



# Dilapidations

## Guidance Note to Best Practice



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Society of Chartered Surveyors Ireland  
Dilapidations Guidance Note to Best Practice  
1st Edition

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This is a guidance note. It provides advice to the Society of Chartered Surveyors Ireland members on aspects of their practice. Where procedures are recommended for specific professional tasks, these are intended to embody 'best practice', i.e. procedures which in the Opinion of the Society of Chartered Surveyors Ireland meet a high standard of professional competence.

Members are not required to follow the advice and recommendations contained in the note. They should, however, note the following points.

When an allegation of professional negligence is made against a surveyor, the court is likely to take account of the contents of any relevant guidance notes published by the Society of Chartered Surveyors Ireland in deciding whether or not the surveyor had acted with reasonable competence.

In the opinion of the Society of Chartered Surveyors Ireland, a member conforming to the practices recommended in this note should have at least a partial defence to an allegation of negligence by virtue of having followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

On the other hand, it does not follow that members will be adjudged negligent if they have not followed the practices recommended in this note. It is for each surveyor to decide on the appropriate procedure to follow in any professional task. However, where a member departs from the practice recommended in this note, he or she should do so only for a good reason. In the event of litigation, the court might require the member to explain why he or she has decided not to adopt the recommended practice. Also, if a member has not followed this guidance and his or her actions are called into question in an the Society of Chartered Surveyors Ireland disciplinary case that member will be asked to justify the steps he or she did take and this may be taken into account.

In addition, guidance notes are relevant to professional competence in that each surveyor should be up to date and should have informed him or herself of guidance notes within a reasonable time of their promulgation.

## **1.0 Introduction**

- 1.1 The purpose of this guidance note is to provide practical guidance to Members when instructed in connection with dilapidations matters in the Republic of Ireland.
- 1.2 The guidance note seeks to advise members on the factors they should take into consideration when taking their client's instructions, reviewing the lease and other relevant documents, inspecting the subject property, and producing and responding to schedules and other documentation for use by the client, the other party to the lease, third parties, the courts and other legal institutions, such as tribunals.
- 1.3 A dilapidations claim is an allegation of breach of contract and as such is actionable in law.
- 1.4 When advising a client on dilapidations matters, a surveyor should seek fully to understand the client's position, the reasons why the surveyor's advice is sought and the use to which that advice might be put. The surveyor should try to ascertain the relevant factual and legal background insofar as it will impact on that advice.
- 1.5 Often, after a surveyor has advised his or her client, a document is sent or disclosed to the other party to the lease, to third parties, or to a court or tribunal. That document can be held out as the product of the surveyor applying his or her training, knowledge and expertise to the matter. The surveyor, whilst complying with his or her client's instructions, should ensure that any such document does not contain statements or assertions that the surveyor knows or ought to know are not true or properly sustainable or arguable.
- 1.6 Surveyors should not allow their professional standards to be compromised in order to advance clients' cases. A surveyor should not allow a document that contains statements or assertions that he or she knows or ought to know are not true or properly sustainable or arguable to be sent bearing his or her name or the name of his or her firm. A surveyor should give proper advice even though the client might choose to ignore it.
- 1.7 **Areas Covered**
- 1.7.1 The situations in which surveyors can be asked to act or advise and which are covered by this guidance note are as follows:
- claims at the end of the term;
  - claims during the term;
  - forfeiture situations;
  - entry to repair situations;
  - break clause situations; and
  - assignments
  - claims by tenants against landlords.
- 1.8 **Naming conventions**
- 1.8.1 Whilst in general this text is gender neutral, on occasions where masculine terms only are used (such as in legislation quotes) these should be taken, in the case of surveyors, as meaning 'she' and 'her' as well, and in the case of the parties, as 'he', 'she', 'they' or 'it' (for the case of a corporate body).
- 1.8.2 The word 'tribunal' is used to mean courts, tribunals, arbitrators and independent experts.
- 1.8.3 The physical subject of the claim is referred to as the 'property', which therefore should be taken to include part of a property or a demise.

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## **2.0 Role of the Surveyor**

### **2.1 Generally**

- 2.1.1 A surveyor could be offered instructions in a dilapidations case as an expert witness, and/or as an adviser/negotiator.
- 2.1.2 Professional objectivity is required in the role of adviser/negotiator in the type of advice given. The surveyor should act in accordance with the Society of Chartered Surveyors Ireland and/or RICS Rules of Conduct. A surveyor in the role of expert witness is expressly forbidden by the court (and by the RICS Expert Witness Practice Statement) to impart anything but the whole and complete truth.
- 2.1.3 The surveyor acting as an adviser/negotiator should guard against exaggeration or understatement. This is particularly important as any subsequent litigation carries with it the danger of a heavy costs order against the party who exaggerates or understates its position.
- 2.1.4 Surveyors should be mindful that the area of dilapidations involves many legal considerations and should avoid advising or taking steps outside their area of expertise.

### **2.2 Acting as adviser (but not instructed as an Expert Witness)**

- 2.2.1 Surveyors appointed as advisers have an obligation to act in accordance with the Society of Chartered Surveyors Ireland Rules of Conduct and their duties to their clients.
- 2.2.2 The role of adviser can encompass surveyors using their expertise to identify or comment on breaches of covenant and appropriate remedies, prepare schedules or responses, provide or comment on valuation advice, negotiate with other parties with the aim of achieving a settlement, and provide advice on strategy and tactics in relation to a claim or potential claim.
- 2.2.3 Surveyors should undertake their instructions in an objective, professional manner. They should have appropriate experience and expertise to undertake the instruction. Schedules or responses should not contain allegations of breaches that do not exist, remedies that are inappropriate or costs that are exaggerated or understated.
- 2.2.4 Surveyors acting as adviser/negotiator should heed the warning expressed in 2.1.3 regarding exaggeration or understatement, whether in terms of the content of the schedule, the costs attributed to the claim or the overall assessment of loss.
- 2.2.5 An adviser using his or her professional expertise to prepare or comment on a schedule or a valuation is not an Expert Witness. The Expert Witness Practice Statement (see 2.3 below) will not therefore apply until the surveyor is considering accepting expert witness instructions. Nonetheless, the surveyor should be influenced by the considerations relating to expert witnesses in advising his or her client, particularly to provide objective advice.
- 2.2.6 It is also important that surveyors do not formalise settlements without the consent and authority of clients. Indeed, in some situations, it might be appropriate – or a client requirement – that the settlement is formalised via solicitors. See section 12 (Settlements).

### **2.3 Expert Witness**

- 2.3.1 An expert witness appointment is a personal one. A surveyor appointed as an expert witness (whether appearing for one party or as a single joint expert) will be bound by the RICS Practice Statement and Guidance Note for Surveyors Acting as Expert Witnesses.
- 2.3.2 Briefly stated, the obligation of an expert witness to any tribunal is to give objective unbiased evidence. It follows that the evidence given by the expert witness should be the same whether acting for the tenant, the landlord or as a single joint expert.
- 2.3.3 Surveyors appointed as expert witnesses should act in accordance with the Society of Chartered Surveyors Ireland Rules of Conduct insofar as there is no conflict with their duty to the tribunal.

