

Dilapidations Four

Legal Framework

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Divide Again



- Get into groups of six.
- Pick two local buildings you all know and can get to, which has access to at least one elevation of the outside and two rooms inside.

Pick a Role

- Landlord
- Landlords Surveyor
- Landlords Solicitor

Or

- Tenant
- Tenants Surveyor
- Tenants Solicitor



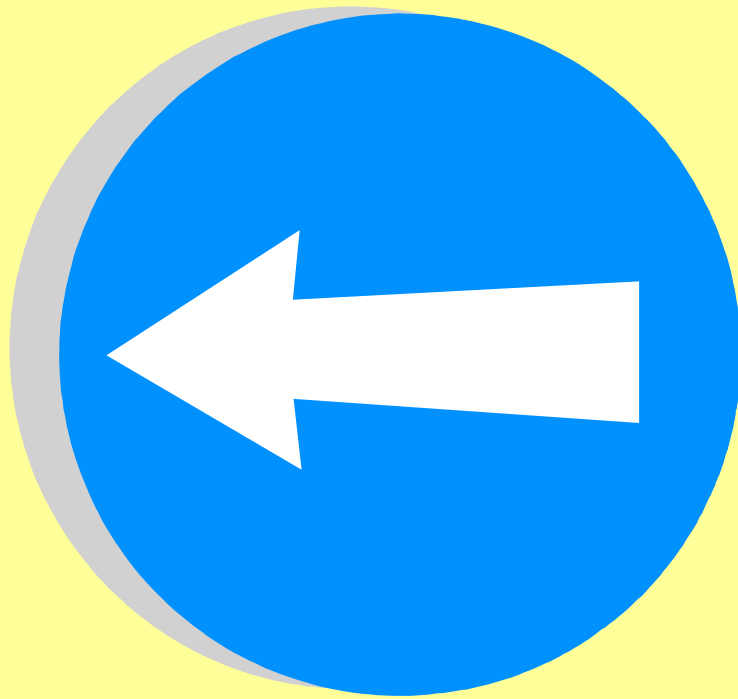
Pick a Building



- Pick a local building, which could be a:
 - Café
 - Bar
 - Public building, such as a library, university or leisure centre etc.

It just needs to be open and within easy reach of here.

Landlords Left Tenants Right

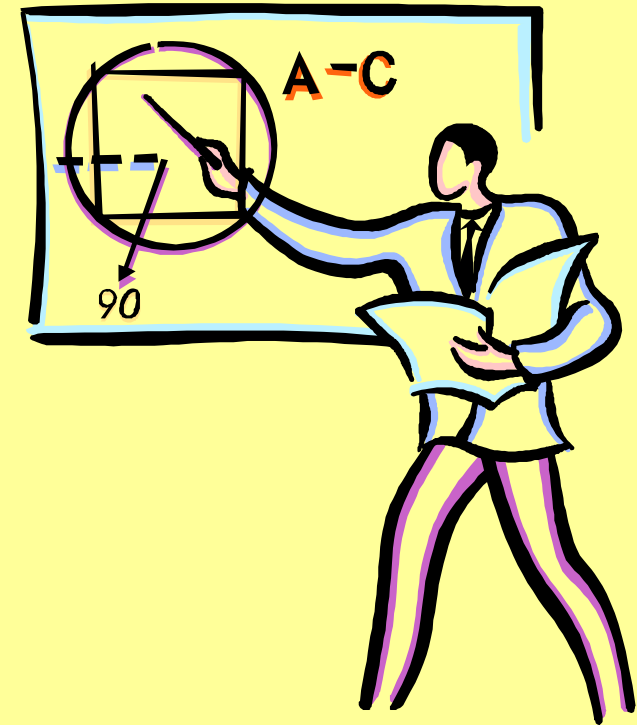


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Summary

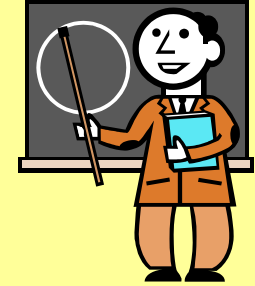
Every lecture will follow the same format:

- The first hour or so will be my presentation (but it will need some participation from you!).
- The second hour or so will be a tutorial – active learning.
- The last half an hour will be general feedback.



