# DILAPIDATIONS
# Claims for damages for breach of contract

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Michael is a solicitor who has specialised on property litigation and risk management for most of his career and is a strong advocate of a proactive approach to the management of commercial risks associated with owning and occupying property. Within his field of work, Michael has a particular expertise in relation to legal issues relating to telecommunications matters and property, for example, issues relating to phone masts. He also extensive experience in relation to commercial property dilapidations claims. He regularly presents CPD seminars both in-house and for commercial CPD providers and he is also the founder of the Linkedin Dilapidations Discussion Forum and Interest Group which has in excess of 2,500 members.

Michael here follows up on his first article on dilapidations, giving extracts from real cases to illustrate his points.

## Background

In 2021 Summer Terrier I wrote an article looking at various aspects of dilapidations focussing on the nature of such claims and the fact that when we refer to dilapidations, we are referring to claims for damages which are properly recoverable at law as a consequence of alleged breach of contract.

The article concluded by recommending that for landlords and tenants, it is worth making sure that retained advisers are properly instructed from day one and understand that they may be required to present evidence to a court. As the saying goes: "If you want peace prepare for war".

## Prepare for war

Another way of looking at dilapidations is as a well travelled road. It is a journey that many landlords and tenant travel, usually with the assistance of a guide – but in reality, the route is very well known. It involves the preparation of a schedule of dilapidations and then a response by the tenant. Each party sets out their position and then they engage in a process of negotiation. This process can in some instances drag on for years with little progress being made, but in many cases the parties do eventually reach a compromise, sometimes simply because they are ground down by the process and decide it is time to move on in life.

This process of haggling can enable parties to reach a position that they can live with, but often the outcome will involve little consideration of what the actual liability for damages is in relation to breach of contract. The reason for this is that dilapidations is a complex discipline with many varied aspects to consider, if one is going to look properly at what the legitimately recoverable damages might actually be.

Issues such as supersession may be relevant. The landlord, as with any claimant, has a duty to mitigate tenant's losses. Damages may be assessed by reference to valuation expertise. There may be complex, and sometimes subtle, points of contractual interpretation that can have a fundamental relevance to the quantification of recoverable damages.

In many cases, these types of point can be brushed over because neither the landlord nor the tenant has any enthusiasm for the complexities that may be introduced by such issues – after all, complexity tends to increase expenditure on professional fees. Both parties are content to just haggle based on the schedule and to close matters off.

The relatively casual approach to preparation of claims may not be a problem providing the tenant plays along, but for landlords the difficulties can arise if the tenant will not engage.

Similarly, tenants often miss opportunities by just engaging in negotiating without undertaking a critical and forensic analysis of the claim purportedly being presented against them.

In short, landlords need to prepare their claims thoroughly and diligently and tenants need to be careful to test the veracity of claims they face. With regard to tenants, I would illustrate this point by referring to a case I was recently instructed upon, where the tenant was preparing to remove an industry sector-specific fit out before vacating their property and handing it back to their landlord. Upon being instructed, initial questions were raised as to why they were considering removing the fit out, to which the answer was because the landlord had served a schedule of dilapidations which included for removal (at some not insignificant expense) of the fit out. Further investigation indicated that the landlord's reasons for claiming for the removal of the fit out was because they wanted the

unit back in conformity of configuration to other units on the same estate. In short, their rationale for claiming for the cost of removing the fit out was based upon something they considered was reasonable to require, rather than any analysis of the contractual obligations of the tenant.

The point to be made here is that tenants need to be sceptical as to what is being presented and should scrutinise in detail each and every item claimed for.

Similarly, landlords and those who advise them do not know which claims will just be dealt with casually by negotiation and which claims will be subjected to intense and detailed scrutiny. The problem for landlords is that in relation to any particular claim, by the time it becomes apparent that the tenant is not going to play ball it may be too late. They may find that things have been written in presenting their initial claim that cause them serious issues if they need to take the matter to court.

That of course brings us back to once again to make the point that ultimately, if a tenant just tells the landlord to get lost then they only have two options: they can either forget the claim and move on, or they can take the matter to court. To be able to go to court they have to be able to prove their case and that in practical terms means putting their expert witnesses in the witness box, on oath, to give evidence to the court, and hope that their evidence is believed and the court orders damages to be paid. For the landlord to recover that which they are entitled to, their experts need to be credible. The problem for landlords, and many experts, is that when first instructed to inspect the subject property and prepare a schedule of dilapidations, neither the landlord nor the experts know whether that case will be the one that the landlord has to take to trial. If it turns out to be the one, and they have not prepared diligently from day one, then the landlord could be in trouble. Accordingly, they should prepare for war from day one.