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## **3.0 Taking instructions**

### **3.1 Generally**

- 3.1.1 Instructions relating to dilapidations should be taken in accordance with the Society of Chartered Surveyors Ireland Rules of Conduct. Particular regard should be paid to notification of terms and conditions of engagement to be provided in writing to the client. Instructions in dilapidations matters are no different in this respect from any other instruction.
- 3.1.2 Surveyors should bear in mind that, in addition to their duties to their clients, they have duties to the Society of Chartered Surveyors Ireland (in maintaining the reputation of the Society and complying with its rules). Surveyors will usually also have duties to any tribunals to which they give evidence.
- 3.1.3 Surveyors should inform clients of these additional duties.
- 3.1.4 Surveyors may want to consider with each client whether sub-consultants are required or may be required during the course of the instruction.

### **3.2 Fees**

- 3.2.1 Fees for undertaking dilapidations instructions are a matter of contractual agreement between surveyors and their clients.
- 3.2.2 Surveyors also have an obligation to set out the basis of their fees in such a way that clients are aware of any financial commitments they are making by instructing the surveyor.
- 3.2.3 As regards conditional/contingency fees for instructions to act as Expert Witness, surveyors should take note of the position and guidance set out in Surveyors Acting as Expert Witnesses (RICS Practice Statement and Guidance Note). It is the view that surveyors are prohibited, where the surveyor is acting as Expert Witness to accept an instruction on a contingency fee basis, unless the court gives permission.

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## 4.0 The lease and other enquiries

- 4.1 The surveyor should obtain a copy of the relevant lease and other documentation with all plans and other attachments.
- 4.2 Additional information which might be necessary or desirable can include:
- plans;
  - licences or other consents for alterations, with plans and specifications;
  - any agreement for lease (if intended to survive the grant of the lease);
  - assignments and licences to assign;
  - side letters or other written agreements;
  - schedules of condition, together with appropriate photographs;
  - inventories;
  - schedules of fixtures and fittings;
  - any applications for consent.
- 4.3 Surveyors should satisfy themselves that the documentation obtained is sufficient for them to discharge their instructions. Any questions as to authenticity need to be addressed to the client or the client's legal adviser. Ambiguities in the documents or in instructions should be clarified as they arise.
- 4.4 Surveyors should read and seek to understand the documentation to at least a sufficient extent to enable them to discharge their instructions. Surveyors who are uncertain about any item contained in the document, such as the interpretation of a particular covenant or the extent of the property, should bring the matter to the attention of the client or the client's legal advisers.
- 4.5 Particular lease clauses to which the surveyor will refer include those listed below.
- 4.5.1 **Demise**
- Generally a tenant's obligations are limited to the property that has been demised to it. Further, a landlord's obligation to repair, if there is one, will usually be limited to those areas not required to be repaired by the tenant. The surveyor should understand what is the physical subject matter of the relevant covenants.
- 4.5.2 **Repair**
- Repairing covenants vary widely. Some covenants say nothing more than that the property is to be kept in good repair. Others, prepared using the 'torrential' form of drafting, contain a long list of additional requirements, such as to uphold, maintain, rebuild, renew, amend, etc. In whatever manner the covenant is drafted, its scope should be understood thoroughly.
- 4.5.3 **Decoration**
- If there is an obligation to decorate, it might be contained in a separate covenant or might be included as part of the repair covenant. It is usual, but by no means universal, for there to be an obligation to decorate at specific intervals or on particular dates during the term, as well as within some period (usually specified) shortly before the end of the term.
- 4.5.4 **Alterations and reinstatement**
- The surveyor should have regard to both the lease and any licences for alterations when considering the question of alterations and reinstatement. Either or both documents might contain provisions relevant to the surveyor's instructions. An obligation to reinstate lawful alterations will only arise if there is express provision in the lease or licence which may or may not require prior notice to be served. If there is a requirement for prior notice, that notice must be served in compliance with any associated conditions if the obligation is to be enforceable.

#### 4.5.5 Yielding up

The 'yield up' clause might simply require the property to be yielded up in accordance with the lease covenants. It might, however, impose a different set of obligations (e.g. complete recarpeting regardless of the condition of the existing carpeting). If the clause is relevant to the surveyor's instructions, that is to say, the lease is shortly to end or has ended, the clause should be considered carefully.

#### 4.5.6 Statutory obligations

Leases normally include covenants requiring the tenant to comply with and carry out works required by the provisions of any relevant statute or regulation. Many statutory obligations (e.g. fire regulations) arise only in respect of occupied premises and are not often applicable retrospectively. The surveyor should consider, not just the lease covenant, but the actual provisions of the relevant statute or regulation, or take legal advice on those provisions, if the surveyor believes they are relevant to his or her instructions.

### 4.6 Recovery of fees

- 4.6.1 As a general principle, the fees incurred by a landlord for preparing and serving a schedule of dilapidations may be recovered from the tenant. Those fees can, be recovered pursuant to an express provision in the lease and The surveyor should consider the lease to see whether it contains an express recovery provision. In the absence of an express recovery, the landlord may well be able to recover the costs if the tenant has made no reasonable attempts to comply with their repairing obligations throughout the course of the lease and the landlord is forced into a situation of having to engage professional advice in seeking compliance with the lease covenants.
- 4.6.2 With regard to negotiation fees, if no litigation is commenced and the lease contains no express provision regarding the recovery by the landlord of such fees (as is often the case), then, if the landlord is to make recovery of those fees, they will need to be dealt with as part of the settlement agreement. If, however, litigation is commenced, on the conclusion of the substantive proceedings it would be open to the landlord to seek an order from the court to allow it to recover its negotiation fees.
- 4.6.3 As to the amount of those negotiation fees, it is common to see as part of a landlord's claim (prior to the commencement of any negotiations) an entry for negotiation fees, however these are calculated. Unless the lease expressly provides for recovery on that basis, such claims should be avoided as the fees claimed may bear little or no relationship to the amount of work actually undertaken for which the tenant could reasonably be held to be liable. It is better practice to state that the landlord's claim for negotiation fees are 'to be assessed' or, if a specific figure is included, to state that the figure is an estimate based upon an anticipated level of work.
- 4.6.4 Other fees might be recoverable, either under the terms of the lease, as consequential losses, or as litigation costs.

### 4.7 Schedules of condition

- 4.7.1 The usual purpose of a schedule of condition, when attached to a lease, is to modify or clarify the repairing obligation. There is no standard approach for dealing with such schedules. All that can be said is that the surveyor should consider carefully the drafting of the schedule which should comprise purely statements of fact and should be backed up with photographs and the references to it in the body of the lease. If there is any uncertainty as to its application to the surveyor's instructions, the client should be informed of the need for legal input.

### 4.8 Other Enquiries

- 4.8.1 The other investigations that should be made, and documents gathered, by the surveyor might, depending on the nature of the client's instructions, include the following:
- current or historic planning consents and the planning environment;
  - statutory notices relating to the property;
  - original or current letting or investment sale details;
  - the landlord's intentions for the property at, or shortly after, the termination of the tenancy (this might include details of works proposed to the premises); and
  - evidence of rental values and yields.