Dilapidations

Lecture Overview



Lecture One – Dilapidations overview and schedule of condition

Lecture Two – Schedules of Condition, Dilapidations and Scott Leases

Lecture Three - RICS Guidance / Protocol, Dilapidations Game

Lecture Four – Legal Framework

Lecture Five - Clients / Terms & Conditions

Lecture Six – More Dilaps

Review

- Week 1 - Schedule of Condition & Property Report for tenants
- Week 2 - Dilapidations for Landlords
- Week 3 – Leases - Full Repairing and Insuring or Limited Liability Leases
- Check 4Rs and Yield Up

Course Work

Course work requirement:
Oral presentations



In groups of six with teams of three (with five minutes minimum each) on Schedules of Condition & Property Reports and Schedules of Dilapidations

1/12/2008 Ready to present

Oral Presentation

- This will mean a good readable set of site notes from everyone
- A Schedule of Condition & Property Report
- And a Schedule of Dilapidations with the case law relating to each item
- And a presentation each person taking a five minute minimum part

Pick a building

- Do you have.
- Two local buildings you can get to, which has access to at least two elevation of the outside and two rooms inside.



Quote for the Day

“It's choice,
not chance,
that determines
your destiny ”

Jean Nidetch



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Today - Now

First Part

Legal frame

Classic case law

Newish case law

Surveyors role and terms to know

Examples

Second Part

- Complete S of C and Property report and a schedule of Dilapidations in Scott schedule format based on lease terms give

Last Half Hour

- Feed back

Further reading

- Read The Dilapidations Handbook Need to Know series ten or Dilapidations case in point or similar with case law examples

www.DilapsHelp.com Has many book reviews

Dilapidations Process

- ✓ Client rings for advice/ quote
- ✓ Talk to client
- ✓ Confirm instruction and T & Cs
- ✓ Gather available information
- ✓ Inspect property
- ✓ Prepare Schedule of Condition or Dilaps report
- ✓ Advise and agree way forward with your client
- ✓ Meet other surveyor
- ✓ Negotiate and agree
- ✓ Negotiate and Disagree and go to court

Legal Frame work



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Legal Framework

- The majority of Dilaps claims are resolved without legal action and often with little or limited legal advice
- They are agreed within a legal framework by chartered surveyors specialising in Dilaps work



Four ways the Landlord can serve the following schedules

- Repairs Notice (may be served by a surveyor)
 - Interim Schedule of Repairs
 - Terminal Schedule of Repairs
 - Final Schedule of Repairs
 - Further Final Schedules of Repair
- Must be served by a solicitor (s.146 L&TA 1925)

The Notice will specify by which date the repairs must be completed but sufficient time must be given.

Repairs Notice – States work needed. No limit to the number of Repairs Notices.

Interim Schedule – Must satisfy the five points in the 1938 Act and relate to a major disrepair. No limit to the number of Interim Schedules.

Terminal Schedule – Can only be served during the last three years of a lease of seven years or more. Will be a detailed schedule.

Final Schedule – Can be served only on determination of the lease. More than one schedule can be served up to six years after determination – if a further action is brought can be served up to twelve years.

Effect of S.5.1, Leasehold Property (Repairs) Act 1938

A tenant may counterclaim within 28 days against an Interim Schedule. The court will only give a landlord leave to proceed if he can prove that the repairs come under one of the five specified grounds:

1. To prevent substantial diminution in value of the reversion.
2. That repairs are required for the purpose of an Act / Bye-Law.
3. Where the lessee is in occupation of part and repairs are required in the interests of another occupier.
4. The cost of immediate repair would be small compared with the cost of delayed repairs.
5. Special circumstances render it just and equitable.

- Terminal and Final tend to be the main notices served

Procedure at the Terminal Stage

The purpose of a Terminal Schedule of Dilapidations is to ensure the property is put in as good an order as possible prior to determination of the lease. Not for the landlord to 'fleece' the tenant.

The sum of damages claimed may not exceed "the diminution in value of the remainder man's interest".

This involves complicated before and after valuations.

Damages cannot be claimed if the tenant carries out the repairs or if the landlord takes the property back while the lease is still current.

The 1938 Act does not apply at Terminal Stage.

Read the Lease



- Remember your a surveyor not a lawyer and whilst reference to case law can be made when negotiating with another surveyor
- It's ultimately the Solicitor's job to examine case law and decide which case best suites your case – but you should not get to that stage!

