

SME's Property Series Session II Dilapidations

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Owner / Occupant

Freehold or leasehold

Assuming leasehold

- More onerous
- No choice
 - E.g.. Redecorate every three years
 - Clean windows every month
 - To keep / to put in repair

Taking on a leasehold interest

- **New lease**
- **Sub lease**
- **Assignment**

Existing building / new building

- Condition
- Implications of condition
- Surveys
 - Building survey
 - Planned maintenance inspection
 - Schedule of condition
 - 3 views
- Limiting the obligations

The Lease

- **Full Repairing and Insuring FRI**
- **Internal Repairing and Insuring IRI**
 - Very similar, but not standard
 - Obligations will vary
 - Review in detail
 - Amend
 - Redraft

Basic Principles

- Firstly

- **What is a schedule of dilapidations**

A Schedule of Dilapidations is a document which sets out the works that a tenant is required to do in order to comply with the repairing obligations of his or her lease.

- Unique term
- No special status
- Often confused, SOC, SOW

Typical Repairing Clause

- **Actual**

“To repair and keep the demised premises and all additions thereto and all landlords fixtures therein in good and substantial repair and condition”.

- **Landlords Interpretation**

“Well and substantially to repair the demised premises and maintain and keep them in good and substantial repair and condition and whenever necessary to rebuild them notwithstanding that the relevant work may be necessitated by some inherent or latent defect and to replace the Landlords fixtures and fittings in the demised premises which have become beyond repair”

- **Tenants Interpretation**

“To maintain the demised premises in a reasonable state of repair and condition taking into account their age and present condition Provided Always that the tenant shall not be liable for fair wear and tear, damage by insured risks, damage from latent or inherent defects and for the avoidance of doubt shall not be liable to put the demised premises into any better state of repair and condition than that existing at the date hereof”.

- Rebuilding versus lick of paint
- Answer lies in-between
- Dependant on the particular term

When would a Schedule of Dilapidations be served

- Basically any time but....
- **Interim Schedule**
- **Terminal or Final Schedule of Dilapidations**

Why serve a schedule of dilapidations

Perhaps more importantly, why.

1. End of the lease.
 2. Assignment.
 3. Break option
 4. Rent review.
 5. Maintain value of interest.
- Many reasons but important to know why
 - 25 pages versus 10 items
 - Remember any relationship will be damaged
 - Timing
 - Game plan
 - Tenants complain of late service

Example of Schedule of Dilapidations

- preparing schedule
- detailed inspection, accessing all parts e.g., Attics, roofs
- guidance note

Item No.	Clause No.	Breach of Covenant	Remedial Action	Costings
<u>FOURTH FLOOR</u>				
Ceilings				
1.	2.5	Numerous tiles were water stained and damaged to various isolated areas throughout the ceiling grid and in the vicinity of the projecting bay windows along the side elevations.	Replace all stained and damaged tiles with tiles to match existing.	€1,200
Walls				
2.	2.13.1.4	The open plan office layout has been sub divided by tenant installed partitioning to form various offices and ancillary rooms.	Strip out the demountable partitions and make good any damage caused by their installation and subsequent removal.	€4,010
3.	2.8	Various isolated scuffs and scratch marks evident to wall finishes throughout with numerous hairline cracks noted to paint finish.	Thoroughly sand down prepare for and repaint walls throughout.	€2,280
Floor				
4.	2.25	Floor covering heavily soiled and worn along main traffic area throughout office.	Strip out floor covering throughout and replace with new to match existing.	€10,944
Internal Doors and Joinery				
5.	2.5	Window boards have become damaged in various areas with cracking also noted at junction between reveals and window board to various isolated areas.	Thoroughly sand down, prepare for, rake and fill cracked junctions at reveals and window boards.	€400

The Responsibilities

- What to include? The most crucial part
- Must come under the umbrella of the lease
- Responsibility, the R's
- Two categories
- **Redecorate** – separate clause
- **Repair** – main issue, - to put, to keep, to leave, to yield up, any differences?
- **Regulations** – standard public authority clause
 - fire regulation, not cart blanche
- **Reinstate** – potentially very onerous
- **Renew** – less frequent but can be very onerous
- **Rebuild**
- **Restore**
- **Replace**
- Some or all will arise
- Misconception if the same formula
- Individual circumstances
- Expert in construction, strong legal understanding, eg. Expert in Health & safety, Building Regs, Planning
- Guidance Note, refer to clause

Pricing / Negotiating a Schedule

- Separate exercise
- If lease still running then tenant has two options
 - To either execute the works
 - Or make a financial settlement
- If lease has expired then only option is a financial settlement
 - Costs not relevant in an interim situation
 - Only an issue for the tenant
 - Landlord doesn't care if it's €1,000 or €10,000

Responding to a schedule – Scott Schedule

- Author not an expert

- Grey areas

- Negotiating stance

- Try on / bully

- Therefore response required

(2 experienced surveyors should get to conclusion, misguided, unreasonable and bullies, easier to respond, based on SS)