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## 5.0 Inspection

- 5.1 Whenever an inspection is to be undertaken before the lease expires, whether the tenant is in occupation or not, a landlord's surveyor should comply with the terms of the lease when making arrangements for access. (NB: A surveyor who is instructed in connection with a forfeiture situation should check with the client or the client's legal advisers before making access arrangements, to ensure that no issue of waiver of forfeiture rights will arise from making such arrangements.)
- 5.2 Surveyors are advised to acquaint themselves with RICS guidance relating to inspecting property.
- 5.3 It is generally appropriate for an independent inspection to be undertaken on behalf of each party initially, although at least one subsequent joint inspection is normally advisable as part of the negotiation dialogue.
- 5.4 It is advisable for the surveyor, at the time of the initial inspection, to note the general standard of repair in the locality and whether similar properties are empty or boarded up. It is also advisable to note any changes to the nature of the area since the lease was granted. The information might be relevant to the assessment of the scope and standard of repair and also to matters relating to the diminution in the value of the landlord's reversion discussed later. See section 7 (Claims at the end of the term).
- 5.5 The inspection should be sufficiently thorough to enable an accurate record of the relevant breaches to be ascertained. The information recorded should also include all necessary data to allow costs to be calculated. All site notes, measurements or other transcriptions should be retained. When relevant, sketches should be made and photographs taken. It is recommended that these be cross-referenced to the schedule and dated. If a video record is made, the same would apply.
- 5.6 Further specialist input might be required from, for example, a consultant engineer or quantity surveyor. The surveyor can facilitate the process, liaising with the client and the consultant(s) concerned as necessary. It is recommended that the surveyor advise the client of the importance of ensuring that the consultants' instructions are consistent with those of the surveyor and that the documentation produced by the consultants is similarly consistent.
- 5.7 A note might need to be made where further investigation or opening up is required. When this is justified, the agreement of the client and, where appropriate, the tenant should be obtained, together with the extent of making good. It should be noted that, if no breaches are discovered, then the cost of specialist inspections might not be recoverable as part of the claim.

## 6.0 The schedule

- 6.1 Schedules are a statement of breaches of covenant. A schedule could be required in each of the situations covered by this guidance note and listed in 1.7 above. Whilst the format will vary depending on the precise situation, schedules should contain these details:
- the contract, lease or covenant alleged to be breached; and
  - the nature of the alleged breach.
  - the action required to address the breach.
- 6.2 Considerations specific to particular uses of schedules in different scenarios are dealt with in the relevant sections of this guidance note. The following are general points.
- 6.3 **Layout and format**
- 6.3.1 Scheduled items could be best sorted into sections relating to the type of covenant alleged to have been breached, such as items of repair, decoration, reinstatement and statutory compliance, or other systematic manner, such as for example element/location. The Schedule should identify any notices served by the landlord requiring reinstatement works to be undertaken.
- 6.3.2 Schedules for claims at the end of the term would normally contain the following columns:
- an itemised numbered reference;
  - the relevant clause of the lease or other document;
  - the breach alleged;
  - the remedy required; and
  - the cost of the remedy.
- 6.3.3 The columns in other schedules can vary depending on the purpose of the schedule.
- 6.3.4 An example of a schedule of dilapidations is attached at Appendix B.
- 6.4 **Costing**
- 6.4.1 The schedule of dilapidations should be costed if it is anticipated that the appropriate remedy is damages. There will also be other situations where the parties will require costing of the schedule. In any such case, the schedule should be priced with due reference to reliable and appropriate cost information which is available from a number of sources, for example:
- Recognised pricebooks (to which the appropriate regional variations should be applied if relevant);
  - relevant and recent tender price information (on projects of a similar nature and size to that envisaged by the claim); and
  - the result of a consultation with and assistance from a contractor (which could be conducted on the basis of a full specification of works derived from the schedule of dilapidations).
- 6.4.2 Pricing should be undertaken in sufficient detail to enable an itemised breakdown of the costs to be provided in the event that the recipient of the claim challenges the quantum.
- 6.4.3 For larger and more complicated claims it could be appropriate for the client to engage a quantity surveyor to undertake the pricing process, the cost of which might be recoverable as part of the cost of preparing the schedule, if preparation costs are themselves recoverable (see 4.6 above).

**6.5 Service**

- 6.5.1 The claimant's solicitors will usually formally 'serve' the schedule of dilapidations, perhaps because legal and statutory formalities apply.
- 6.5.2 Where formal 'service' is not necessary it can be quite acceptable for the landlord's surveyor to simply issue this document on a client's behalf. In such instances, surveyors should advise clients to satisfy themselves by consultation with their solicitors that the formal route is not required. In each case, confirmation should be obtained from the client of the address to which the schedule should be sent.

**6.6 The schedule in discussions**

- 6.6.1 In most instances, the claim is discussed between the parties with a view to reaching a negotiated settlement. By adding additional columns to the schedule both parties can record their respective positions thereby developing it into a Scott Schedule.
- 6.6.2 An example of a Scott Schedule is attached at Appendix D.
- 6.6.3 During the course of dialogue, the tenant's surveyor can generally state his or her position on the above basis by use of the columns entitled 'tenant's comments' and 'tenant's costs'. Thereafter, the construction of any subsequent schedules will be largely a matter of common sense, reflecting how the surveyors agree the dialogue should be recorded in the interests of narrowing the issues between them.

**6.7 The schedule in proceedings**

- 6.7.1 If the dispute is not resolved and proceedings are commenced, the claim is most likely to be based upon the schedules prepared by the surveyor. The version of the schedule is likely to be the one following discussions with the defendant so that the most up to date position is put before the tribunal. This is likely to be in Scott Schedule form so that the views of the defendant are also shown to the tribunal.
- 6.7.2 Surveyors should be aware of the wide scope of the courts' powers on costs. It is possible that the schedule originally served, or the original response will be compared with that forming the basis of the claim or defence and the finally determined liability. If the original schedule is found to be exaggerated, or the original response found to be understated, the offending party may be at risk of a punitive order on costs.

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## 7.0 Claims at the end of the term

7.1 Probably the most common dilapidations situation is where:

- a lease has ended or is close to ending; and
- the property has been, or it is anticipated that it will be, left in a condition below covenanted condition.

7.2 If the lease has already ended, the only remedy a landlord has is a claim for damages.

7.3 If the surveyor is instructed before the lease has ended, there can be alternative remedies available to the landlord. These alternatives are discussed in section 8 of this guidance note (Claims during the term). Further, there might be time for the tenant to comply with the terms of the lease. The surveyor should consider these alternative remedies, bearing in mind that damages will become the only remedy once the lease expires.

7.4 Schedules served by landlords in respect of claims at the end of the term are commonly known as 'terminal schedules' or 'final schedules'.

### 7.5 Principles of damages

7.5.1 A landlord cannot recover more than its loss. The purpose of damages is to compensate an injured party for its loss; it is not to punish. That is the position regardless of the nature of the breach(es).

7.5.2 As a consequence of the common law and statutory positions described below, generally, the damages recovered by a landlord will be agreed or determined by reference to:

- the cost of works;
- the diminution in the value of the landlord's reversion; or
- consequential costs
- a combination of the above.

7.5.3 How that loss is assessed is discussed in section 7.6 below.

7.5.4 The common law position is that, where there has been a breach of the repair covenant, the normal measure of damages is the cost of repair.

7.5.5 Where there have been breaches of covenants other than the repair covenant, damages are usually assessed at common law by reference to the diminution in the value of the landlord's reversion but, in an appropriate case, can be assessed by reference to the cost of works.

