LIABILITY FOR DILAPIDATIONS

A. The extent of the obligation to repair

1. In construing a repairing covenant, regard is had to the age, condition and nature of the building at the time of the letting and the length of the lease. Accordingly, the standard will vary from building to building and location to location. The longer the lease, the greater a liability a tenant is likely to have agreed to under its repairing covenant as there is more likelihood of serious disrepair occurring and replacement being necessary.

2. Where the initial landlord is the developer, and the landlord is responsible for repair as the premises are multi-let (such as a Block of Flats), then the repairing obligation will be more onerous as it would have been intended to cover design and workmanship deficiencies as well as any material defects (see Hunt –v- Optima (Cambridge) and Strutt & Parker (29 April 2013)).

3. Since an obligation to keep in repair incorporates an obligation to put the premises into repair, a tenant cannot ordinarily rely on any disrepair at the time of the letting so as to lessen its repairing liabilities. The premises are to be treated as if they were in repair save where the Lease incorporates a Schedule of Condition limiting the tenant’s repairing liability to re-instating the premises to no better condition than they were to begin with.

4. Repair should be to a standard to make the premises fit for occupation by a reasonably minded tenant of the class who would be likely to take a letting of the premises at the commencement of the Lease (see Sunlife Europe –v- Tiger Aspect (7 March 2013) and Twinmar Holdings –v- Klarius UK (19 April 2013)). There will be a greater obligation where premises were new at lease commencement.

5. An obligation to repair only covers the remediating of any damage or deterioration to the property. The repairing obligation will not normally be triggered just because any item has become unsuitable, inefficient or insufficient or does not meet the requirements of any incoming tenant.

6. It is very important to understand that account must be taken of the ageing process. A repairing obligation does not normally require the tenant to maintain the premises in perfect condition or to return them at the end of the lease in as good condition as they were at the start or with the same life expectancy (however note Twinmar Holdings –v- Klarius UK where it was held that “rooflights must be, so far as maintenance and repair can do it, in the condition they were at lease commencement. In other words, they must be capable of letting in about the same amount of light and must be structurally sound and weatherproof”.

7. It is important to also understand that a tenant is not liable to undertake “preventative work”. Just because something is old and likely to fail in the near future does not mean it...
is in disrepair. If, as at lease expiry, it is continuing to perform its function and it is not yet in disrepair, then the outgoing tenant will have no liability to undertake any works. In Westbury Estates -v- RBS (2006) it was made clear that the test for disrepair was not whether the plant was less efficient than modern equivalents.

8. A tenant is liable to undertake such method and mode of repair that a sensible surveyor would adopt. The test is what the reasonable tenant would do in order to make the premises reasonably fit for occupation.

9. Repair may involve remedying the underlying cause of the disrepair as the only sensible way of making good the damage. For example, in Westminster -v- F&C (2005) the repairs including inserting expansion joints into the cladding as no competent engineer would have re-erected the cladding without including expansion joints even though they were not included originally.

10. A tenant must act in accordance with good building practice and comply with such regulations as may be applicable (Ravenseft -v- Davstone (1980) QB 12). Even where the building regulations do not apply, the Court may nonetheless proceed on the assumption they represent good practice. In Lurcott -v- Wakely (1911) 1KB 905, a tenant was held liable to rebuild a wall and to incorporate proper footings and a dpc in accordance with the regulations. Additional work necessary to comply with regulations will amount to repair where the defects cannot be properly or lawfully remedied any other way.

11. If the only realistic or reasonable way to remedy the defect is to replace the item in disrepair rather than repair it, then the tenant is liable to replace the item (Stent -v- Monmouth (1987) 54 P&CR 193). In Roper -v- Prudential Assurance (1992) 1EGLR 5, an obligation to repair was held to cover the re-wiring of the premises. Where patching is not a reasonable method of dealing with the disrepair, the obligation to repair can only be fulfilled by replacing the part concerned.

12. It is a question of fact and degree whether works required go beyond repair. Works may not be repairs if they would involve giving back to the landlord something quite different to that which was demised. For example, a tenant may not be liable to replace faulty foundations where the works would involve installing new and different foundations and the costs would be nearly as much as the building was worth.

13. The additional requirement in a repairing obligation "to renew" adds little to the expression "repair" (Collins -v- Flynn (1963)).

14. Works that involve improvements may still be repairs. Repair almost inevitably involves some element of renewal or improvement. If the works involve the replacement of something already in the premises which has become dilapidated or worn out, then, albeit the works involve replacing the item with its modern equivalent, it comes within the category of repairs and not improvements (Morcom -v- Campbell-Johnson (1956)1KB 106).

