Independent Retail News

# Managing the risk of property disrepair

What are the obligations of a retailer to keep their leasehold property in good repair and what should business owners do to mitigate the risk of a claim from their landlord?

## The problem

The terms of the leasehold agreement on my store state that I have to hand back the property in good condition at the end of the lease. I still have several years left on the lease. Do I need to worry about this now, or can it wait?

## The law

Most retail units are occupied pursuant to a lease, usually requiring the tenant to keep the property in good repair. This can prove costly if the tenant takes no steps to manage the risk of property disrepair and simply vacates the retail unit at the expiry of the lease. Ultimately, the landlord may pursue a "dilapidations" claim for many thousands of pounds in damages.

Dilapidations are claims for damages for an alleged failure on the part of the tenant to comply with the repairing (and other) covenants in a lease, which is usually pursued by landlords after tenants have vacated a property at the end of a lease.

The landlord prepares a "schedule of dilapidations" which is served on the tenant. This may be followed by a period of negotiation and a settlement of the claim may be agreed. This simplistic approach can result in unnecessary and significant expenditure by tenants.

## Expert view

The best approach for retailers is to actively manage the risk of dilapidations, and the key to mitigating risk is forward planning. This starts with a detailed analysis of what is required to deliver the property to the landlord in a lease compliant state. Someone needs to take ownership of the process of delivering the property back to the landlord, and should work with solicitors and other specialists to identify precisely what needs to be done to best reduce risk.

There are a number of possible outcomes to this process. Not all will involve undertaking repairs. It may be that a thorough analysis results in the conclusion that there is little risk; instead, some preparation may be required prior to the end of the lease in order to lay the groundwork for defending any claim presented by the landlord.

It is not unknown for tenants (and their advisers) to negotiate with landlords without anyone actually analysing whether there is a genuine claim for losses. Consequently, significant sums are needlessly paid out by tenants. Rather than haggle a deal, the best

approach is to analyse the claim first. Generally, planning and implementing a strategy to mitigate risk at least a year before lease expiry is prudent.

The risk of a dilapidations claim is best managed by a team of experts from various disciplines, brought together sooner rather than later. Managing the risk of a claim for damages may require input from any or all of the following: solicitor, building surveyor, quantity surveyor and valuation surveyor.

## Beware

Two things to watch out for are contingency fees from advisers and interim dilapidations claims from landlords.

Quite often, landlords retain advisers to pursue claims on the basis of ' no win, no fee' arrangements. This gives landlords' advisers a direct incentive to claim as much as possible from the outgoing tenant, which is something for tenants to bear in mind.

Sometimes, landlords take action to enforce repairing obligations during the term of the lease. Tenants should react immediately if a schedule of dilapidations is served by taking expert advice.

Unfortunately, tenants often consider dilapidations are a matter that can be left until the end of the lease. By that time, the landlord may already have taken legitimate and expensive enforcement action and the best opportunity for mitigating the risk of a substantial claim may have been lost.

## Contact

Advice was provided by Richard Robinson, associate solicitor at Shulmans LLP. Richard is a property litigator and specialist in the field of disputes relating to property disrepair.

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