### 7.6 Assessment of loss

7.6.1 It is usual for the landlord's loss at the termination date of the lease to be assessed by reference to the cost of works. Whether the unadjusted cost of works properly reflects that loss will depend on a number of factors, including:

- the landlord's intentions for the property;
- whether the landlord has carried out, or intends to carry out, the works;
- whether the property has potential for redevelopment or refurbishment;
- the market for the property; and
- what arrangements might be made with a new tenant.

The cost of repair figure might only be a starting point from which adjustments need to be made. Those adjustments are known by various names, including 'dilutive effects' and 'supersession'.

#### 7.6.2 Adjustments to cost of works

Where the landlord has carried out, or intends to carry out, all the works that the tenant failed to complete, the cost of works could represent the landlord's loss and no adjustment might be required.

7.6.3 If, however, the landlord has not done and does not intend to do some or any of the works, the cost of works figure might not be a fair reflection of the landlord's loss. The reason for the landlord not doing the works and its intentions for the property might need to be examined. Its intention might be to do works that would have rendered valueless some or all of the items that the tenant failed to carry out and so those items would need to be removed from the schedule and the claim.

7.6.4 In an extreme case, if the landlord intends to demolish the property, few or no items will remain.

7.6.5 Where the property has potential for redevelopment or refurbishment, depending on the circumstances, items of work rendered valueless by this potential may need to be removed to arrive at a fair figure for the landlord's loss.

- 7.6.6 Where there are several different ways of properly undertaking an item of work but the landlord undertakes or intends to undertake a method that is not the cheapest, there is a risk that the landlord will not be able to recover the full cost.
- 7.6.7 Where remedial work cannot be undertaken without some degree of betterment or improvement, the full cost will normally be recoverable by the landlord. However, where there are alternative methods, some of which involve betterment or improvement and some of which do not, it is likely that recovery will be limited to the cost of the methods that do not involve betterment.
- 7.6.8 Comparable method of assessment
- If the appropriate evidence is available, the landlord's loss could be assessed by:
- ascertaining the market value of the property in the state in which it should have been left by the tenant pursuant to the covenants of the lease; and
  - deducting from that the market value of the property in the actual condition in which it was left.

## 7.7 The lease, other documents and enquiries

- 7.7.1 The surveyor should obtain and consider the lease and other relevant documents as discussed in section 4 above. In particular, the yield up clause of the lease (see 4.5.5 above) should be considered.
- 7.7.2 For the reasons outlined in 7.6 above, the intentions of the landlord with regard to the premises at or shortly after the end of the term should be ascertained. It should be established, for example, whether the building is to be demolished or physically altered in any way and if so, in what manner.
- 7.7.3 For similar reasons, the property's potential for redevelopment or refurbishment should be looked into. Where appropriate enquiries should also be made of the local planning authority.

## 7.8 Inspection

- 7.8.1 It is recommended that the guidance in section 5 above regarding inspections is followed. If the property is inspected before the end of the lease, it should be re-inspected at the end of the lease (see 7.9.4 below).

## 7.9 Schedule

- 7.9.1 The guidance in section 6 above regarding schedules should be followed. The surveyor should consider, in particular, paragraph 6.3.1 as to separation of various breaches of covenant. An example of such a schedule of dilapidations is also included in this guidance note at Appendix B.
- 7.9.2 As a claim at the end of the term is a claim for damages, costings are essential. It is particularly important – and helpful to everyone concerned – if the claim represented by the schedule is fully summarised on a single sheet either at the beginning or the end of the schedule. Cross-references to sections of the schedule, if there is more than one section, are also useful.
- 7.9.3 Dialogue is inevitable on such claims, and the schedule should be structured so as to aid such dialogue.
- 7.9.4 It is common practice for an uncosted schedule to be prepared and served by the landlord on the tenant before the end of the term and then, following the expiration of the lease, for a costed schedule to be served. Surveyors should be mindful, however, of the following:
- Which clauses of the lease are alleged to have been breached will depend on the time the schedule is served. Different covenants can easily apply during the term and at the end of the term.
  - The property should be re-surveyed at the end of the lease. The condition of the property set out in a schedule served before the end of the term might not be the same as the condition at the end of the term. The condition might be better (if, for example, the tenant has done some remedial work), the same, or worse (perhaps through further deterioration, or damage caused by the tenant's removal activity).
- 7.9.5 Where there are adjustments to the cost of repair for the reasons discussed in 7.6.2 to 7.6.7 above or for any other reason, then it will be helpful for those adjustments to be shown on an item-by-item basis. They could be recorded, perhaps by adding further columns to the schedule, such that the whole nature of the dispute can be considered on an item-by-item basis by the parties and, should the matter go so far, at trial.
- 7.9.6 Though the surveyor who prepares the schedule might exclude items from the final schedule that is served on the tenant for the reasons discussed in 7.6.2 to 7.6.7 above, it is recommended that he or she makes and keeps a note of all breaches of the lease, as that information might be needed for an assessment of the diminution in the value of the landlord's reversion. That information may also be relevant to the question of costs.

**7.10 Surveyor's statement**

- 7.10.1 The schedule should be signed by the surveyor preparing it. This can be given either by the surveyor in his or her own name or by the surveyor signing in his or her own name stating he or she does so 'for and on behalf of ' XX firm or company if appropriate.
- 7.10.2 The schedule should include a statement by the surveyor preparing it. The surveyor's statement should confirm that in the opinion of the surveyor all the works set out in the schedule are reasonably required in order to put the premises into the physical state required by the terms of the lease and any licences or other relevant documents, and, that full account has been taken of the landlord's intentions for the property at or shortly after the termination of the tenancy; and that the costs, if any, quoted for such works are reasonable.'
- 7.10.3 It is recommended that the surveyor asks the landlord for its intentions for the property in writing before making the signed statement (see 4.8.1 and 7.6.1 above), and that a written record of the reply is made and kept on file.
- 7.10.4 In giving a statement, the surveyor should make reference to any relevant information provided by the landlord or advice given by consultants such as valuers and quantity surveyors.
- 7.10.5 Before signing the statement if there is a concern as to the landlord's entitlement under the lease to pursue an item, whether in the body of the schedule or a consequential loss item, the surveyor should bring the matter to his or her client's attention and, if necessary, recommend that advice is sought from the client's solicitors.

**7.11 Consequential losses**

- 7.11.1 Where relevant, the following consequential losses incurred might be added to the claim:
- legal fees in connection with the service of the schedule;
  - administration of the work envisaged by the schedule;
  - VAT (see Appendix E);
  - holding costs expected to be incurred before re-letting or sale, as the case may be as a direct consequence of the works
  - loss of rent for a reasonable time period for of any works and during any additional marketing period required as a consequence;
  - rates liability for a reasonable time period to cover the duration of the works;
  - insurance, security, energy and cleaning costs not already reflected in the building works claim; for a reasonable time period to reflect the duration of the works.
  - Fees for the loss due to lack of service charge recoupment;
  - finance costs (including interest);
- also:
- preparation of the schedule; and
  - other fees of the surveyors (including fees relating to assessment of rent and diminution in value).
- However, the ability to claim these losses could be subject to specific lease requirements.