15. In many cases, particularly where the premises are not modern, the most appropriate way of remedying the disrepair may be to employ a more up-to-date design and/or employ modern methods and materials. In Elite Investments -v- Bainbridge (1986) 2EGLR 43, a tenant was held liable to replace a roof made of corrugated galvanised steel with polyvinyl chloride coated corrugated steel sheeting. In Postel Properties -v-
Boots (1996) 2EGLR 60, the replacement of the flat roof coverings of a shopping centre with thicker insulation and a higher specification cap sheet came within the repairing covenant. In Minja Properties v Cussins (1998) 2EGLR 52, the replacement of single glazed windows with double glazed windows was held to be repair.

16. Where a particular item of plant is at the end of its useful life, it may require replacement. Where an exact replica cannot be found or would not be in accordance with good practice or the regulations, replacement with the most modern equivalent may be required even though this involves improvement. Plant and machinery will often have a shorter lifespan than the length of the lease so it is within the contemplation of the parties that it may well require complete replacement and that, at that time, a better alternative may be available.

17. Plant and equipment must perform their intended function in a proper, safe and reliable manner (Ultraworth v General Accident (2000) 2EGLR 115). The fact that plant and equipment or any item may not be in accordance with current regulations or requirements does not mean that it is out of repair so long as it is functioning satisfactorily. The fact that plant and equipment may have exceeded their likely or predicted lifespan does not mean they are out of repair.

18. If there is more than one possible method of repair that would satisfy the covenant, the choice is for the paying party to make so, if it is the tenant, it can choose the cheapest option. Replacement will only be required where repair is not reasonably or sensibly possible. See Sunlife Europe v Tiger Aspect re the tenant being "entitled to perform his covenants in the manner that is least onerous to him".

19. A tenant needs to call expert evidence where disrepair is disputed as, in the absence of evidence to the contrary, the Court is entitled to infer that remedial work is necessary (Sunlife Europe v Tiger Aspect).

20. A landlord can still recover the costs of repairs even though he may take the option to upgrade rather than repair the damaged item. If the landlord would not have upgraded if the item had been left in repair, then the repair costs can be claimed (Latimer v Carney and Carmel Southend v Strachan & Henshaw).

21. In Van Dal Footwear v Ryman (2009) the landlord, rather than undertaking repair to an existing 17th century fabric, decided to replace it with modern material and was unable to recover anything as the Court held this was not a reasonable repair but a replacement.

22. A covenant to keep in good and substantial repair does not require the property to be put into perfect repair. Where there is also an obligation to keep the property in good and substantial condition, as well as repair, this can require improvements to be made to rectify inherent defects (Credit Suisse v Beegas Nominees (1994)).

23. Leases and Licences for Alterations frequently include a requirement for re-instatement of alterations on the expiry of the Lease. Sometimes, the tenant is only under an obligation to re-instate if the landlord so requires and, if the landlord does require re-instatement in such a case, it is important it gives notice to this effect before the Lease expires. If a landlord only gives notice shortly before lease expiry, a tenant may be entitled to remain in occupation after the expiry date in order to complete the re-instatement works. Often alterations add to the value of the premises and a landlord can
only recover damages for a failure to re-instate if this actually causes it a loss i.e. if it has to carry out the re-instatement works.

24. There are frequent disputes as to whether a tenant is liable to remove fixtures it has installed? Frequently, leases do not actually require their removal. However, a tenant who leaves a fixture or fitting is liable to leave it in repair as it is treated as being part of the premises so a tenant may incur a greater liability by leaving rather than removing something it has installed (such as air-conditioning or non-demountable partitioning).

B. **Extent of liability for damages for Terminal dilapidations**

25. S.18 (1) of the Landlord and Tenant Act 1927 limits damages for breach of a repairing covenant to the diminution in value of the reversion caused by the disrepair at the date of expiry of the lease. In the event that the landlord has a firm and settled intention to pull down the premises, or to undertake such structural alterations as would render valueless the repairs, at or shortly after the termination of the tenancy, no damages are recoverable.

26. The question to be answered is how much has the market value of the reversion been diminished as at the lease expiry date by reason of the disrepair? How much less would a purchaser in the market at that time pay for the premises because they are in disrepair? The required exercise is as explained by Luxmoore J in *Hanson v Newman* [1934] Ch 298; “you take the value of the reversion as it is with the breach… and you take it as it would be if there were no breach. And you provide that the amount of damage shall not exceed the amount by which the value of the property repaired exceeds the value of the property unrepaired.”