For tenants, careful analysis of the presentation of the landlord's claim documentation and evidence very early on in the process may expose credibility issues that can be exploited later on. Again, from day one on receipt of a claim, tenants would do well to prepare their response on the basis that every element of it is going to be sufficiently credible when their expert witnesses come under intense cross examination.

Preparing for trial from day one does not mean that the matter will be more likely to go to trial, but rather it potentially enables a party to negotiate a settlement from a fully informed position, a position which hopefully is one of strength when compared with their opponent; of course, negotiating from a position of strength is generally advantageous in any context. If a landlord believes that their tenant will take them all the way to trial and the tenant is very well prepared, then they may think twice about fighting and may have to take any settlement the tenant is prepared to offer. A tenant who feels their landlord is likely to succeed at trial may have to take a settlement proposal rather than risk the potential adverse costs of going to trial and losing.

## Credibility

For both landlords and tenants, success at trial (or convincing their opponent that they will succeed at trial) will depend upon the credibility of their expert witnesses and the evidence they are able to present. Their expert witnesses need to be just that – experts.

Unfortunately, very often expert witnesses make statements early on in the process that show them up to be anything other than expert. What might otherwise be innocuous statements in a schedule of dilapidations can come back to bite them in cross examination. In one seven figure dilapidations claim that went to a 2-week trial in the Technology and Construction Court, the landlord's expert witness in property letting was giving evidence. He took the oath and presented his expert witness report and then was opened up to cross examination by the QC retained by the tenant.

After around 7 minutes of cross examination, by asking a series of fairly innocuous questions of him, leading counsel put the question to him:

"You are not an expert in property letting are you?"

The answer that came back was "No".

This was a case that had been ongoing for 5 years. Ultimately the landlord had not received any satisfactory offer of settlement, so they had done the only thing left to them which was to issue court proceedings and put their money where their experts' mouths were. All the experts had prepared their reports, they had engaged in meetings and hundreds of thousands of pounds were spent in preparing for the trial but when it actually came down to it, the landlord's letting expert was lacking in credibility.

Ultimately a party to a damages claim may find they have a determined opponent and they have a simple choice: they can either fight all the way to trial or sue for peace on the terms offered by their opponent. If their appointed experts lack credibility they may not have the choice in reality.

An expert witness must genuinely be an expert and they will have to establish their expertise to the court. Similarly, their client's opponent will be seeking to establish they are not an expert – and very often they do much to assist their client's opponent unwittingly.

Protocols and guidance

Generally, claims should be signed off in accordance with the Civil Procedure Rules pre-action Protocol (the Dilapidations Protocol).

On 1 January 2012, the Dilapidations Protocol was adopted as a formal pre-action protocol under the Civil Procedure Rules. The website of the Property Litigation Association (PLA) details the history of the protocol:

*"The Dilapidations Protocol, a pre-action protocol by the Property Litigation Association, relating to dilapidations claims for damages against tenants at the termination of a tenancy, was first published in 2002, with the aim of preventing landlords exaggerating claims and to lead the way for early settlements without involvement of the courts.*

*The second edition, issued in 2006, aimed to reduce costs by recommending diminution valuations were considered just before the issue of proceedings.*

*The third edition, issued in May 2008, required the landlord's surveyor to sign an endorsement confirming, amongst other things, they had followed the protocol.*

*From 2008 to 2011 the PLA and the RICS worked with the Civil Justice Council to refine the wording of the Protocol ready for its adoption.*

*On 1 January 2012 the Dilapidations Protocol was adopted as a formal pre-action protocol under the Civil Procedure Rules."*

The endorsement introduced by the third edition included reference to the Draft Pre-Action Protocol prepared by the Property Litigation Association.

The RICS helpfully provides a raft of guidance for those engaged in advising

on dilapidations claims, such as the RICS Guidance Note – 'Dilapidations in England and Wales', 7th Edition, September 2016.