**7.12 Statement of loss**

- 7.12.1 The initial pre-action claim by the landlord for damages is a reference to the landlord's formal statement of what it considers it is owed in damages as representing its loss. That statement is made before proceedings are commenced. It is the starting point which may or may not lead to court proceedings. The expression 'the claim' is therefore not to be confused with the phrases 'particulars of claim' or 'claim form' which are documents used in court proceedings; the claim is a reference to the whole statement of the landlord's loss in advance of proceedings.
- 7.12.2 The landlord's claim for damages should include a full statement of what the landlord says it is owed for the schedule. It will usually consist of a costed schedule of dilapidations (endorsed by the surveyor preparing it, dealt with above in 7.10) and a summary of any consequential losses.

### 7.13 **Service**

7.13.1 The landlord's initial pre-action claim for damages is usually served on the tenant by the landlord's solicitors. There is generally no formal requirement in the lease for service in that manner, but the lease should be checked. In the absence of any such requirements, the landlord needs simply to convey the claim it is making to the tenant by an effective route.

### 7.14 **The response**

7.14.1 In preparing a response, the tenant's surveyor should consider the factors and take many of the steps the landlord's surveyor should have considered and taken as discussed above. The standard of behaviour required of a surveyor is the same whether he or she acts for a landlord or tenant. Both surveyors should act in a reasonable, professional and timely manner.

### 7.15 **The Scott Schedule**

7.15.1 The landlord's item-by-item claim schedule and the tenant's item-by-item response are usually brought together for ease of reference in a Scott Schedule.

7.15.2 The suggested structure of a Scott Schedule is set out in Appendix C and discussed above at 6.6. The Scott Schedule is indispensable as an aid to dialogue between parties in claims at the end of the term.

### 7.16 **Dialogue**

7.16.1 Both the courts and the Society of Chartered Surveyors Ireland encourage dialogue between parties to a dispute. In order to achieve this, it is desirable that surveyors of like disciplines should meet during the course of the dispute, in order to clarify the nature of the dispute and if possible, to settle aspects of it.

7.16.2 Because of the high costs involved, it should be the parties' objective, as well as the courts', that the matter be settled instead of tried, if at all possible.

### 7.17 **Physical work versus damages**

7.17.1 There might be advantages to both landlord and tenant in works being carried out by the tenant prior to the end of the term. From the landlord's perspective, it could be able to market the premises more speedily. Equally, a tenant who chooses to do the work during the term:

- will have control of the actual works and the timetable for those works;
- will probably avoid a claim for loss of rent and interest; and
- might be able to recover VAT where the landlord cannot (see Appendix E).

7.17.2 After the lease has expired, the landlord has control. It will be able to dictate the quality and scope of the works (as far as the expired lease allows), as well as the timetable. The landlord can then recover its reasonable loss as damages.

### 7.18 **Court proceedings**

7.18.1 Most dilapidations claims at the end of the term do not result in proceedings being issued. Normally the matter can be settled between the parties without that step being taken. Should matters go so far, however, once proceedings are issued, the surveyor will need to take his or her lead from the client's solicitors.

## 8.0 Claims during the term

8.1 'Interim claims' is the name often given to claims that do not fall within the definition of claims at the end of the term. A better expression, for clarity of definition, is 'claims during the term'.

8.2 **The remedies available to a landlord pursuing a claim during the term can include:**

- damages;
- forfeiture;
- entry to carry out the work, followed by a claim for costs; and
- specific performance.

8.3 The remedies of damages, forfeiture and entry to carry out the work are considered below.

8.4 The remedy of specific performance is beyond the scope of this guidance note. Legal advice should be taken in every case.

### 8.5 Damages

8.5.1 As noted in 7.5.1 above, the purpose of damages is to compensate an injured party for its loss; it is not to punish.

8.5.2 With damages claims during the term, the common law position is that, whether there have been breaches of the repair covenant or other breaches of covenant, damages are usually assessed by reference to the diminution in the value of the landlord's reversion.

8.5.3 Where the lease has some time to run before its expiration, the landlord might have some difficulty in establishing any substantial diminution. Exceptions to this can include situations where the landlord owns other nearby or adjoining properties which are being devalued or endangered by the tenant's breaches.

### 8.6 Forfeiture

8.6.1 The remedy of forfeiture, if successfully pursued, results in the lease coming to an end. This is a complex area. Consequently, it is strongly recommended that legal advice should be obtained.

8.6.2 A landlord cannot forfeit a lease for a tenant's non-compliance with its covenants unless:

- the lease contains a forfeiture clause;
- the landlord has served a valid notice pursuant to section 14 of the Conveyancing and Law of Property Act 1881 on the tenant;
- a reasonable period of time has expired since service of the section 14 notice; and
- the tenant has not complied with the section 14 notice during that time.

8.6.3 Additional restrictions apply to the forfeiture of residential long leases.

8.6.4 The right to forfeit can be lost or waived by a landlord if it or its agents, after becoming aware of the relevant breach, take any step that unequivocally recognises the continuing existence of the lease, such as demanding or accepting rent. The issue of waiver might not be relevant to a continuing breach (such as of a repair covenant) but might be of importance where there has been a once-and-for-all breach (such as making alterations without the requisite consent).

## 8.7 **Entry to undertake remedial works**

- 8.7.1 Many leases contain a right for the landlord to enter the property without the consent of the tenant to undertake works the tenant should have carried out (i.e. where the tenant is in default of its obligations).
- 8.7.2 These clauses are usually very specific about the circumstances under which landlords can operate the rights they contain (such as notice periods for landlord's inspections) and what works are to be undertaken should breaches of covenant be found.
- 8.7.3 Extreme caution is required when using these clauses. Incorrect application by a landlord can lead to counterclaims from the tenant for trespass and breach of quiet enjoyment. Consequently, it is strongly recommended that legal advice is obtained regarding their use.
- 8.7.4 Usually, the landlord is entitled to enter the property (subject to specific notice requirements) and to take a record or schedule of the breaches of covenant and then to serve notice of those breaches on the tenant. It is essential that only the breaches allowed for by the clause are scheduled and no others. If the clause only refers to breaches of repairing covenant, only items of repair can be included in the schedule. Incorporation of inappropriate breaches could invalidate later steps under the clause.
- 8.7.5 Once notice has been served on the tenant, there is usually a specific time period for the tenant to undertake the works. Again, this time period can vary, as can the obligation to complete or commence the works.
- 8.7.6 If, at the end of the designated time period, the tenant has not undertaken the works set out in the landlord's notice, the landlord is entitled to enter the property and undertake the works itself. The works are only those set out in the landlord's notice in accordance with the terms of the lease.

## 8.8 **Instructions**

- 8.8.1 Refer to section 3 (Taking instructions) above.
- 8.8.2 On being instructed by a party in connection with a claim during the term, the surveyor should also ascertain the remedy or remedies being contemplated or pursued by the landlord and the role the surveyor is to play in pursuing/defending against that remedy/those remedies.

## 8.9 **The lease, other documents and enquiries**

- 8.9.1 Refer to section 4 (The lease and other enquiries) above.
- 8.9.2 Where the landlord is pursuing forfeiture as a remedy, particular note should be made of the forfeiture clause and circumstances in which forfeiture is permitted.
- 8.9.3 Where the landlord is pursuing a remedy under an entry to repair clause, the terms of the clause should be considered carefully for the reasons set out in 8.7 above.
- 8.9.4 Any issues of interpretation should be referred to the client's solicitors.

