

DILAPIDATIONS: AN OVERVIEW

This note briefly highlights a number of issues relating to dilapidations for a business tenant. This is a highly complex area of law and specific legal advice should always be sought on your own position. This note is not intended to be a substitute for such advice.

What are dilapidations?

Dilapidations is the legal term used to describe items of disrepair that are covered by repairing obligations contained in a lease. Breaches of the following types of obligation are generally relevant to a tenant's liability for dilapidations:

- Repairing covenant, e.g. “to keep the premises in good and substantial repair” or obligations to return the premises at the end of lease in a particular condition.
- Decorating covenant, e.g. “The Tenant shall decorate the outside and the inside of the Property as often as is reasonably necessary and also in the last three months before the end of the term”.

Often overlooked are:

- obligations to comply with statutory obligations – e.g. adaptation of premises in relation to disability discrimination; and
- reinstatement requirements that relate to alterations carried out by the tenant (and usually apply at the end of the term).

What remedies does a landlord have?

The remedies available to the landlord depend on the specific terms of the lease and whether or not the term of the lease has expired. There are certain statutory restrictions on the landlord's remedies but in general these include:

- Damages;

- Forfeiture - the right to terminate the lease by reason of the tenant's breach;
- Refusal of break rights (as to which see our separate note on break rights; and
- Self-help – the right for the landlord or persons on its behalf to come in and carry out the repairs.

Damages

In this note we are mainly looking at the dilapidation costs that arise at the end of a lease. In very broad terms following the end of a lease the damages a landlord is entitled to include:

- the reasonable cost of doing the works that the tenant has failed to do;
- loss of rent for the period until the works have been completed;
- professional fees relating to the repairs (such as the costs of supervising the works); and
- irrecoverable VAT that the landlord incurs.

The law in this area is complex and any tenant facing a dilapidations claim must taking legal advice on its position.

Should the tenant carry out the works?

Unless there is a significant dispute as to the work required, generally it may be better for the tenant to carry out the works itself and avoid additional costs, such as any landlord's fees for which the tenant may be liable or costs arising from litigation. It may also be that the tenant can recover VAT on the work whereas the landlord cannot.

By carrying out the work itself the tenant can choose the timing and the method of repair and to use its own contractors, which may reduce costs. The tenant may, for example, be able to schedule the repairs to coincide with a programme of redecoration works. However, in relation to works needed to remedy dilapidations, the tenant will need to complete these prior to expiry of the term because it would not normally be entitled to remain in the premises after the end of the lease to deal with outstanding dilapidations.

Some tenants may decide it is more economical to operate from the premises until the very end of the term and then deal with the dilapidations claim after the term has ended.

What other implications could dilapidations have?

The existence of dilapidations may have additional consequences under the lease. It may prejudice a tenant's ability to assign or underlet during the currency of the lease both from a landlord's consent perspective but also from the incoming tenant's perspective. Rights to break could be lost – some break options are conditional on the tenant having complied with its repairing and/or decorating covenants. Dilapidations may entitle the landlord to resist a claim for renewal of the lease.

Worried about your dilapidation obligations?

For further information or advice on the issues raised by this briefing note or indeed any commercial property matter please contact me by:

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Barry Challender is commercial property partner at AB Corporate LLP with a wide and varied experience of all commercial property related matters. His clients include SMEs, PLCs, private pension funds and national charities. Barry's past experience as a director of both clients and business support agencies enables him to put his legal advice in a pragmatic and commercial context.

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