27. Events occurring after the lease expiry date cannot be relied upon to increase or reduce the damages payable but they may still be relevant in establishing what any hypothetical purchaser would have done. The Court may have regard to actual stance of an incoming tenant (*Latimer -v- Carney (2006)*).

28. Where the landlord has done, or intends to do, the remedial works, the cost of the works is prima facie evidence of the damage to the reversion.

29. Various recent attempts by landlords to recover the cost of improving premises by replacing items (normally the roof) rather than simply carrying out patching repairs have failed (*Riverside Property -v- Blackhawk Automotive (2004)* and *Carmel Southend Limited -v- Strachan & Henshaw (2007)*). More recently, a claim for replacing cladding failed on the basis the existing cladding could be repaired (*PFG -v- un Alliance (July 2010)*).

30. Where premises are left in disrepair, and the landlord takes the opportunity to improve the premises by, say, putting on a new roof rather than repairing the old one, the landlord can still recover the costs of repairing the roof if it can establish that, left in repair, it would not have replaced it.

31. Loss of rent will only be awarded where the landlord can show a direct connection between the disrepair and the loss of rent (*Scottish Mutual -v-British Telecom*).
32. If a sub-tenant is going to hold over and accept repairing liabilities going forward, then there may well be no diminution in value, and no damagesrecoverable, for that part of the premises.

33. Interest is recoverable at the rate the landlord would have expected to pay if it borrowed the monies to undertake the works. In PFG –v- Royal & Sun Alliance it was awarded at 3% above LIBOR and in Sunlife Europe –v- Tiger Aspect at 3% and in Twinmar Holdings–v- Klarius UK at 3% above base.

34. Landlords should seek maintenance records and other relevant documentation from the tenant before deciding what M&E works are required.

35. Landlords should be careful about obtaining advice in writing as to the extent of works required and as to possibilities for redeveloping/refurbishing the premises as these may all have to be disclosed in any proceedings and may prejudice the claim.

36. There is now an updated Pre-Action Protocol for Terminal Dilapidations Claims. It provides detailed guidance as to how claims should be presented and progressed in an effort to save costs and avoid litigation. It provides for the landlord’s surveyor to include an endorsement in the Schedule of Dilapidations to the effect that all the works are reasonably required and that account has been taken of the landlord’s intentions for the property in determining what works need to be undertaken. Accordingly, it is important for a landlord to make clear to its surveyor what its intentions are for the property and whether it does intend to simply repair the property or to carry out works of refurbishment or redevelopment. A landlord need not wait until the lease expires to do the works. Most leases allow a landlord to enter and do the works itself if the tenant fails to do so. This can be a very effective threat and can secure either the undertaking of the work or a good financial settlement.

C. Liability for inherent defects

37. A letting of commercial property incorporates no implied warranty that the premises are fit for the purpose they are let. The doctrine of caveat lessee ("lessee beware") applies.

38. There is no term to be implied in a Lease that the landlord will remedy pre-existing defects in the structure or adjoining premises.

39. An obligation to keep premises in repair incorporates an obligation to put premises into repair where there is deterioration from a better condition. If there is no deterioration from any better condition (i.e. the defect is inherent) then there is no disrepair. It matters not whether the original defect is down to bad design or bad workmanship. A party is not generally liable to carry out improvements or to carry out works to make the property a different thing to what was demised.

40. Where there is an inherent defect in the structure of the property but no deterioration occurs, and no damage is caused to any other part of the structure, then there will be no liability to repair. Disrepair is related to the physical condition of whatever has to be repaired, and not to questions of lack of amenity or inefficiency.

41. If there is an inherent defect in the structure and damage is caused to other parts of the property, then liability will be as follows:-
a) Where landlord is liable to repair the structure and tenant is liable for interior (including plasterwork) then landlord likely to have no liability and tenant likely to be liable to repair interior and, possibly, carry out improvements to prevent further damage.

b) Where landlord liable to repair structure and plasterwork, then landlord will be liable to repair damage to plasterwork and this may involve carrying out improvement works. The same applies to a tenant if it is responsible for structure and plasterwork.

42. The following cases (which all relate to water ingress) illustrate the position and show how difficult it is to hold a landlord liable for original design or workmanship failures:

**Pembery v Lamdin (1940)**

Shop premises on ground floor with cellar were let and there was no damp proofing at all. The bricks were porous and extensive remedial work was required. Landlord held not to be liable as works would involve giving the tenant a different thing from that which was demised.

