

Commercial landlord and tenant property issues: practical essentials for junior surveyors

14 November 2023

Agenda

1. Talk: Dilapidations and disrepair
2. Talk: Obtaining possession under the Landlord and Tenant Act 1954
3. Break – 10 minutes
4. Talk: Alienation – assignments and subletting
5. Talk: EPCs, green lease clauses and MEES
6. Drinks and networking

Dilapidations and disrepair

Darrell Chiheb



Topics

1. What are dilapidations?
2. Relevant tenant covenants
3. Breach of repairing covenant
4. Remedies
5. Dilapidations Protocol
6. FAQs

What are dilapidations?

- Breaches of tenant covenants in a lease
- Damages for breach of covenant (unliquidated sum)
- A sum of money to compensate for financial loss suffered

Tenant covenants

- Repairing
- Decorating
- Yielding up
- Cleaning
- Complying with statutes
- Alterations
- Landlord's expenses in serving a schedule
- Schedule of condition?

Breach of repairing covenant – five stage test

1. What is the physical item that should be in repair?
 - Is it clear who is responsible?
2. Is that item in a damaged or deteriorated condition?
 - Inherent defects? Comparison to date of construction. Improvements not required.
3. Does it fall below the standard required by the repairing covenant?
 - "in good repair and condition" - Consider age, character and locality of the property. Fit for reasonable tenant.
4. What needs to be done in order to bring it up to the standard required?
 - Reasonably necessary to remedy the defect.
5. Was the work of such a nature that it was contemplated by the parties?
 - Factors: age, character and locality of property; length of lease; landlord or tenant carrying out works; cost of works.

Remedies (1) – during term

- Forfeiture/re-entry
 - Right to terminate lease
 - Notice under Section 146 of the Law of Property Act 1925
 - Protection of Leasehold Property (Repairs) Act 1938
- Self-help (Jervis v Harris)
 - Contractual right in lease
 - L can serve notice requiring works, if no action L can enter and do works and recover cost as a debt
- Specific performance
 - Court application to compel tenant to comply with covenants in lease
 - Expensive
 - Court discretion

Remedies (2) - during and end of term

- Damages claim
 - During term
 - Subject to 1938 Act
 - Limited to diminution in value of the reversion
 - Claims after expiry/terminal dilapidations claim – starting point the cost of carrying out the repairs
 - Subject to Section 18 Landlord & Tenant Act 1927
 - First limb: Damages capped at diminution in value of reversion – valuation evidence
 - Second limb: No damages if premises to be pulled down/structural alterations made which would render repairs valueless (supersession)
 - Value and landlord's intention assessed at date of termination of tenancy
 - Cost of repairs - evidence of diminution in value

Dilapidations Protocol (1)

- Best practice
- Emphasis on presenting damages claim early and settlement
- Key elements:
 - Schedule of dilapidations
 - Endorsement
 - Quantified demand:
 - Set out all breaches clearly
 - Confirm surveyor will attend meetings
 - Substantiate with estimates/actual cost of works
 - Restrict to landlord's losses
 - Do not include works that will be superseded by landlord's plans for the property
 - Parties should consider ADR and settlement
 - Quantify loss before bringing claim (formal diminution in value report/undertake works)

Dilapidations Protocol (2)

- Recommended steps set out at Annex A of the Protocol:
 - L to send schedule and Quantified Demand (normally within 56 days after the termination of the tenancy)
 - T to send Response (normally within 56 days after landlord sending the Quantified Demand)
 - Negotiations
 - Quantification of loss
 - Stocktake
 - Proceedings

FAQs

Q1 – When is the deadline for serving a notice to reinstate on a tenant?

Q2 – How long does a landlord have after lease expiry to bring a dilapidations claim?

Q3 – Is VAT payable on dilapidations claims?

Q4 – Can you claim for loss of rent for the period that the landlord needs to repair the property?

Q5 – What happens to a dilapidations claim if the landlord sells its interest after a lease has terminated?