FRI Lease is Usual

FRI is standard in UK (in my experience)

It's great for the landlord - rent and no repairs

Double check type of lease

Read the lease

Read the lease



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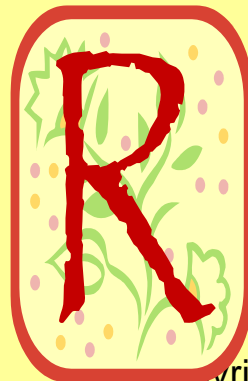
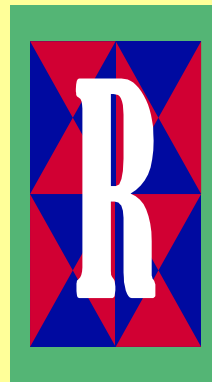
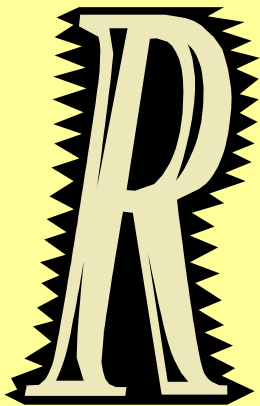
“Repair”

- Most leases are “repair” leases – but make sure that you know what your one is
- “Repair” = to a standard suitable for age, character and locality of the building



The 4Rs

4Rs and yield up

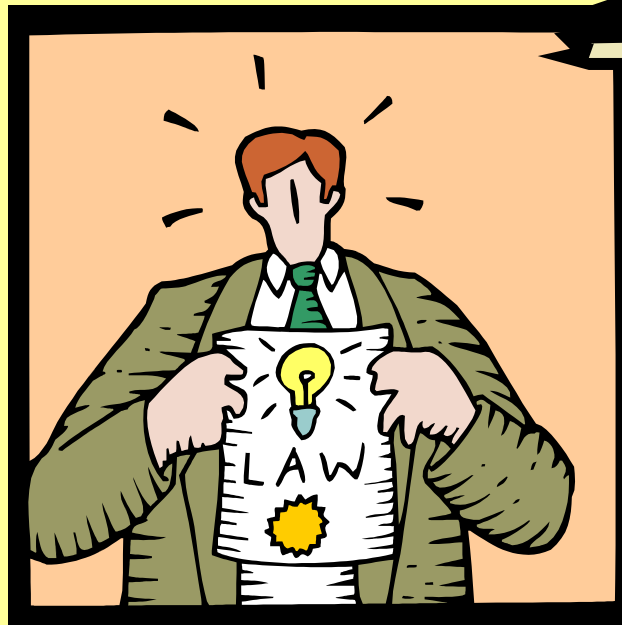
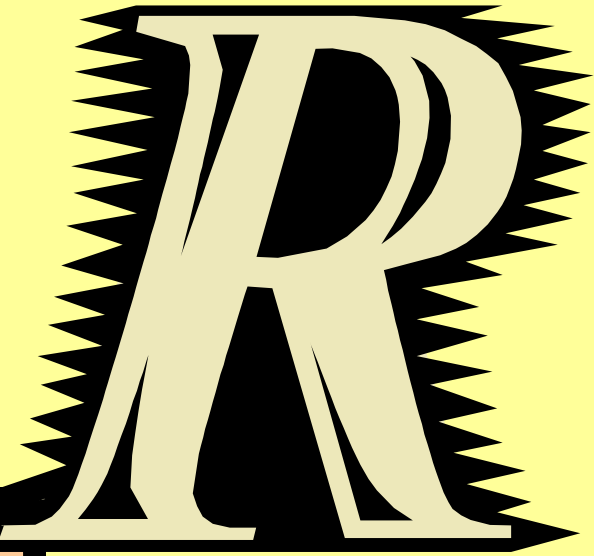