The Guidance Note of course has full details of the requirements under the Civil Procedure Rules Protocol in terms of presenting and responding to a claim. It also includes the following warning:

*"This is a guidance note. Where recommendations are made for specific professional tasks, these are intended to represent 'best practice', i.e. recommendations that in the opinion of RICS meet a high standard of professional competence.*

*In the opinion of RICS, a member conforming to the practices recommended in this guidance note should have at least a partial defence to an allegation of negligence if they have followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.*

*It is for each member to decide on the appropriate procedure to follow in any professional task. However, where members do not comply with the practice recommended in this guidance note, they should do so only for good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice.*

*Also, if members have not followed this guidance, and their actions are questioned in an RICS disciplinary case, they will be asked to explain the actions they did take and this may be taken into account by the Panel.*

*In some cases there may be existing national standards that may take precedence over this guidance note.*

*National standards can be defined as professional standards that are either prescribed in law or federal/local legislation, or developed in collaboration with other relevant bodies.*

*In addition, guidance notes are relevant to professional competence in that each member should be up to date and should have knowledge of guidance notes within a reasonable time of their coming into effect."*

Any expert witness acting in a dilapidations claim who endorses a claim as being prepared in accordance with a Draft Protocol that was superseded 10 years ago may find their professional credibility called into question by reference to the Guidance Note, which among other things requires them to have knowledge of the Guidance within a reasonable time of it coming into effect.

It is quite normal to see claims where corners are cut and the guidance is not followed, presumably because those claims are prepared in circumstances where the authors are confident they will never have to be tested under cross examination, but a failure to follow professional guidance can open up an attack on credibility.

Well-advised tenants will be looking for these opportunities from day one in order to work out how best to capitalise on them later on. However, very often tenants spend a significant sum with their own expert witness, having them "red pen" the landlord's claim. While they may feel they have achieved a great deal showing their client how well they have done, in reality they may just have spent their time (and their client's money) helping put a poorly presented claim in better order.

Credibility of experts in court proceedings is critical and if it goes wrong, it can go badly wrong. What this means is possibly a judgment that is very damning of the expert witness and which is a matter of public record.

By way of illustration, there follows an extract from a court judgment in relation to a lease renewal under the Landlord and Tenant Act 1954 which shows how the credibility of an expert witness can be critical (the name has been changed):

*In direct contrast, I did not find Mr. Smith to be an impressive witness. He assured me that he had, as he put it, "read CPR 35 the other day" but then said he could not recall when previously he had last considered it. He prepared two reports, dated 10 August 2016 and 12 October 2016. Neither report was CPR-compliant. Practice Direction 35.3.1 sets out the requirements for an expert's report; in particular, the need to provide details as to the expert's qualifications. Save for the fact that I am told Mr. Smith has a BSc FRICS and is a Fellow of the Royal Institution of Chartered Surveyors, building services faculty, and is a partner of [firm], I have no more. I have no information upon which to assess his ability to act as an expert in this case. I refute the contention that a bald statement as to his professional qualifications suffices. However, that is not the only failure within the report. Mr. Smith referred to the wrong email re his engagement. It was only during the course of this trial that the right email was disclosed.*

*His significant failings as an expert were compounded by his oral evidence. I found his evidence most unsatisfactory. He attested to the truth of the two reports he had compiled and the joint statement. However, he had to concede that, in all three documents, he had made a fundamental error. He said that he had excluded decoration in his reports because he believed that s18 of the Act applied, as opposed to s29. He said he had not corrected his error in the joint statement, as he was concentrating on the reinstatement aspects of the schedule. However, his explanation as to why he then attested to the truth of his reports, on oath, was, to quote Ms. S, "patently absurd" or disingenuous. He said that he thought he was attesting to their truth at the time, namely the time they were written. He was not asked to attest to the truth then but now, and was further asked if there was anything he wished to amend.*

This error also affects his credibility. He was an engaged as an expert, and I concur with Ms. S's view:

"To fundamentally misunderstand and confuse the statutory framework in which he is giving evidence undermines any suggestion that he is a reliable expert in this field".

## Conclusion

Whether landlord or tenant, claimant or defendant, anyone involved in a dilapidations claim would be well served to focus on the quality of the expert witnesses they retain and one of the first points to be clear about is the role in which professionals are appointed.

Ultimately, if a party does not have the support of properly instructed professional expert witnesses, then they do not have the ability to prosecute or defend the claim at trial if their opponent proves to be uncooperative or unresponsive. Faced with a well-prepared opponent who is ready to take them on, they may have to capitulate.

A failure to be diligent and thorough in surveying and collecting evidence can be costly later on. Similarly, a failure to follow professional guidance and the requirements of the Civil Procedure Rules can be detrimental in terms of credibility before the court.

Cutting corners in terms of preparation might appear to be a sensible cost saving measure where it is believed that a claim will settle, but can prove to be costly should this ultimately have an impact on credibility.

Again, it is worth repeating – if you want peace prepare for war.