FAQs - answers

Q1 – When is the deadline for serving a notice to reinstate on a tenant?

A – Notice can be served up to the last day of the term.

Q2 – How long does a landlord have after lease expiry to bring a dilapidations claim?

A – Depends on the lease documents. Simple contract – 6 years. Deed – 12 years. Evidential issues.

Q3 – Is VAT payable on dilapidations claims?

A – Damages claim so should not attract VAT.

Q4 – Can you claim for loss of rent for the period that the landlord needs to repair the property?

A – In principle yes. But evidentially difficult to prove that L could have re-let earlier if property in repair.

Q5 – What happens to a dilapidations claim if the landlord sells its interest after a lease has terminated?

A – Outgoing landlord retains the right to claim for dilapidations unless assigned. Will need to evidence diminution in value of reversion.

Any questions?

Obtaining possession under the Landlord and Tenant Act 1954

Lindsey Whittle



Topics

- Recap: what is the Landlord and Tenant Act 1954?
- Strategies for recovering possession
 - Grounds under the Act
 - Ground (f) – Redevelopment
 - Other routes to VP
- Scenarios

What is the 1954 Act?

- Grants 'security of tenure' to tenancies which are occupied for business purposes
- The lease continues at end of contractual term
- Limited circumstances in which landlord can terminate a protected lease
- A valuable right for a tenant
- Does it always apply? Contracting out
- Why do I need to know about the 1954 Act?

Recovering possession under the Act

- Landlord's grounds under 1954 Act:
 - a) Disrepair
 - b) Persistent delay in paying rent
 - c) Other breaches
 - d) Suitable alternative accommodation
 - e) Achieve higher rent if let as a whole
 - f) Landlord intends to re-develop
 - g) Landlord intends to occupy
- Compensation for the 'no fault' grounds (e), (f) and (g)
- Consider combining with a 'fault' ground

Ground (f)

- Intention
- To demolish or reconstruct the premises or a substantial part
- Or, to carry out substantial work of construction
- Could not reasonably do so without obtaining possession of the holding

Ground (f) - intention

- a fixed and settled desire to do what they say they intend to do
- a reasonable prospect of being able to bring about the desired result
- *S Franses v The Cavendish Hotel [2018] 3 W.L.R. 1952* - would the landlord intend to do the same works if the tenant left voluntarily?

Ground (f) - intention

- When? At the date of the Court hearing
- Examples of evidence
 - board resolutions
 - financing
 - planning permission
 - third party consents
 - contractors lined up
 - other tenants – do you have a ransom tenant left?

Alternative routes for recovering possession

- Forfeiture
- Negotiate a surrender
- Negotiate a contracted-out shorter lease
- Consider the current rent – is it significantly below market level? Could serve an unopposed Section 25 Notice offering a new lease at a market rent but risky strategy
- Early engagement with solicitors is key!

Scenario

- The Old Candleworks rents space to artists and crafts workers
- Purchased from Bohemia Ltd by Steady Estates who have recently completed a commercial development of an old factory nearby, which is not yet fully tenanted
- Plan to convert the Candleworks to residential with retail below if planning can be obtained - but rumour has it the council are holding up all applications until the general election in 2024

Scenario

1. Jennifer Herbert Designs

- Jennifer is an interior designer for high net worth individuals who love her creative ways. She is always late in paying the rent and is currently in substantial arrears, not because she doesn't have the money, but because she regarded Bohemia Ltd as a soft touch.
- She definitely wants to stay put, as the Candleworks is conveniently situated close to her target market, and the 19th century building suits the brand.

Scenario

2. Monty's Smithery

- Monty caters for the wrought iron needs of the neighbourhood. His smithery is very dilapidated and needs a lot of work. However, it wasn't in that fantastic a state when he moved in 15 years ago.
- Monty really dreams of being a proper village smith, shoeing horses rather than providing wrought iron balconies for hedge fund managers. The rent is cheap for London but his cousin has just moved to Devon and asked if he wants to go into business.
- He's had a letter from the new landlords complaining about the disrepair but has decided to ignore it.

