

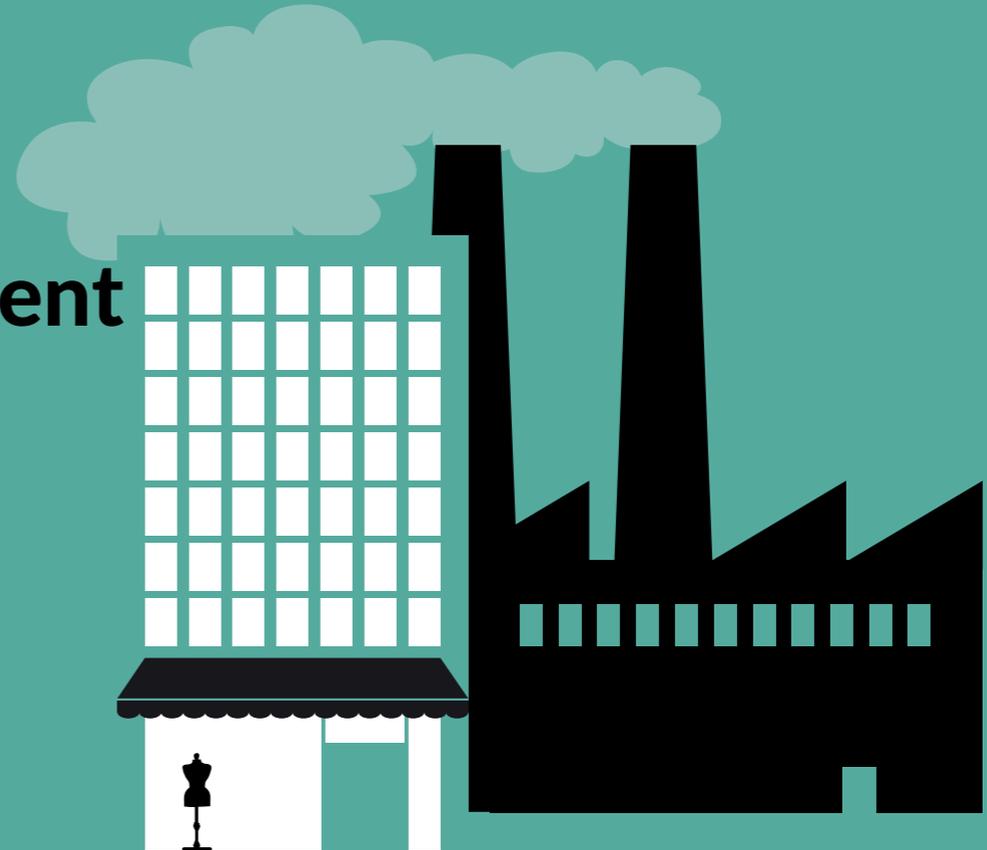


Falcon Chambers

Caroline Shea KC White Paper Conferences

Dilapidations: Judicial thinking and impact on client advice

falcon-chambers.com



Dilapidations clauses

Judicial thinking



Three recent cases

- Ashtenne Caledonia Ltd v Saleem
[2023] CSOH 18; [2023] 3 WLUK 105
- Peachside Ltd v Lee
[2024] EWHC 921 (TCC)
- Stevens v Done Brothers (Cash Betting)
Limited (Luton County Court unreported)