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Repair

Repairs

Define elements that
are in disrepair

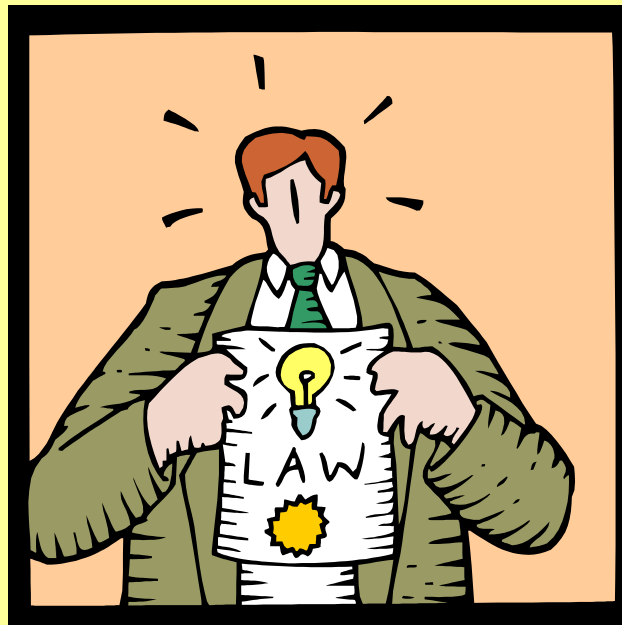


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Redecorate

Redecoration

Frequency and standard
of redecoration

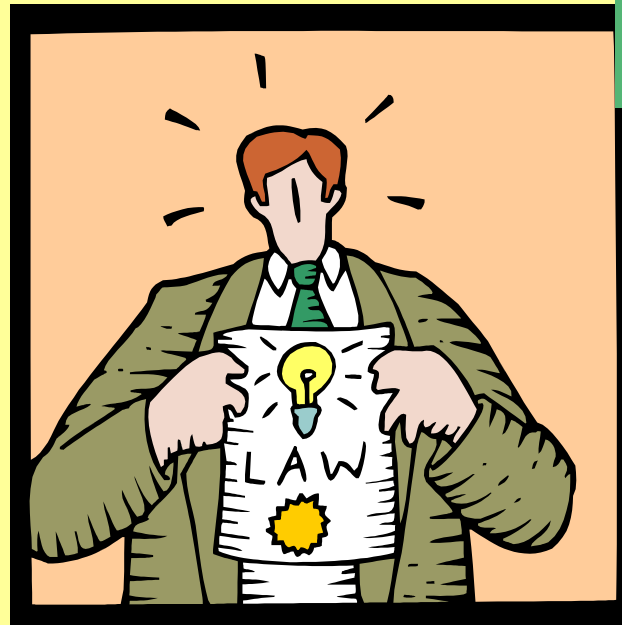
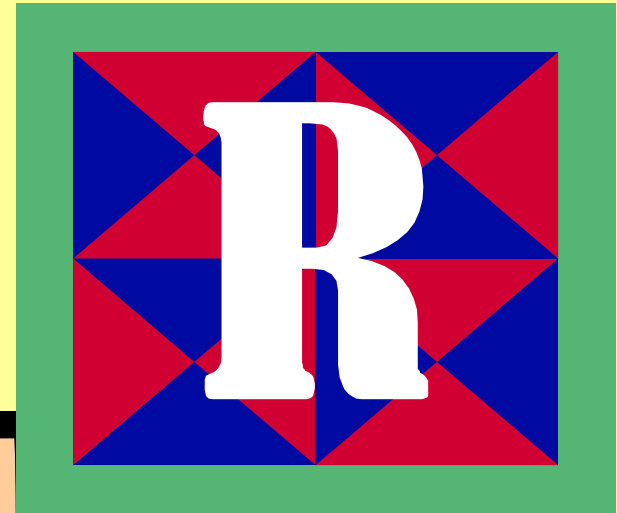


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Reinstatement

Reinstate

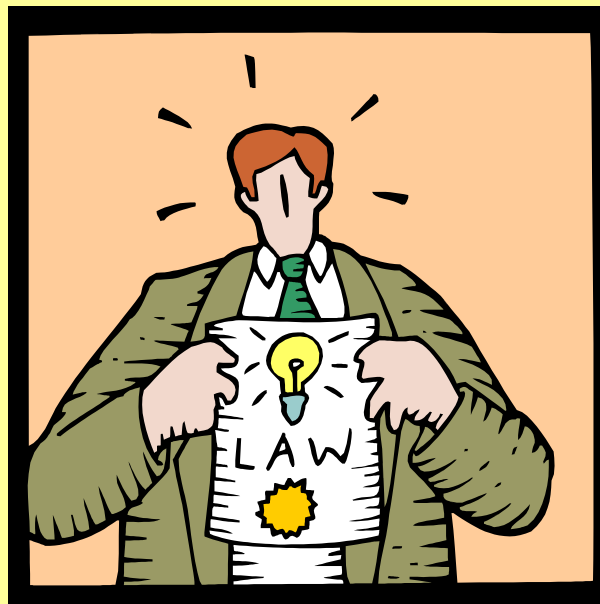
Put back to how detail in
the lease subject to any
licences