Alienation – assignment and subletting

Joseph Preisner



Agenda

1. Restrictions on assignment and subletting
2. Pre-agreed restrictions – assignment
3. Pre-agreed restrictions - subletting
4. Statutory duties relating to consent
5. Reasonable refusal
6. Reasonable time
7. Options where the landlord breaches its duties - remedies
8. Industry guides

What are assignment and subletting?

- Assignment – transfer the benefit of a lease

Assignor  Assignee

- Subletting – grant of sublease out of a lease

Tenant



Subtenant

Restrictions on assignment and subletting

- The tenant of commercial premises is free to deal with the lease unless it contains restrictions. However, most leases require landlord's consent to an assignment or subletting and some absolutely prohibit it.
- Leases almost universally prohibit assignment of part. Some permit subletting of part, if the premises comprise appropriate sub-units, for example, floors in a building.

Pre agreed restrictions – assignment (circumstances)

The lease may also include pre-agreed:

- circumstances in which the landlord may withhold consent to an assignment; and
- conditions subject to which any consent may be given

(Section 19(1A) of the LTA 1927).

Common circumstances for refusal include:

- Rent arrears.
- Other material breaches of the lease (e.g. repair).
- Assignee is not of sufficient financial standing.

Pre agreed restrictions – assignment (conditions)

Common conditions for consent include:

- Supply of an authorised guarantee agreement.
- Supply of guarantor.
- Supply of rent deposit.

The landlord can also withhold its consent in any other reasonable circumstances and make the consent subject to any other reasonable conditions.

Pre agreed restrictions – subletting

The lease may include pre-agreed conditions to any subletting.

- Market rent with no premium or excessive rent-free.
- Synchronised rent reviews - Any rent reviews under the underlease should correspond with those in the headlease.
- Security of tenure excluded.
- Not to vary the sublease.
- To enforce the sublease.

Statutory duties relating to consent

Where the lease restricts dealings without the landlord's consent -

- It is implied that consent is not to be unreasonably withheld (section 19(1) of LTA 1927).
- The following statutory duties are imposed on the landlord (sections 1 & 2 of the LTA 1988):
 - To give consent, except where it is reasonable not to do so.
 - To give consent within a reasonable time (without delay).
 - To give the tenant written notice of the decision - specifying conditions/giving reasons for refusal.
 - To pass on the application to anyone else whose consent is needed under the lease.

Remember:

- A formal application for consent needs to be served on the landlord (E.ON UK plc v Gilesports Ltd [2012]).
- The landlord cannot generally charge a premium for consent but can recover reasonable legal and other expenses (section 19(1) of LTA 1927).

Reasonable refusal

- Any suggestions as to when it might be reasonable to refuse?

Reasonable refusal

- A question of fact depending on all the circumstances.
- The reasoning must relate to the relationship of landlord and tenant and the subject matter of the lease (*International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1985]) and must not be to gain a disproportionate benefit or collateral advantage.
- Diminution in value of reversion – Although this will not be a reason for withholding consent if the landlord has no intention of selling the reversion (*Ponderosa International Development v Pengap Securities* [1986]).
- Financial position of assignee - The landlord is entitled to be satisfied that the financial position of the assignee (together with any guarantor) is sufficient to be able to pay the rent and comply with the lease (*British Bakeries (Midlands) v Michael Testler & Co* [1986]).
- Tenant-mix - A landlord of a shopping centre may reasonably withhold consent where the nature of the proposed assignee's business does not accord with the landlord's tenant-mix policy, as long as that policy is known to the tenants and is a rational one (*Moss Bros v CSC Properties* [1999]).

Reasonable time

- Any thoughts on what might be a reasonable timeframe?