## 8.10 **Inspection**

- 8.10.1 Refer to section 5 (Inspection) above.
- 8.10.2 Surveyors instructed by landlords pursuing forfeiture are reminded in particular of the warning given in 5.1 above about waiver of forfeiture rights.
- 8.10.3 If the landlord is pursuing a remedy under an entry to repair clause, the surveyor should follow precisely the procedural steps and timings set out in the lease concerning inspections.

**8.11 Schedule**

- 8.11.1 Refer to section 6 (The schedule) above.
- 8.11.2 The schedule, where damages and/or forfeiture are being pursued, should set out the breach. The remedial work can also be set out.
- 8.11.3 Where the schedule is produced pursuant to an entry to repair clause, it is similarly likely to be a requirement that breaches be specified rather than the remedy. Regardless of the manner in which the clause is drafted, though, its requirements should be closely followed.
- 8.11.4 Only if damages are being pursued is it likely to be appropriate for the schedule to be costed and, even then, the costs of works might bear little resemblance to the loss that the landlord has suffered, particularly if the lease has some time to run (see 8.6 above).

**8.12 Service**

- 8.12.1 It is very likely that, where forfeiture or an entry to repair remedy is being pursued, formal notice provisions will apply. Service should therefore be undertaken by the client's solicitors.

**8.13 Response**

In preparing a response, the tenant's surveyor should consider the factors, and take many of the steps, that the landlord's surveyor should have considered, and taken, as discussed above.

**8.14 Undertaking the work**

The tenant might consider undertaking the work to minimise the claim against it or to avoid losing the lease altogether. The surveyor should review the discussion at 7.17 above, which sets out some of the relevant considerations, and should advise his or her client on the possible advantages and disadvantages of undertaking the work.

**8.15 Subsequent steps**

The subsequent course of the dispute depends on the remedy being pursued by the landlord. If the landlord is pursuing a damages claim, the parties' surveyors might be able to negotiate a settlement without the (further) need for the involvement of solicitors other than, possibly, to document any settlement reached. By contrast, if forfeiture or the use of an entry to repair clause is being pursued, the tenant's reaction to the threatened use of the remedy could require legal advice, as could the manner in which the remedy is to be implemented.

**8.16 Court proceedings**

Most claims do not result in proceedings being issued. Normally the matter can be settled between the parties without that step being taken. Should matters go so far, however, once proceedings are issued the surveyor will need to take his or her lead from the client's solicitors.

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## 9.0 Break clauses

- 9.1 Many leases contain clauses giving either landlord or tenant the right to determine the lease before the end of the contractual term. These are also known as options to determine or, more commonly, break clauses.
- 9.2 It is strongly recommended that legal advice be obtained when dealing with a break clause.
- 9.3 Any conditions relating to the exercise of a break must be complied with for the break clause to operate. It is for the party operating the break clause to ensure it has complied with the relevant conditions.
- 9.4 **Conditions often found in leases include the following:**
- Service of a period of notice. Time can be of the essence when dealing with notice periods. Further, some time periods are precise and specify a particular date by which notice must be served, others give a minimum period of notice such as 'not less than six months'.
  - Payment of a premium. This obligation could vary in application and could specify either a fixed amount or the method of calculating the amount, such as 'six months' rent'.
  - Providing vacant possession. This is an obligation on a tenant-operated break clause. Provision of vacant possession implies removal of all tenant's chattels. It is essential that all chattels are removed, and what constitutes a chattel will require careful consideration.
  - Compliance with lease obligations. This is an obligation on a tenant-operated break clause. The requirements of this clause can vary, so careful reading is required. For example, if full compliance is required there can be no subsisting breaches on the option date. If compliance is qualified in any way, or compliance only with specific covenants is required, whilst the scope/standard might not be so onerous, it is nevertheless recommended that the highest standards are applied when undertaking works.
- 9.5 If one or more of the conditions attached to a break are not satisfied, the lease will continue past the break date, unless the parties agree otherwise.
- 9.6 For the surveyor advising on the physical condition of the property, providing vacant possession and compliance with lease obligations are the more relevant considerations. These should be considered in conjunction with the solicitors advising on the legal matters. It is recommended that advice be sought if there is any uncertainty over the obligations or conditions.
- 9.7 **Instruction, lease, enquiries and inspection**
- 9.7.1 It is strongly recommended that a surveyor, on being instructed in connection with a break clause, immediately obtains and reads the lease to make him or herself aware of any relevant time limits and conditions. Many negligence actions have arisen from professional advisers failing to spot such time limits or conditions through not reviewing the lease at an early stage. Extreme care should be taken to ensure that the interplay between the legal position, the landlord's objectives and the physical state of the building is handled correctly; legal advice should be sought on every occasion.
- 9.7.2 The objectives of the client with regard to the break and the property should also be ascertained, as should the objectives of the other party, insofar as the client is aware of them.
- 9.7.3 The further steps that are taken by the surveyor will very much depend on the objectives of the client and the client's preferred strategy for dealing with the break. It may or may not be in the client's best interest for the surveyor to inspect the property, to make enquiries of his or her counterpart at an early stage, or to produce a schedule. No steps of this nature should be taken without legal advice.

**9.8 Schedule**

If the surveyor is instructed by a landlord to produce a schedule in connection with a break clause, the surveyor should consider the guidance given in section 6 above (The schedule). If the landlord is seeking to make the tenant aware of the works it considers need to be completed before the break takes effect, it is likely that the schedule will not need to be costed. If, however, the landlord is seeking to agree a financial settlement with the tenant, then it should probably be costed and include a claim for relevant consequential losses. Much of the guidance in section 7 (Claims at the end of the term) could also be of relevance.

**9.9 Service**

It could be that formal notice of the break has already been served and that the lease contains no further service requirements. Nevertheless, the surveyor should consider with the client's solicitors the manner in which any schedule the surveyor is instructed to produce is served on the tenant.

**9.10 Response**

The response by a tenant to the receipt (or non-receipt, for that matter) of a schedule will depend on the tenant's objectives and preferred strategy for dealing with the break. The guidance above should also be considered by the surveyor instructed by a tenant.

**9.11 Dialogue and court proceedings**

The nature and extent of any dialogue will depend on the parties' objectives and strategies. The surveyor is reminded that the courts and the Society of Chartered Surveyors Ireland encourage parties to be open and reasonable in the manner in which they conduct themselves in disputes and that, where parties fail to be open or they conduct themselves in an unreasonable manner and matters proceed to court, they could suffer cost sanctions.

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## 10.0 Claims against landlords

- 10.1 A lease can contain a landlord's covenant to repair the property and/or other parts of the building (e.g. the common parts) or such an obligation might be implied by statute or common law.
- 10.2 Generally, a tenant cannot enforce a landlord's covenant/obligation to repair within the property unless the tenant has first given the landlord notice of the breach. In respect of repairs outside the property (e.g. within the common parts of the building), generally no notice is required.
- 10.3 For evidential reasons, any notice required should be in writing. The landlord does not need to be given exact details of the disrepair, or of the remedial works required, so long as the contents are sufficient to put the landlord on notice that works are required.
- 10.4 In addition to carrying out works of repair for which it is liable, the landlord will generally be obliged to make good any consequential damage to the property caused by such works of repair.

### 10.5 Remedies

- 10.5.1 The remedies available to a tenant for breach by the landlord of its repairing obligation include:
- damages;
  - self-help; and
  - set-off.
- 10.5.2 There could be other remedies available (e.g. specific performance) but these are beyond the scope of this guidance note.