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Statutory Regulation

Usually a requirement to meet
statutory regulation such
Health and Safety at Work Act



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Classic Cases



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Top Ten Classic Cases

Top Ten Selling Albums of All Time

Artist	Album	Sales (millions)
Michael Jackson	Thriller	100–108
AC/DC	Back in Black	42
Whitney Houston/ Various artists	The Bodyguard	42
Eagles	Their Greatest Hits (1971–1975)	41
Bee Gees / Various artists	Saturday Night Fever	40
Pink Floyd	The Dark Side of the Moon	40
Meat Loaf	Bat out of Hell	37
Shania Twain	Come on Over	36
Backstreet Boys	Millennium	35
The Beatles	Sgt. Pepper's Lonely Hearts Club Band	32

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My Top Repair Classic Cases

Only by reading the cases in full will you understand them

Case	In a few words	Date
Proudfoot v Hart	Repair	1890
Calthorpe v McOscar	Meaning	1924
Belcher v McIntosh	Better than	1830
Hatfield v Moss	All included	1988
Dobson v Canterbury CC	Future use	1980
Maddoc v Davis	Actual cost	1950
Perry v chotzner	No tiny defects	1893
Regis v Dudley	Consequential loss	1997
Brown v Davis	Fair wear tenant to prove	1958
Norwich Union v BR Board	Beyond Repair	1987

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A few more Classic Cases

Only by reading the cases in full will you understand them

Case	In a few words	Date
Cornish v Cleife	New Buildings	1864
Brew Bro v Snaz	Design or inherent defect	1970
Low v Innes	Rebuilt	1864
PO v Aquarius	Attend to damage done	1978
Quick v Taff Ely BC	Future use	1985

“Repair”



“Repair” is required to a standard suitable for age, character and locality of the building

Example

Proudfoot v Hart 1890

Meaning of Words

“Whatever words the parties use they plainly express the intention that the premises are to be repaired, kept in repair and yielded up in repair”.

Calthorpe v McOscar (1924)

Better than Originally

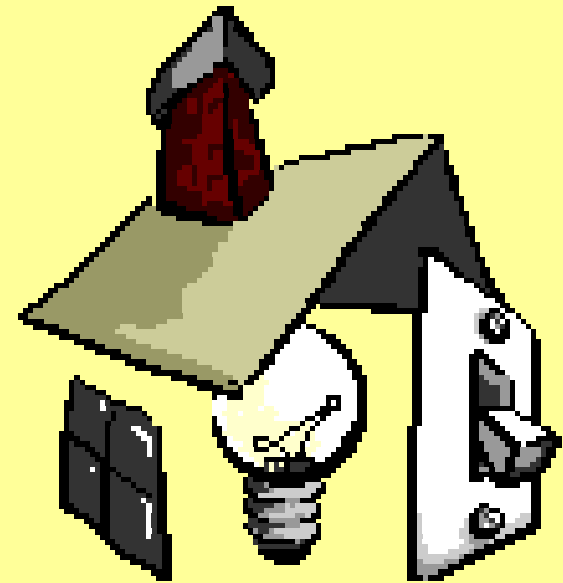
There may be a duty to put a property into better condition than it was found in at the commencement of the lease, fit to be occupied for the purpose for which they were let

Example: If four radiators leak and two do not yet leak only the leaking ones count as a disrepair.

Belcher v McIntosh (1839).

All Included

The interior, exterior
and roof are included
unless specifically
excluded



Hatfield v Moss 1988

You will Find

- Many cases are very similar

Future Use of property

The likely fate of the property must be taken into account (i.e. is it to be demolished at the end of the lease?)

Example: Landlord has planning permission to redevelop as a housing site and is out to tender

Dodd Properties v Canterbury City Council (1980)

Actual Costs

Final Stage Schedule - the only remedy is damages.
Damages will be the actual cost of putting the building into the state of repair required by the lease

Maddox Properties Ltd v Davis (1950).

The Schedule will include:

- Cost of works + VAT including securing the building.

And may include (if the wording of the lease permits):

- Costs of preparing schedule / inspections / negotiations
- Supervision of works
- Loss of rent
- Legal costs / valuation fees / specialist testing etc.

