

It is imperative that expert dilapidations advice is sought from the outset, whenever considering entering into a commercial lease of a premises outside England and Wales. Waiting until the approach of lease expiry is never a cost effective option. Landlords and Tenants of property outside England and Wales must appreciate the nuances in dilapidations practise and law around the British Isles, and how these affect liability. Professional advice must be sought: contact Neil Gilbert of TFT (0117) 934 9900.

LINKS

[RICS](#)

[PLA Protocols](#)

[LinkedIn Dilapidations Group](#)