**Elmcroft Developments v Tankersley-Sawyer (1984)**

Flats suffered from rising damp due to a defectively installed and/or designed slate dpc. The remedial works necessary involved the installation of a horizontal damp-proof course by silicone injection together with vertical barriers where external walls met the dividing walls.

The landlord was liable to keep the exterior and main walls in repair and it accepted that the plasterwork was damaged and it was liable to repair the plaster. The Court of Appeal held that the landlord was liable to carry out the dpc works to cure the damp. Patching work to repair the plaster time and again would not suffice and it was more economical to do a once and for all proper repair even though this involved improving the property. The fact that the properties were newly let residential flats appear to have been an important factor in favour of the tenant.

**Post Office v Aquarius Properties (1986)**

The basement of a newly constructed office building leaked when the water table rose and became ankle deep in water. No actual damage was caused to the building itself.

The defect was due to poor workmanship resulting in weakness in the concrete so it was porous in parts.

The tenant had a full repairing liability under their lease but denied they were liable to repair the concrete. As the defect was pre-existing and there was no deterioration, Court of Appeal held there was no disrepair.

Court left open question as to whether tenant would have been liable to repair the defect if there was consequential damage to plasterwork or electrical fittings. It would depend on circumstances and extent of works.

This case was relevant to rent review. The tenant wanted to establish that it was not liable to repair the defect so it could rely on it to reduce rent on review.
Lee-*v-* Leeds City Council (2002)

Local authority flats suffered from damp which produced mould and condensation. Plaster was not damaged and problem was due to original defects and what was now required was treatment with a fungicide and redecoration with a fungi check system.

Local authority was responsible for repairs to structure and exterior.

The Court of Appeal confirmed that repair can involve not only the making good of the immediate occasion of disrepair but also, if sensible, the elimination of the cause through making good of the inherent defect where this does not involve substantial rebuilding of the whole.

However, as there was no deterioration of structure or exterior, local authority had no liability to treat the damp.

Janet Reger International -*v-* Tiree (2006)

The tenant suffered dampness in basement of a newly constructed building. There was no damage to brickwork structure but there was damage to plasterwork and Amtico flooring.

The damp proof membrane had not been correctly installed and was not continuous so water could penetrate. There was no damage to the membrane itself.

The landlord was responsible for maintaining the structure but the tenant was liable for the plasterwork.

The Court held that the landlord had no liability to replace or extend damp proof membrane. There was no deterioration so no disrepair. In fact, the tenant was liable to protect the interior under its repairing covenant which required it to put and keep the demised premises in good and substantial repair and condition. Accordingly, the tenant was liable to line the interior faces with waterproof material.

Even if there had been some deterioration to the brickwork, this would not require any works as it would have no adverse effect in itself. The Court recognised that some deterioration from time of first construction is inevitable and does not give rise to need for repair.

Jackson -*v-* JH Watson Property Investment (2008)

The tenant's flat suffered water ingress due to construction failings in concrete of adjoining light wells.

As there was no disrepair, tenant framed his claim in nuisance.

Court held landlord not liable as the principle of caveat lessee applied. A tenant has to take a property as he finds it. There is no warranty of fitness from the landlord.

 Accordingly, a tenant taking a letting needs to seriously consider the following options:-

(i) Seeking to include wording in the lease to make the landlord liable to repair any inherent defects;
(ii) Obtaining a survey to establish if there are any such defects;

(iii) Obtaining collateral warranties from contractors and professionals where property is a new build or recent conversion;

(iv) Ensuring that the rent review clause does not include any assumptions which would negate the effect of any inherent defect on the rental value of the property.

(v) Insuring against the risk

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ADDENDUM RE POINTS TO LOOK OUT FOR

1. Watch out for provisions providing for i) landlord's surveyor to quantify dilapidations liability based on costs of works and ii) rent to be paid for period of works – both probably void under S.18 (1) of 1927 Act or as a penalty (as liability should be limited to actual diminution in value caused to the premises by the disrepair).

2. Seek to limit landlord's ability to do or permit works to common parts or adjoining properties which will materially interfere with the tenant's enjoyment of the premises.

3. Seek to include rights as to light and air in any letting for any length of time.

4. Don't agree conditional break clauses dependent on any repairs or other works being undertaken.

5. Try to ensure any re-instatement notice has to be served 6 months before Lease expiry.
"REPAIR ; what does full repairing, dilapidations, yielding up and schedules of condition actually mean and how can the humble acquiring agent best push his client's case in Heads of Terms?