Tiny Defects

Avoid putting in every tiny defect. Generally the courts will not allow minor items such as pin pricks in the plaster and general decorative wear and tear.

The tenant is not bound to fill cracks in the plaster made by nails: *Perry v Chotzner (1893)*. 'Keep is satisfied by substantial repair. Trivial matters will not amount to a breach: *Plough Investments I v Manchester C.C. (1989)*.

Fair Wear & Tear

The tenant is required to prevent consequential damage 'fair wear and tear' would not produce:

Regis Property Co Ltd v Dudley (1979).

Unless you Read

All the case history will seem
very similar

Fair Wear and Tear

Leases may say “fair wear and tear excepted” but the onus of proof lies with the tenant:

Brown v Davies (1958).

Beyond Repair

A covenant may require something beyond repair, and when necessary, to rebuild, reconstruct or replace the same and in such condition and repair yield up:

Norwich Union v BR Board (1987)

New Buildings

A covenant to repair includes buildings erected subsequently to the demise and also fixtures, even without express mention:

Cornish v Cleife (1864).

Design or Inherent Defects

If repairs go beyond what was substantially contemplated by the parties to the lease – inherent or design defects the case to look at is:

Brew Bros v Snaz (Ross) (1970).

In this case Philimore L J said “The tenant is not liable for costly repairs arising from a long term defect to the drains”.

So

You can find case law to show your side of things – it's only a deep read that will show the difference

Rebuilt but Different

A rebuilt property is not required to be similar in construction or elevations:

Lowe v Innes (1864).

Causation

Example: The basement of a property floods due to a rise in the water table. How might this be a disrepair?

The case to study is *Post Office v Aquarius Properties (1978)*

The decision was: “There is no want of repair but the tenant is liable to attend to the damage done by water ingress”.

Good Sense

In repair liabilities the courts take the view of the good sense of the agreement. Thus the repair of a cold bridge behind a concrete lintel was not a want of repair:

Quick v Taff-Ely B.C. (1985)

Minimum and Maximum

A tenant covenanting to repair at his expense is free to adopt the minimum standard (or maximum).

But

A landlord is entitled to rebuild at a tenant's expense is not obliged to adopt minimum standards of repair but must be reasonable if a higher standard is required:

Plough Investments v Manchester CC.

Good Habits

- Keep up to date with case law
- And get to know a few other people to chat to about dilaps

Newish Case Law



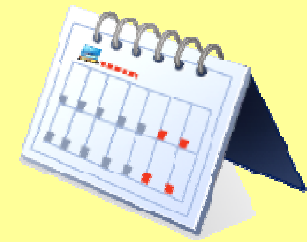
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Top Ten Classic Cases

Top 10 singles this week

No 1	Pink	So What
No 2	Kings of Leon	Sex on Fire
No 3	Oasis	The Shock of Lightning
No 4	Sugababes	Girls
No 5	Boyzone	I Love you Anyway
No 6	Rihanna	Disturbia
No 7	Katy Perry	I Kissed a Girl
No 8	Pussycat Dolls	When I Grow Up
No 9	Iglu & Hartley	In this City
No 10	Gym Class Heroes Ft The Dream	Cookie Jar

This is out of date

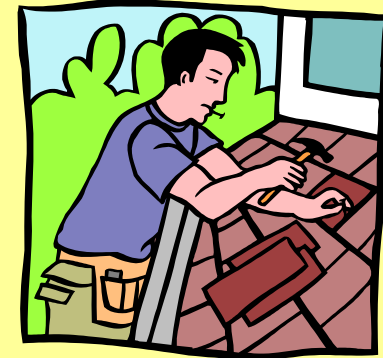


- Whatever I tell you today about the legal side of Dilaps could be out of date tomorrow or next week or in a years time
- We have a basic framework of classic case history
- And new and specific cases relevant to your dilaps case

Good Habits

- To keep up to date with latest cases
- For example Yearly Dilaps conference
- Plant
- Damages (your claim)
- Tenants alterations
- RICS GN & PLA Protocol
- Mediation

‘Old’ does not mean ‘Disrepair’



Because something is old it does not mean it's in disrepair

Example: A lift, or a boiler, may be elderly. If documentation shows it is serviced regularly and it works even if it is old it is not in disrepair dilapidation.