Reasonable time

- This will generally be measured in terms of days or weeks rather than months (Go West Ltd v Spigarolo [2003])
- The period may be affected by the complexity of the transaction. Any loss suffered as a result of the delay may be relevant in determining whether it was unreasonable.
- The landlord is entitled to sufficient information to enable it to reach a decision but a failure on the part of the tenant to supply full details will not necessarily invalidate the application.
- The period starts from receipt of the tenant's application and not from receipt of an appropriate undertaking for costs.

Options where the landlord breaches its duties - remedies

- Claim for breach of statutory duty resulting in potential damages and, in appropriate cases, an injunction.
- Court declaration that consent has been unreasonably withheld.
- Proceed without consent – if the landlord unreasonably withheld then this is lawful...but if not, the tenant would be in breach of lease and risks damages and forfeiture.

Industry guides (Lease Code)

Code for Leasing Business Premises, England and Wales 2020

The RICS professional standard, designed to improve the quality and fairness of lease negotiations.

Assignment

- Assignment of whole, with consent not to be unreasonably withheld or delayed.
- Any pre-agreed circumstances for refusal should be reasonable and appropriate.

Subletting

- Subletting of whole (and, if appropriate, subletting of part), with consent not to be unreasonably withheld or delayed. Security of tenure excluded and at a rent not less than market rent.
- Subleases on terms consistent with the headlease, except for security of tenure and appropriate disparity for subleases of part.

Industry guides (the Alienation Protocol)

Protocol for Applications for Consent to Assign or Sublet (the Alienation Protocol)

The behavioural code and best practice guide intended to reduce disagreements over lease applications.

Helpful guidance on:

- Details and form of the application.
- Legal costs.
- Acknowledgements and requests for further information.
- Decision making process and timescales – within 21 days of application.

Any questions?

EPCs, green lease clauses and MEES

Lisa Beagley



Outline

- EPC's
- The MEES Regulations
- 'Green Lease' clauses
- Questions



EPC's

Key features:

- Property description
- Asset rating A – G
- Recommendation report
- Date of issue

Requirements:

- All commercial properties
- Sales
- Lettings
- Refurbishments

MEES Regulations

- The Minimum Energy Efficiency Standards (MEES)
- Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015
- Sub-standard – below an E
- Landlord's responsibility to make improvements
- Effect on 1954 Act renewals

Exclusions / Exemptions

Exclusions

- Leases for a term of less than 6 months.
- Leases for a term of 99 years or more.

Exemptions

- Consent for improvements refused
- Improvements would reduce the market value by more than 5%
- Listed buildings
- On the exemptions register

Penalties for non-compliance

- Penalty payments
- Reputational damage



What measures can a landlord take

- Expert advice
- Check the lease
- Properties with a current D or E rating
- Upgrade works
- Exclusion or exemption
- Renewal or reversionary lease

Retrofit?

Re-build?

Walk away?



One New Change

"Environmental sustainability is at the heart of how One New Change operates, evidenced in its BREEAM 'Very Good' rating. One New Change operates one of the largest ground source heat pump systems in Europe, with 100% of electricity procured from renewable sources. 100% of waste is diverted from landfill, and the centre has achieved an impressive 70% recycling rate."



Green Lease Clauses

- Co-operation and data sharing
- Building management
- Reduce the environmental impact of the premises
- Improve energy efficiency
- Target wider environmental aspects
- Joint focus
- Who should pay?

Why does this all matter?

- Wider impact of real estate
- Landlords and tenants need to work together
- What are tenants looking for
- Innovation and the use of PropTech and AI
- Future requirements

Questions

Contact



Darrell Chiheb
Partner

+44 (0)20 7423 8418
dchiheb@towers.com



Lisa Beagley
Senior Associate

+44 (0)20 7423 8599
lbeagley@towers.com



Joseph Preisner
Senior Associate

+44 (0)20 7423 8658
jpreisner@towers.com



Lindsey Whittle
Associate

+44 (0)20 7423 8669
ldwhittle@towers.com

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