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# **Dilapidations: The latest judicial thinking**

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## **Introduction**

1. One of the most recent dilapidations decisions of which I am aware is the judgment of the Deputy High Court Judge in Coldunell Ltd v Hotel Management International Ltd [2022] EWHC 1290 (TCC). The decision usefully records a number of fundamental principles of leasehold dilapidations law. In that sense, it does not exemplify anything novel – but it is nevertheless helpful in providing a cogent summary of the law (as well as illustrating the perils of partial expert evidence). It also prompts an analysis of the impact of the obligation to comply with statute.

2. The decision in Coldunell concerned The Mitre Hotel, Hampton Court Road, Hampton Court, Surrey, located opposite the main entrance to Hampton Court Palace. The Hotel dates back to the 1660s. It had been let to the Defendant under a 20-year lease expiring in 2014, containing standard tenant’s repairing obligations. At the end of the term, the Defendant applied for the grant of a new tenancy, but its proceedings were ultimately compromised, and it delivered up possession in 2016. The Claimant then commenced a programme of works, served various schedules of dilapidations upon the Defendant, and issued proceedings for damages in 2020.

3. The parties were divided concerning the application of the principles derived from the authorities, but not as to the principles themselves, which they agreed, as follows.

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### **The hallowed principles of dilapidation**

4. First, the standard of repair imposed by a covenant to repair is such repair as, having regard to the age, character and locality of the premises would make them reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take them: see Proudfoot v Hart (1890) 25 QBD 42 at [52] per Lord Esher MR (and at [55] per Lopes LJ):

“Lopes LJ has drawn up a definition of the term “tenantable repair” with which I entirely agree. It is this: “‘Good tenantable repair’ is such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it.” The age of the house must be taken into account, because nobody could reasonably expect that a house 200 years old should be in the same condition of repair as a house lately built; the character of the house must be taken into account, because the same class of repairs as would be necessary to a palace would be wholly unnecessary to a cottage; and the locality of the house must be taken into account, because the state of repair necessary for a house in Grosvenor Square would be wholly different from the state of repair necessary for a house in Spitalfields. The house need not be put into the same condition as when the tenant took it; it need not be put into perfect repair; it need only be put into such a state of repair as renders it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it.”

5. Secondly, the covenant to repair does not require the property to be kept in perfect repair or pristine condition: Riverside Property Investments v Blackhawk Automotive [2005] 1 EGLR 114 at [54] per HHJ Coulson QC (as he then was); it therefore follows that a tenant is not required to attend to every defect, however minor.

6. Thirdly, the tenant is not required to return the premises in the same condition as they were let: Mason v TotalFina Elf UK Ltd [2003] 3 EGLR 91 per Blackburn J. The obligation was to keep the Premises in good and substantial repair and condition and not in the same condition.

7. Fourthly, the date for assessment of damages is the date on which the lease comes to an end, although the standard of repair is to be judged by reference to the time the lease was granted: see again Mason, and Anstruther-Gough-Cathorpe v McOscar [1924] 1 KB 716.

8. Fifthly, the covenant does not require the tenant to deliver up the property with new equipment or equipment that had any particular life expectancy but with equipment kept to a standard to be judged by reference to the condition of the equipment and fittings at the time of the demise: Sunlife Europe Properties v Tiger Aspect Holdings [2013] EWHC 43 (TCC).

9. Sixthly, the age of the building is of particular importance in ascertaining the required standard of repair, in two ways. First, as above, the standard of repair is that appropriate to the age of the building. To quote Atkin LJ in Anstruther-Gough-Calthorpe:

“Time must be taken into account: an old article is not to be made new; but so far as repair can make good, or protect against the ravages of time and the elements, it must be undertaken.”

10. Secondly, the covenant does not require the tenant to bring dated premises up to latter day standards of construction or specification: Pgf II SA v Royal & Sun Alliance Insurance Plc [2010] EWHC 1459 (TCC) at 51 per HHJ Toulmin QC. Thus, in the present context, the Defendant was not required to bring a 17th century building fully refurbished in 1994 to the standard of a 17th century building fully refurbished to 2019 standards.

11. Seventhly, where equipment, fixtures and fittings do need to be replaced by the tenant so that the covenant is complied with, they need only be replaced to the same standard as was there at the time of the demise *subject to any new equipment, fixtures or fittings meeting current legal, regulatory and safety standards*.