Reger International Ltd v Tiree Ltd 2006

Patch Repair

A patch repair can do the job - the Landlord cannot force a replacement

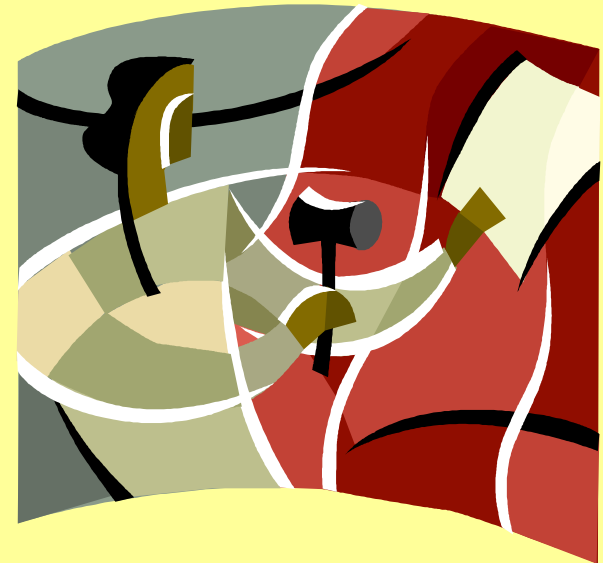
Carmel Southend Ltd v
Henshaw Ltd 2007



Court has Final Say

Court has discretion –
although a party has
“won” the litigation the
court has discretion

*Johnsey Estates Ltd v
Secretary of Environment
Transport and Regions
2001*



Remember if you're acting for the Landlord



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Before 1st January 1996



- The head / original tenant is responsible throughout the term of the lease
- So the landlord can accept an assigned from the original tenant A to new tenant B
- If tenant B does not pay, the rent can come back to the original tenant A
- Now that's unfair particularly if its tenant D E or F!!!

Why can't the tenant just walk away



They can but usually
commercial leases have a
personal guarantee

Remember if you're acting for the tenant



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Remember, Schedules of Conditions are great for Tenants



- A landlord's surveyor should make the tenant's surveyor be as precise as possible

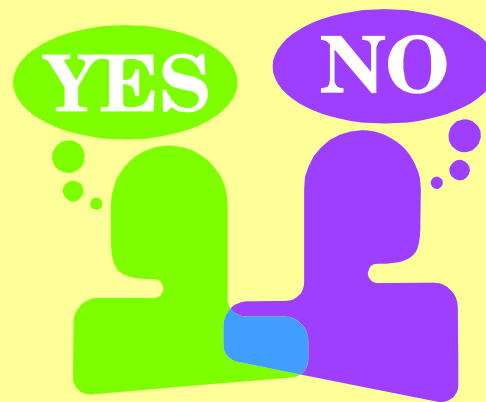
i.e. '22 slates are cracked'

- A tenant's surveyor should be general, some may say vague

i.e. 'Overhaul roof'

Remember

Its difficult for a landlord's surveyor to argue against quality of repair carried out by a tenant unless really bad



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Improvements not required but ...

No tenant has to improve a landlord's property but it may be the only reasonable option

For example, if the heating has come to the end of its life – it would be hard to replace it like for like, unlike damaged brickwork which even if 100 years old can usually get a good **match** – is this true?

Surveyor's Role



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Common Sense



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Knowing the Rules

Dilaps only work because both surveyors know the rules (the legal framework) the Dilaps Game is played under



It's partly a game - have fun!

- Know the RICS Guidance notes
- Know the Protocol
- Confirm your instruction - your client needs to know what you are doing for him
- Read the lease
- Gather all the information
- Know the latest case law
- Prepare a good reasoned argument

Surveyors need Information

- Signed lease
- Agree / approved Licences
- Any correspondence
- Schedule of Condition if applicable
- LA approvals if required



Schedule of Dilapidations or Condition

- Prepared by surveyor based on 4Rs and terms within – which in turn are defined by case law
- For example Repair covenants using the term “repair” are based on *Prodfoot and Hart* case – which showed the repair should be appropriate for the age type and style of property