### Damages

- 10.5.3 As before, whilst an award of damages is one of a number of possible remedies available during the term, it is the only remedy available at the end of the term.
- 10.5.4 The amount of damages to which a tenant is entitled is that which, so far as money can, will put the tenant in the position in which he or she would have been had there been no breach by the landlord.
- 10.5.5 Where there has been a breach of the landlord's repair covenant, the tenant may choose to:
- remain in the property;
  - temporarily vacate; or
  - sell its interest in the property or sublet.
- 10.5.6 The appropriate heads of damages will vary depending on which of these actions the tenant takes.
- 10.5.7 A tenant who remains in the property might claim for:
- inconvenience and discomfort (which might be assessed by reference to the rental value of the premises);
  - ill health;
  - damage to personal belongings;
  - damage to the property; and/or
  - loss of profits.
- 10.5.8 A tenant who vacates might claim for:
- cost of alternative accommodation;
  - cost of moving;
  - redecoration and cleaning costs; and/or
  - loss of profits.
- 10.5.9 A tenant who sells or sublets might claim for any reduction in price/rent achieved due to the breach.

**Self-help**

10.5.10 Where the breach relates to part of the property, the tenant can carry out the required works itself and seek to recover the cost from the landlord. Where it relates to disrepairs outside the property (e.g. within the common parts of the building), in the absence of an express right, the tenant should be cautious about undertaking the work itself. There could be no implied right of entry, and the tenant could be committing a trespass.

**Set-off**

10.5.11 Set-off is deduction from rent and other sums payable to the landlord under the lease. The tenant might wish to recover the damages it has suffered by way of set-off, along with any sum the tenant has reasonably spent remedying the breach through self-help.

10.5.12 The right of set-off can, however, be expressly excluded by the terms of the lease.

**10.6 Instructions, documentation and inspection**

10.6.1 On being instructed by a party to a claim by a tenant against a landlord, the surveyor should make many of the same enquiries and take most of the steps that would have been made and taken in a claim by a landlord against a tenant, as set out in sections 3 to 5 of this guidance note.

10.6.2 Additional matters to note are as follows.

10.6.3 The scope of the landlord's repairing covenant could be contained in the service charge provisions, and/or alongside the landlord's other covenants or implied. The covenant/implied obligation should be fully understood, as should any provisions restricting the remedy or remedies available to the tenant.

10.6.4 The surveyor should ascertain what action the tenant has taken following the breach, in terms of remaining in occupation, vacating, selling its interest or subletting.

10.6.5 The surveyor should seek to understand the remedy or remedies being sought or pursued by the tenant.

**10.7 Schedule**

10.7.1 If the landlord's breach is a simple one (e.g. failure to maintain the communal air-conditioning plant in a multi-let office block), a schedule might not be required. If, however, there are numerous items of breach, then the tenant's claim will be better set out in schedule form.

10.7.2 The schedule used for a claim by a tenant against a landlord is likely to be similar to that required for a claim by a landlord against a tenant. Whether such a schedule should be costed will depend on the remedy or remedies being sought. One prepared where the tenant is proposing self-help probably does not need initially to be costed. One prepared in connection with a damages or set-off claim might need to be, depending on the heads of damage.

**10.8 Service**

The tenant's claim will usually be served on the landlord by the tenant's solicitors but there is generally no formal requirement in the lease for service in that manner.

**10.9 The response**

In preparing a response, the landlord's surveyor should consider the factors and take many of the steps the tenant's surveyor should have considered and taken, as discussed above.

**10.10 Undertaking the work**

The landlord ought to consider undertaking the work to minimise the claim against it. The surveyor should review the discussion at 7.17 above which sets out some of the relevant considerations and should advise his or her client on the possible advantages and disadvantages of this route.

**10.11 Subsequent steps**

The subsequent course of the dispute depends on the remedy being pursued by the tenant. If the tenant is pursuing a damages and/or set-off claim, it may be that the parties' surveyors can negotiate a settlement without the (further) need for the involvement of solicitors other than, possibly, to document any settlement reached. In contrast, if self-help is being pursued, the landlord's reaction to the threatened use of the remedy could require legal advice, as could the manner in which the remedy is to be implemented.

**10.12 Court proceedings**

Most claims by tenants against landlords do not result in proceedings being issued. Normally the matter can be settled between the parties without that step being taken. Should matters go so far, however, once proceedings are issued, the surveyor will need to take his or her lead from the client's solicitors.

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## 11.0 Alternative Dispute Resolution

### **Arbitration & Independent Expert Determination.**

- 11.1 Arbitration is a form of ADR and will often be found to be the required tribunal for resolving certain disputes arising out of leases, such as those pertaining to service charges.
- 11.2 Unlike arbitration (where the award issued by the arbitrator is based on the evidence adduced by the parties or obtained by enquiry), an independent expert determination is, as the name suggests, a determination by an expert in the field. The expert must base that decision on his or her own knowledge and experience, and is not obliged to receive, or even consider, any evidence adduced by the parties (unless the lease so requires or the parties agree).
- 11.3 The independent expert's decision, known as a determination, is final and binding, and there is no right of appeal. However, the independent expert can be held liable in damages for any provable loss sustained by a party through the expert's negligence.
- 11.4 There are several factors that make mediation different from most other forms of dispute resolution:
- No decision can be imposed upon the parties by the mediator; nor will the mediator express any personal view on the dispute unless the parties so request.
  - During mediation the parties are able to freely discuss the strengths and weaknesses of their case and those of the other side with the mediator, without prejudicing their position should a settlement not be reached.
  - The mediator will also encourage and help the parties to generate and consider their options, and develop these into viable courses of action.

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## 12.0 Settlements

- 12.1 Most claims do not end up in court. They are normally settled by negotiation. Those negotiations will often be undertaken by the surveyor who acted as adviser and prepared or responded to the original schedule or valuation. In reaching a settlement the surveyor should consider the claim as a whole, including time and costs in pursuing the claim. He or she should bear in mind that the total costs to both parties in relation to a claim taken through to trial will often exceed the value of the claim. It is therefore important that the surveyor provides objective advice on the merits of a proposed settlement.
- 12.2 If a claim is determined by a court, an arbitrator, or an independent expert, the successful party will have a court order, award or determination which can be enforced by a court. If court proceedings are settled out of court, the terms of the settlement will usually be recorded at the court by way of a court order and hence the proceedings are disposed of. Again, the successful party has a court order which can be enforced.
- 12.3 However, if a claim for dilapidations is settled between the parties (and most are) either by agreement or by use of a mediator, without court proceedings being issued, the parties must record the terms of the agreement precisely in order that, if necessary, the agreement can be enforced by commencement of court proceedings for breach of the agreement.
- 12.4 **A settlement agreement should:**
- (a) be in writing, identifying:**
    - the parties (i.e. the landlord and the tenant);
    - the relevant lease;
    - the schedule and the claim to which the settlement applies;
  - (b) be open, i.e. not marked 'without prejudice';**
  - (c) be stated to be in full and final settlement of the claim;**
  - (d) deal with each and every part of the claim including, where appropriate, any interest and costs;**
  - (e) state the date by which:**
    - if appropriate, any payment pursuant to the agreement is to be paid and/or,
    - if appropriate, works are to be conducted, inspected and signed off (including, if appropriate, a procedure for agreement and signing off of any 'snagging items');
  - (f) be dated; and**
  - (g) be signed by each party, or signed for and on behalf of each party by a duly appointed surveyor, lawyer or agent authorised to bind the party for whom they sign.**

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## Appendices

Appendix A: Recommended form of a schedule of dilapidations

Appendix B: Example of a schedule of dilapidations

Appendix C: Recommended form of Scott Schedule

Appendix D: Example of a Scott Schedule

Appendix E: Value Added Tax

Appendix F: References to legislation and relevant Case Law.