Item No	Landlords Claim	Landlords Estimate	Tenants Response	Tenants Estimate	Agreed Figure
1.7	Clean / wash down entire facade of front brickwork.	2,420	Refuted. Firstly there is no requirement in the lease to clean external facades of the building. Secondly the external facade is relatively clean and relies on natural weathering (rain) for the natural washing of the facade. The Conservation department would normally frown upon a proposal to clean a building simply for the sake of cleaning it, and such cleaning would normally only be carried out in the context of associated remedial work. To clean a building of this nature would require planning permission and we understand in fact that the landlord has since been granted planning permission for this and they are now perfectly entitled to carry this work out at their own expense should they so desire.		
1.16	Entrance door to basement level is of poor quality - new hardwood door required. Ref: B/D03	800	Refuted. Firstly the door is clearly an early feature which predates the lease, and if it were of poor quality, there is no obligation under the terms of the lease to replace this on the basis of quality. Secondly and in any event the quality is fine and the door has performed very well for years and is still in satisfactory condition. There is some decay to the frame and the decayed section should be replaced and the entire cleaned down and redecorated.		
3.4	Strip out storage heating	See 3.1	Refuted. No breach of lease. No requirement to strip out heating. In fact there is a specific requirement under Clause 18 to yield up the storage heating. Furthermore the storage heating is relatively new and in good condition.		
3.5	Treat rising dampness throughout basement level. This will include stripping off all plasterwork on walls and treating exposed masonry / brick walls with Heidi applied by specialist followed by replastering to specification.	38,000	Refuted. Rising dampness by its very nature is an inherent defect in a property of this nature and this has obviously been going on for years and long before the lease started. The tenant is not responsible for addressing inherent defects and such a requirement would constitute an improvement for which the tenant is not responsible under the repairing and yielding up obligations of the lease. Furthermore, but only of academic interest, it would not in our opinion be appropriate to introduce a Heidi type treatment into a historic and protected building of this nature. No doubt our clients Conservation architect will comment further on this item. Our client is however prepared to accept responsibility for a basic / nominal allowance for some plaster repairs as part of a normal preparation for redecoration.		
3.6	Apply additional plaster fireline slab to entire basement ceiling to bring up fire rating to 1 hour standard. Any future lighting will be uplighting or suspended fittings. No puncturing of ceiling slab will be tolerated. Note - There are no cornices in this area	4,785	Refuted. Note breach of lease. This is obviously a request to upgrade the fire resisting standard of the building which would constitute an improvement. The tenant is not responsible for improvements of this nature under the terms of the lease. Such a requirement, which is dubious in origin and content might only become necessary in the context of one undertaking a material alteration to the building or in the context of a change of use. Clearly as the lease is now over, the tenant has no intention of carrying out any material alterations or of changing the use of the premises and accordingly the tenant is not responsible for such an improvement of this nature. Furthermore we would have to question the appropriateness of works of this nature in a protected structure. (See also item 4.4 below where there is a further attempt on behalf of the landlord to upgrade the fire resistance of the floor from above which is equally unnecessary and not the responsibility of the tenant for the reasons outlined).		
4.12	All cornices have been painted without correct preparation. Stripping off paintwork before painting to be looked at. These cornices are not intricate and may not need this attention.		Refuted. The cornices have been more than adequately prepared and have been painted regularly as required under the terms of the lease. The landlord simply cannot call for all of the earlier coats of paint to be removed at this stage. However as it is clear that the landlord will want to go to this extreme, and which to be fair is very commendable in terms of appropriate "restoration" of character, then it is obviously foolish and a waste of resources for the tenant to take on the decorations for which they have direct responsibility i.e. the addition of two coats of paint, which would only have to be removed with all of the other previous coats of paint over the years. In effect the landlord will not suffer any loss by the lack of decoration by the tenant and thus there is a very strong case to be made that the tenant refute responsibility for any decoration works here at all. Whereas the actual cost of the tenants responsibility is shown here, this should really be factored in and lead to a reduced financial settlement in lieu of executing the work.		

Potential Mitigating Factors

- Condition at commencement of lease (what if no soc?, 10 yrs V 35 yrs, age, character & location)
- Continuing, roll over of lease, which lease is relevant? (helps with reinstatement)
- Will the work be done? (Lower Mount Street, €40K to €5K)
- Is there a loss? (Demolition, refurbishment, rent)
- Supersession (no Irish law, lift / heating)
- Diminution in value (section 65, simplistic, only caps the repair and possibly redecorations)

Diminution In Value

- E.g. lets say building is worth €2,000,000
in good condition but only
worth in it's current state of
repair. €1,800,000
- Value of dilapidations claim (portion only)
is capped at €200,000

Responsibility Versus Common Sense

- Surveyors are reasonable after all
- More often than not the requirement for repair is often far from a common sense answer. E.g.. single glazed timber window frame in poor condition
- Lets say €200 to repair
- By comparison lets say replacement double glazed uPVC window cost €400.
- Better to give €150 to landlord on account rather than €200 spent on repairing the old window.
- A bird in the hand is worth two in the bush.





VAL O'BRIEN & ASSOCIATES

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- Building Surveys
- Snag Lists
- Schedules of Dilapidations
- Schedules of Condition
- Building Defects Analysis
- Reinstatement Cost Assessment Valuations

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