

Relevant documents

When a building has suffered damage or has failed in a particular way, the landlord (and/or their advisers) will need to gather all the relevant documents in order to consider the rights and obligations of each party.

The starting point in considering these obligations is to review and understand all the documentation and information relating to the occupation and maintenance of the building in question. A deficiency of information can lead to inappropriate steps being taken.

The principal document to be reviewed is the [lease](#) (or leases, including any subleases) (or the terms of the tenancy, as some terms may be implied, as opposed to recorded in the lease). Other necessary documentation can include:

- any [licences](#) or other consents for alterations, with plans and specifications;
- any reinstatement notices;
- any other licences or deeds that address the state and condition of the building and the obligations to maintain it (these might include [licences to assign](#) and deeds of surrender);
- side letters or other written agreements including deeds of variation;
- any agreement for lease, if intended to survive the grant of the lease;
- any schedules of condition or building surveys (which may or may not be attached to the lease) or building surveys, together with appropriate photographs;
- schedules of fixtures and fittings or inventories;
- any notices under the [Landlord and Tenant Act 1954](#) ;
- any photographs showing the building in a fully maintained state;
- any plans or drawings of the building;
- current or historic planning consents;
- statutory notices;
- original or current letting or investment sale details;
- evidence of rental values and yields; and
- statement of the landlord's intentions.

For further information on the documentation to be referred to, see section 4, 'Documentation', in the RICS [Dilapidations](#) guidance note (7th edition).

An understanding of these documents should enable the landlord to identify the rights and obligations of each party and to determine whether the particular damage concerned can or should be the subject of a claim or some practical action.

Although an appropriately qualified surveyor should be able to review and understand such documentation, sometimes there are ambiguities or missing elements, resulting in a need to seek legal advice.

As a result of the introduction of the [Land Registration Act 2002](#) , many more leases are registered. Consideration should therefore be given to identifying the 'legal' tenant (that is,

the 'owner' of the leasehold interest). There may have been assignments that could result in a need to register a previously unregistered lease at the [Land Registry](#) . Failure to do so could mean that the assignor (or former tenant), being the registered proprietor of the leasehold interest, will technically remain the legal tenant, even though the parties may believe that someone else has become the tenant. If so, notices and the like will have to be served on the assignor. Care should be taken to ensure that notices or other formal documents are served on the correct person or body by the correct person or body (so the landlord's interest should be checked too). Consequently, some investigation at the Land Registry may also be required.

Leases, licences and assignments

Leases

The overriding objective of a lease is to set out the relationship of the landlord and tenant and to prescribe the basis upon which a property is occupied in order to protect and maintain the value of the landlord's investment in the property (in addition to allowing the tenant to use it for its business). To do this the lease looks at both the physical and non-physical parts of the occupation in relation to the tenant's rights and obligations.

The lease should specify the parties to the lease, the date of commencement and length of the lease, and describe the building or part of the building to be the subject of the repairing obligations and characterise this as the demised premises.

The lease will also set out the express terms of the tenancy, specifying the rights and obligations of tenant and landlord. For compliance by the tenant, the lease will generally contain obligations regarding rent, rates, insurance, the standard of repair expected, decorations, alterations, and statutory compliance, and will also usually stipulate the state and condition in which the property is to be returned at the end of the term. The right of quiet enjoyment is the most significant obligation a landlord has towards a tenant, but there will often be other covenants regarding building insurance and, in the case of multi-occupied buildings, an obligation to repair and maintain the building's common parts (together with details of the service charge mechanism). For further discussion regarding 'standard' covenants contained within typical leases see [Key dilapidations issues](#) .

Each lease is unique in terms of the parties and property to which it relates. Consequently each lease must be read in its entirety in order to establish the precise terms and conditions relating to the tenancy. Interpretation of leases and their obligations is a legal process and any doubt or uncertainty must be referred to a solicitor before giving advice. In appropriate cases, it may be necessary to ask a court to make a declaration as to the terms of the tenancy.