12. While the principles set out above are well known, it is the caveat I have highlighted to which I wish to draw particular attention in this Paper.

13. The point is this. A covenant to repair requires the covenantor to comply with all statutory requirements as to the way that the requisite remedial works have to be carried out. A lease will usually include a discrete covenant to comply with statutory requirements, but even if it does not, it is implicit that the tenant must comply with such requirements in any event.

14. An illustration of this appears in the Judge’s treatment of the water heaters in Coldunell. It was common ground that they were operational at the end of the term, *and not in disrepair*. But as the Judge noted:

“... in order to comply with the relevant building regulations the boilers had to be replaced with condensing boilers requiring a certain type of condensing type flue whereas the water heaters required non-condensing flue equipment. Retaining the two water heaters would have meant installing a second flue which would have been a major and costly endeavour in a listed building such as the Property. That evidence was supported by the FHPESS report which also referred to the fact that a separate flue would be needed if the hot water heaters remained. ... In short, the

water heaters that were installed by the Defendant as a partial replacement for the two defunct boilers were incompatible with the required new boiler flue and it was therefore necessary to install a different system to remedy the Defendant's breach of covenant. The new hot water system was therefore a necessary part of replacing the boilers and the cost recoverable."

In this way, the tenant was found liable for the cost of replacing items that were not actually out of repair.

15. Similarly, in the Sunlife case, the extent of the repair works for which the tenant was liable meant that riser cupboard doors, which complied with the Building Regulations at the time they were constructed, no longer complied by the end of the lease. It was held that the tenant was liable for the work required to ensure the doors complied with the updated Regulations.

16. Again, in Craighead v Homes for Islington Ltd [2010] UKUT 47 (LC), the Lands Chamber of the Upper Tribunal held that the replacement of life-expired single-glazed Crittall windows with double-glazed Crittall windows, in circumstances where that was the only lawful way of effecting the remedial works in accordance with the applicable Building Regulations, was work of repair.

17. The impact of the need to comply with statutory regulation in Coldunell, Sunlife and Craighead was not very significant – but in other cases it may well be. One example is where a roof is in partial disrepair, needing patch repair to return it to operational efficiency (an expedient commonly resorted to by tenants in dilapidations cases). That approach may no longer be possible in the light of the developing corpus of Building Regulations.

18. But it is not all bad news for tenants, whose position may now be assisted by a consideration of the Minimum Energy Efficiency Standards ("MEES") set out in the Energy Performance of Buildings (England and Wales) Regulations 2012 (SI 3118) and the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (SI 962). These restrict new or continued lettings of commercial property after 1 April 2023 for both new and existing leases, where the relevant property has an EPC rating of F or G. The Government has also indicated that intends to raise the minimum EPC rating to B by 2030.

19. These Regulations do not require either landlord or tenant to carry out works: they instead now make it unlawful for the landlord to let or continue to let its property. This has obvious ramifications for terminal dilapidations claims. Absent specific drafting in leases, which tenants are likely to resist, either on new lettings or renewal (see the recent decision of Mr Recorder McNamara in Clipper Logistics Plc v Scottish Equitable Plc (unreported, Sheffield County Court, 7

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March 2022<sup>1</sup>), tenants will not have to deliver up their premises in a way that complies with the MEES.

20. Tenants will now be able to contend that they should not be liable for works where the landlord would be bound to carry out different works in order to be able to relet. This has potentially enormous ramifications for dilapidations claims. It will surely not be long before we are treated to some judicial thinking on this topic.

**Falcon Chambers**

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**Falcon Court**

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**15 May 2023**

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<sup>1</sup> In relation to a proposed raft of new terms on renewal where the landlord sought to render the tenant liable to comply with MEES, the judge rejected most of the terms, but said: “I am, though, persuaded that the first part of the proposed clause 3.14.6, which reads “The Tenant shall return the premises to the Landlord with the same EPC rating as it has at the date of this Lease as evidenced by the EPC dated 1 June 2021” ought to be permitted on the basis that its inclusion can be justified on grounds of essential fairness and that it is a fair and reasonable change. Without this clause, the Defendant would, in my judgement, lack any meaningful protection against omissions/inaction by the Claimant which could, during the course of a potential 10 year lease duration, reduce the EPC rating such that the property became sub-standard and, in consequence, bring about for the Defendant the significant adverse consequences referenced above.”