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## Appendix A: Recommended form of a schedule of Dilapidations

1 Item No	2 Clause No.	3 Breach complained of	4 Remedial works required	5 Landlord's costings

DATED

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Signed

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(Name and address of surveyor appointed by Landlord)

## Appendix B: Example of a schedule of Dilapidations

1 Item No	2 Clause No.	3 Breach complained of	4 Remedial works required	5 Landlord's costings
1.	2.1	There is a new door opening and roller shutter fitted in the wall at grid reference 5 E-F.	Remove door and reinstate wall and all original finishes etc.	€ 900
2.	2.1	There is substantial water ingress causing damage to the high level wall claddings and the cladding is heavily soiled throughout.	Approx 70% of cladding to south side and 30% to north to be replaced, remainder to be thoroughly cleaned/ repaired.	€7194
2	2.1	There are several holes in the floor where bolts securing the racking have been removed and there are numerous bolts crudely cut off with sharp ends remaining which are now hazardous.	Remove all remaining bolts and make good holes with suitable cement grout.	€2450

DATED

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Signed

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(Name and address of surveyor appointed by Landlord)

## Appendix C: Recommended form of a Scott Schedule

1	2	3	4	5	6	7	8	9
Item no.	Clause no	Breach of complained	Remedial works required	Tenants comments	Landlords comments	Landlord costs	Tenant costs	Agreed costings
Subcategory of work described in this section of the sheet								
1						0	0	0
2						0	0	0
3						0	0	0
4						0	0	0
5						0	0	0
6						0	0	0
Subcategory of work described in this section of the sheet								
7						0	0	0
8						0	0	0
9						0	0	0
10						0	0	0
11						0	0	0
12						0	0	0
13						0	0	0
Subcategory of work described in this section of the sheet								
14						0	0	0
15						0	0	0
16						0	0	0
17						0	0	0
18						0	0	0
19						0	0	0
<b>CATEGORY</b>					<b>TOTALS</b>	<b>0</b>	<b>0</b>	<b>0</b>

## Appendix D: Example of a Scott Schedule

1	2	3	4	5	6	7	8	9	
Item no.	Clause no	Breach of complained of	Remedial works required	Tenants comments	Landlords comments	Landlord	Tenant	Agreed Costings	
Subcategory of work described in this section of the sheet									
1.	2.1	There is a new door opening and roller shutter fitted in the wall at grid reference 5 E-F.	Remove door and reinstate wall and all original finishes etc.	Agree with breach, disagree with remedy and cost. Door is of benefit to an incoming tenant, door is operational	Agreed	€ 900.00	0.00	TBC	
2.	2.1	There is substantial water ingress causing damage to the high level wall claddings and the cladding is heavily soiled throughout.	Approx 70% of cladding to south side and 30% to north to be replaced, remainder to be thoroughly cleaned/ repaired.	Agree with breach, partially agree with remedy and disagree with cost. Cost to replace 35% of cladding to south and 15% to north.	Agreed to replace 60% of cladding to south side and 35% to north, remainder to be thoroughly cleaned.	€7194.00	€3,600.00	TBC	
3	2.1	There are several holes in the floor where bolts securing the racking have been removed and there are numerous bolts crudely cut off with sharp ends remaining which are now hazardous.	Remove all remaining bolts and make good holes with suitable cement grout.	Disagree with breach, remedy and cost. Bolts have been removed, holes to be filled where required.	€500 will not be sufficient to cover the extent of the damage caused.	€2450.00	€500.00	TBC	
<b>CATEGORY</b>						<b>TOTALS</b>	<b>10,544.00</b>	<b>4,100.00</b>	<b>TBC</b>

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## Appendix E: Value Added Tax

- 1 In the context of a schedule of dilapidations the question of whether a landlord can recover the VAT element of remedial works often arises.
- 2 A sum equivalent to the VAT paid (or likely to be paid) is recoverable as damages where the landlord does, or intends to do, work the tenant failed to do and pays, or will pay, VAT on those works but is unable to offset that VAT as input tax.
- 3 Generally, the services required by a landlord from contractors and professional advisers to deal with dilapidations will be the reduced relevant VAT rate for building works and the standard rate for professional services.  
  
So those contractors and advisers will (unless they are very small businesses) add VAT to the charge for their services; a VAT charge will, therefore, be incurred by the landlord.
- 4 Whether that VAT charge can be offset by the landlord as an input depends on its own tax position and the nature of the property. The precise details of the circumstances in which a landlord will be able to offset its VAT charge is beyond the scope of this note. However, what can be said is that, if the landlord is unable to offset (in part or whole) the VAT charge, then an amount equivalent to the VAT paid that cannot be offset can properly be added to the damages claim. Conversely, if a landlord can fully offset the VAT charge as input tax against any output tax it charges (or can otherwise recover the input tax from Revenue) then it will not have suffered a loss as a consequence of the VAT input charge. In this latter situation, the landlord cannot properly reclaim an equivalent amount as damages from the tenant.
- 5 It is for the landlord to demonstrate that it cannot offset the VAT charge for whatever reason.
- 6 A further question that often arises is whether a tenant can require the landlord to provide a VAT invoice in respect of the dilapidations payment it makes to the landlord. A dilapidations claim represents a claim for damages by the landlord against the tenant and the payment involved is not the consideration for a 'supply' for VAT purposes and so is outside the scope of VAT. Thus, no VAT invoice can properly be raised. As a consequence, the tenant, even if VAT registered, cannot offset or reclaim from Revenue the VAT element of the damages payment to the landlord.
- 7 In view of this, if the landlord cannot offset or reclaim its VAT, there could be a financial advantage to a VAT registered tenant in undertaking dilapidations works before the end of the term. The tenant might then be able to offset the input tax that its contractors and professional advisers charge against its output tax. By doing the works, the tenant would avoid liability for damages equivalent to the landlord's VAT charge that it could not treat as input tax. Having said this if the tenant carries out works it might render the disposal of the reversionary interest subject to VAT without recovery for the purchaser on the basis that the works were carried out "on behalf of" or "for the benefit of the landlord". The VAT cost of the consequences of the freehold becoming subject to VAT without the purchaser having the ability to recover it would far exceed any perceived benefit for the tenant of saving the VAT on the dilapidation re-instatement works.

As always we would comment that the above points have been provided for general information only. Should you have a specific query in relation to how VAT may be applied or not as the case may be to a dilapidations claim; you should seek advice from a qualified Tax expert.

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## **Appendix F: References to legislation.**

### **Legislation References**

Landlord and Tenant Law Amendment (Ireland) Act 1860 (Deasy's Act)

Conveyancing Act 1881 and 1882

Landlord and Tenant (Amendment) Act 1980

Housing (Miscellaneous Provisions) Act 1982

Residential Tenancies Act 2004

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## **Acknowledgments**

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