Dilapidations clauses

Judicial thinking

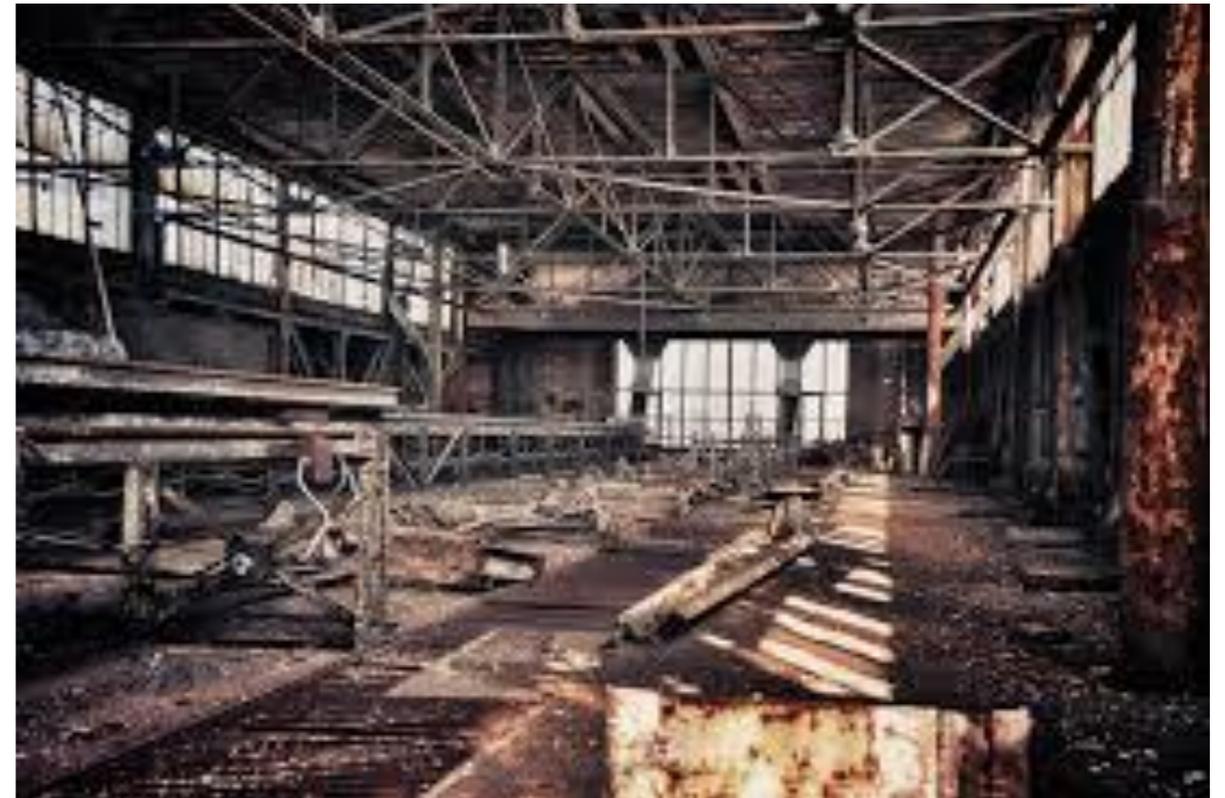


(1) *Ashtenne Caledonia Ltd v Saleem*

Standard of repair :

“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”

Proudfoot v Hart (1890) 25 QBD 42



Dilapidations clauses

Judicial thinking



Anstruther-Gough-Calthorpe v McOscar
[1924] 1 K.B. 716.

“well and sufficiently repair support uphold
maintain paint pave empty scour cleanse
amend and keep the said three several
messuages and buildings thereby demised
... well and sufficiently repaired supported
upheld maintained painted paved emptied
scoured cleansed amended and kept as
aforesaid”



Dilapidations clauses

Judicial thinking



Anstruther test:

the proper measure of liability: the defendants were liable for the cost of doing all necessary acts well and sufficiently to repair the premises in the words of the covenant, that is to say, for the cost of putting them into that state of repair in which they would be found if they had been managed by a reasonably minded owner, having regard -

Per Bankes L.J., to their age;

Per Scrutton and Atkin L.JJ., to their character and ordinary uses, or the requirements of tenants of the class likely to take them, at the time of the demise or at the commencement of the term.

Dilapidations clauses

Judicial thinking



Ashtenne v Saleem

“The Tenant will keep, maintain and repair, renew, rebuild and reinstate the Property and every and any part thereof and all additions thereto and the Landlord’s fittings and fixtures therein and thereon in good and substantial condition and repair ...”

Pursuer:

Different in scope/meaning/effect

Different test to be applied



Dilapidations clauses

Judicial thinking

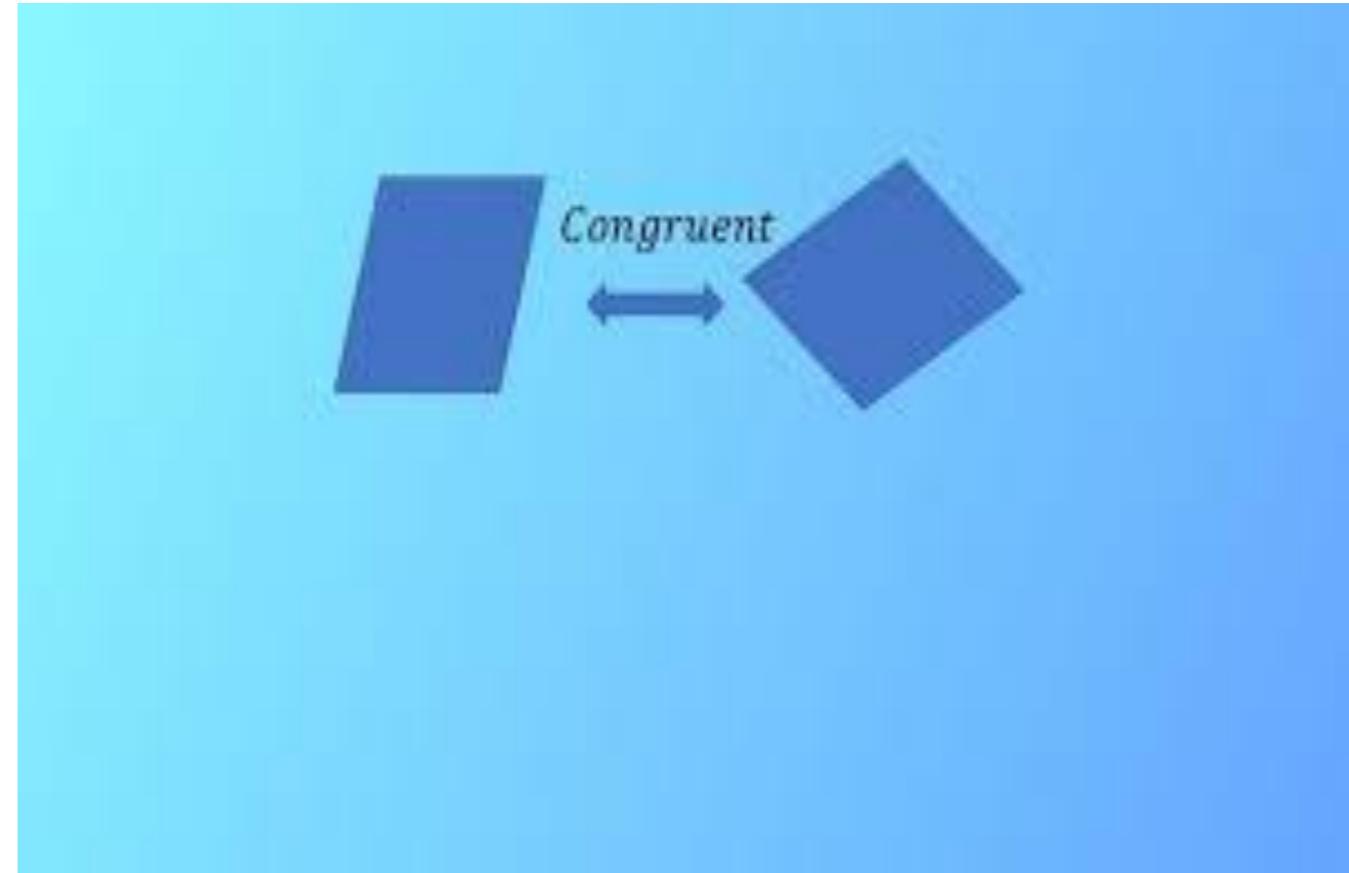


Ashtenne v Saleem - findings

Rejects any contrast between scope of covenant and Proudfoot formula

No difference in substance between the formulations in Proudfoot and Anstruther

Emphasis of both is on what is reasonable by reference to the age and character of the premises at the date of the lease



Dilapidations clauses

Judicial thinking



Peachside Ltd v Lee

Expiry of commercial lease

Terminal dilapidations - £542,671.17

Redevelopment for office use

Tenant contended that LL intended to cash in on the dilapidations claim when the premises were not realistically lettable as office space



Dilapidations clauses

Judicial thinking



LL had performed majority of works

LL's expert:

Premises in repair would command a reasonable rental for office accommodation

Therefore reasonable for the LL to do the works



Dilapidations clauses

Judicial thinking



Starting point where LL has done the work:

the diminution that can be inferred from the costs of the repairs reasonably necessary to make good the loss caused by breaches of covenant

(Sunlife Europe Properties v Tiger Aspect Holdings [2013] EWHC 463)



Dilapidations clauses

Judicial thinking



Comments on T's expert

- Long involvement with T
- Strayed into areas of opinion beyond expertise
- T's expert "a little too invested in advancing his client's interests"



Dilapidations clauses

Judicial thinking



Stevens v Done Brothers (Cash Betting) Limited

- interpretation of covenants
- approach to s.18 in absence of expert evidence
- loss of rent and s.18
- indemnity costs against the defendant landlord on the basis of conduct



Dilapidations clauses

Judicial thinking



Stevens v Done Brothers

Interpretation of covenants

- Demise of the whole premises described in Part A schedule 1 and each and every part of them
- Must be given clear and natural meaning
- Unaffected by fact that when let premises had no staircase and rooms on first floor unused
- “usually so decorated” – objective test



Dilapidations clauses

Judicial thinking



Stevens v Done Brothers

No s18 expert evidence from tenant

Bare denial that costs of works represented damage to the reversion

Held:

S18 was raised as an issue

Absence of evidence does not preclude a finding on diminution inferred from facts (Latimer v Carney [2005] L&TR 5)

Fact sensitive

- Stance taken by incoming tenant
- Actual costs of actual works



Dilapidations clauses

Judicial thinking



Stevens v Done Brothers (Cash Betting) Limited

Loss of rent and s.18

No authority

Held:

if LL shows (i) loss of rent and (ii) that HP would take it into account

then it is (i) recoverable and (ii) falls within the cap



Dilapidations clauses

Judicial thinking



Stevens v Done Brothers (Cash Betting) Limited

- indemnity costs against the landlord
- LL's approach, and that of its expert, took matters 'out of the norm'
- denying liability without justification as part of a corporate stance to put a price on its obligations and negotiate a payment rather than carry out works



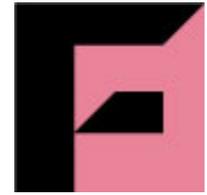
Dilapidations clauses



Advising the client

- **Running novel arguments**
- **Identify the issues and ensure they are evidenced**
- **Manage choice and use of expert**
 - **independence (red flag - previous relationship with client)**
 - **credentials/experience (market rather than court; right area)**
 - **role awareness (CPR; not a lawyer)**
 - **evidential base**
 - **plausibility**

Dilapidations



Judicial thinking and impact on client advice

Caroline Shea KC