1. Full repairing – what does this mean?

See Part A of detailed note attached. In essence,:-

a) It means putting the premises into repair if out of repair.

b) It involves keeping the premises in repair and yielding it up at lease expiry in the repair that it was in at the start of the Lease (so that the premises would be fit for occupation by a tenant of the class who would be likely to have taken a letting at that time).

c) The standard of repair required will depend not only on Lease wording but the nature of the building and length of the lease. The more salubrious the location, or the longer the Lease, the higher the standard of repair required.

d) It requires undertaking the requisite decorations and maintenance of plant and equipment during the Lease.

e) And it also involves complying with all relevant legislation (but only insofar as it applies to any disrepair). Rarely will legislation require improvement works or works to any item in good repair or operating satisfactorily.

f) Repair can involve improvement as the Court does not like futile or short term works and would expect any works to be undertaken in accordance with how any reasonable surveyor would advise as being most appropriate in light of more modern alternatives and current standards.

2. What is dilapidations?

a) It is damage or deterioration that triggers the tenant's repairing or decorating obligations.

b) An item is not in need of repair because it is aged or inefficient or outdated.

c) And a tenant usually has no obligation to carry out preventative work (other than to reasonably maintain plant and equipment). So, if a boiler is operating satisfactorily at lease expiry but will only do so for another year, the tenant has no liability to replace it as it will not require replacement during the term of the Lease.

d) But, pursuant to S.18 (1) of the Landlord and Tenant Act 1927, disrepair only triggers a dilapidations liability if it reduces the value of the premises. If the disrepair is
academic because the premises will be redeveloped or fitted out differently by a new tenant, then any liability may well be superseded.

e) It can involve re-instatement of alterations but, if the alterations add to the value of the premises, then there will be no liability as the landlord will benefit from them remaining.

3. What does yielding up mean?

It means giving back the premises by the lease expiry date with vacant possession.

Yielding up in repair and in accordance with all covenants is self-explanatory but rarely done in practice- hence the large number of terminal dilapidations claim.

4. What's the point of a Schedule of Condition?

It means that the tenant does not have to put the premises into repair and only has to maintain and yield it up in its existing state. But this means that the tenant has to occupy a building in a state of disrepair. It can't hold the landlord liable to repair it. However, as any tenant may well require full repairs undertaken, a tenant can often escape any repair liability under a Schedule of Condition as the whole premises will need substantial works on lease expiry.

5. And what should the humble agent do to best push its client's case in the Heads of Terms?

a) Consider if a Schedule of Condition can be negotiated?

b) Recommend a survey and get the client to actually read it.

c) Cap any service charge liability for repairs and limit ability of landlord to do major works at very end of the Lease.

d) Exclude liability for inherent defects.

e) Seek warranties from landlord's professional team if a new building.

f) Agree alterations without any re-instatement requirements or make re-instatement only insofar as reasonably required.
5 QUESTIONS

1. A tenant leaves the roof in disrepair. It can be patch repaired for £20,000 or replaced for £40,000. The landlord replaces the roof. What amount can it recover from the tenant:-

   a) £40,000 - no, tenant not liable for improvements.
   b) £20,000 - yes, if landlord would not have replaced the roof if tenant had patch repaired it.
   c) £0 - yes if landlord would have replaced roof even if left in repair.

2. A tenant leaves a 3 storey office building in bad disrepair. The Landlord decides that, rather than spending £1 m on repairs, it will spend £2 m on converting it to residential use. What amount can the landlord recover?

   £1 m if premises would have been worth more in repair as offices than as residential. Nothing (save perhaps for stripping out and some external repairs) if any landlord would convert to residential come what may.

3. A tenant has carried out substantial alterations and is liable to re-instate if the landlord so requires. The landlord serves notice requiring re-instatement on the day before Lease expiry. What should the tenant do?

   The notice will be valid but tenant can ask for additional time beyond Lease expiry to carry out the works (but will probably have to pay rent for this additional time)

4. A tenant of retail space wants to reconfigure the premises but the Lease prohibits structural works? What can the tenant do?

   Rely on Part 1 of Landlord and Tenant Act 1927 if works constitute improvements as landlord can't object if they will add to the letting value of the premises. Or, if a lease for more than 40 years with over 25 years expired, apply under s.84 (12) of Law of Property Act 1925 to modify or discharge the restriction on alterations and/or user.

5. A substantial tenant is letting the premises fall into bad repair and the Lease still has many years to run. What remedies are available to the landlord?

   Can enter if Jervis-v Harris clause and do works at tenant's expense (although many practical issues may arise in doing works around the tenant) or can seek to forfeit but will need Court's permission under Leasehold Property (Repairs) Act 1938 if Lease is for more than 7 years with 3 years unexpired.