Licences

A licence is a form of permission granted by a landlord to enable a tenant to exercise a right contained within the lease for which express consent may be required. From a dilapidations perspective the most common licences are those relating to alterations whereby the tenant is entitled to fit out or alter the demised premises to suit its occupational requirements. By granting a licence, a landlord retains an element of control over the nature and extent of the work and the extent to which the works have to be reinstated at the end of the lease. Licences frequently contain conditions under which consent is granted.

Assignments

An assignment takes place when a tenant transfers its interest in the property to a third party. Leases frequently contain rights to assign but also often contain conditions on the frequency and circumstances under which an assignment may take place. When a tenant assigns its interest, the lease continues in accordance with the original terms and conditions, however the new tenant steps into the shoes of the old tenant. Subject to when the lease was entered into and the steps that have been taken in relation to the assignment, the old tenant might at this point be released from further compliance with the lease. Often, however, that is not the case, and the old tenant can, perhaps until the next assignment, remain responsible to the landlord for compliance with the terms of the lease, even though it no longer has possession of the building.

Conditions and variations to the lease

Side letters

It is not uncommon for leases to be varied by side letters, frequently in relation to the sanctioning of alterations carried out by the tenant. It must be remembered that side letters are not deeds of variation and bind only the parties referred to in the letter. If a lease is subsequently assigned, the side letter may not always establish an obligation on the assignee as it was not party to the letter.

Deeds of variation

Leases can be altered by consent of the parties by way of a deed of variation. It is therefore essential to ensure that all such variations are identified and considered fully in order to establish the liabilities of the parties under the lease. Although the point is beyond the scope of this section, it is worth noting that, in some circumstances, a variation to a lease can have the effect of releasing a guarantor from its guarantee. The point should be borne in mind if one is advising a guarantor. Also worth noting although beyond the scope of this section is that, in the case of long leases of flats, there is a statutory basis for seeking a variation of a lease in relation to, among other things, the provisions concerning the repair of property (section 35 Landlord and Tenant Act 1987).

Schedules of condition

Schedules of condition can be appended to leases as a record of the condition and state of repair of the building fabric and services at the time the lease was entered into. Frequently leases specifically refer to schedules of condition and state that the intention of the schedule is to limit liability. In the absence of such an expression of intention, the repairing obligation is not diminished by the presence of a schedule of condition. Also, care should be taken when considering schedules of condition as the limitation can be specific to certain covenants and not others.

Where there is a schedule of condition that limits the extent of the repair covenant, then this will set the minimum standard of repair in which the tenant is obliged to leave a particular item. In reality, where an item has fallen in greater disrepair than is shown in the schedule of condition, it may well be that the only way to put the item into repair in accordance with the terms of the lease, as limited by the schedule of condition, is to correct the full disrepair.

In some instances (although this is a matter of fact and degree), the presence of the limitation can give rise to limits to the landlord's claim, due to the effect of diminution in value. This is because when a valuer seeks to compare the difference between a building with some disrepair (as described in the schedule of condition) and a building with more disrepair, it is often not possible to distinguish between the two.

Schedules of condition are useful records of the arrangement of a building at the beginning of the term, and therefore of the extent of the landlord's fixtures and fittings. Unless the lease specifically records otherwise, where a partition or other fitting is present in the schedule, the landlord will not be able to seek its subsequent removal.

Statutory right to renew

The [Landlord and Tenant Act 1954](#) gives business tenants an automatic right to renew their lease on condition that the provisions of the Act have been followed. It is not necessary for dilapidations surveyors to know the procedural details of 1954 Act renewals. However, they should be aware that such a right exists as occasionally the rights overlap with dilapidations cases. Where 1954 Act renewals apply, advice should be sought from solicitors. The implications of renewal leases and those which expressly exclude the Act need to be appreciated. For example, if, say, a tenant has been given permission to alter the building, unless there is an obligation on the tenant to reinstate those alterations at the end of the lease (which is enforced), when the renewal tenancy is entered into, the alterations generally would become part of the demise and so, when the renewal lease itself expires, there might not be an obligation on the tenant to remove them but perhaps only to leave them in a state of repair that accords with the tenant's repairing obligations.

Some leases allow the term to be extended or the lease renewed at the tenant's discretion. These leases also often have conditions precedent that operate in the same manner.