Site Notes

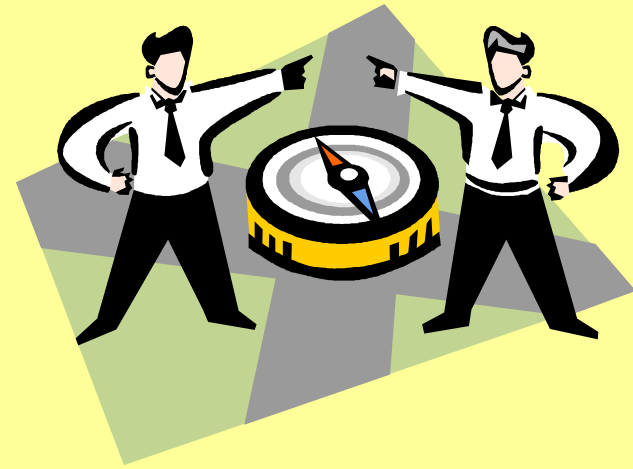


Take good notes that
will be readable in a
few years time

Not just dilapidations -
this applies to any type
of surveying work

Directions and Measurements

- Compass points or left and rights
- Walk around the building, pace it to gauge its size (helps with pricing later)



Landlord's Surveyor's Role



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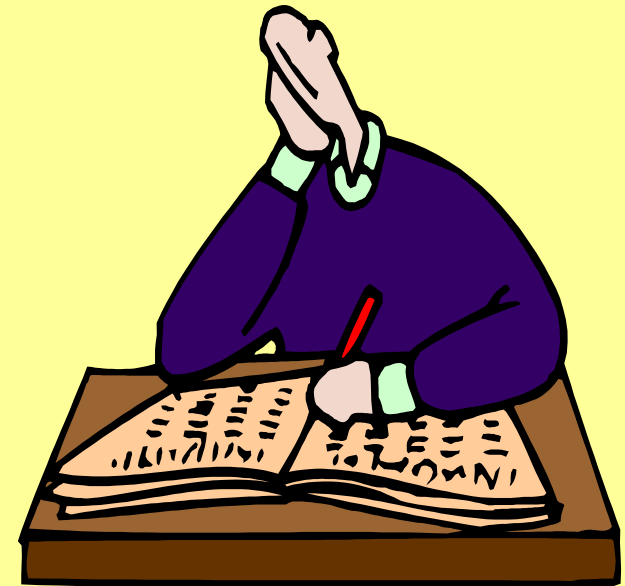
Landlord's Surveyor



- Prepare a Schedule of Dilapidations. The main aim is to identify the breach / defects / disrepair and not give a remedy
- Although all surveyors I know put in both
- Landlords' surveyors can't guess at dilaps, if you can't see it you cant put it in

Landlord's Surveyor does not want a Schedule of Condition, but if he has to have one ...

A landlord's surveyor need a Schedule of Condition to be specific. The only way to do this is for the landlord's surveyor to agree every item with a tenant's surveyor.



It's a case of who gets bored first!!

Dilaps Priced or Unpriced

The choice is yours

Some don't put the clauses
breached in either, which is
wrong, but deal with it
kindly or it may come back
and bite you



Reasonable Time

- The landlord must give the tenant reasonable time to carry out the work – does this depends upon the work required?
- Landlord does not have to serve a dilaps before the end of the lease legally, but is it required by the protocol?

Tenant's F & F



Make sure it goes with the tenant!
Unless of course the landlord likes
them!

A tenant puts in a heating system is
this a F & F?

Tenant's Surveyor's Role



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Tenant's Surveyor - Schedule of Dilapidations that asks the tenant to do investigation can be ignored



- It's up to the landlord to find and detail the breaches
- **Question** - So, would a Schedule of Dilapidations with a phrase that a cherry picker be hired and joint investigation take place be acceptable?

Tenant's Surveyor - Make a Plan



If a Schedule of Dilapidations is served and you the tenant agree the items – also agree a programme of work and time table to minimise any misunderstanding



Terms to Know



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Forfeiture

Lease being taken back.

Courts seem to hold back
on forfeiture against the
leaseholder / tenant why?

Who knows!



Yield up

**Giving the lease back as
the lease terms easier
said than done**

Out of Possession

Tenant not in property
(subject to a Section 18
Limitation)

Tenant liable for:

- repairs
- admin
- solicitors and surveyors fees if in the lease and
- rent



Lease Silent



- The lease does not give a requirement on a matter
- It does not mean the tenant or landlord are liable
- The lawyers would look to case law for the answer

Calderbank letter

A without prejudice letter

- This is too close to being in court or ADR



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