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THE ROLE OF THE M&E ENGINEER IN REDUCING DILAPIDATIONS LIABILITIES.

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Since the introduction of the Dilapidations Protocol in 2012, there has been an increase in the accuracy of cost assessments and a reduction in notional budgets to support out of court resolution, resulting in a reduction in dilapidations liabilities.

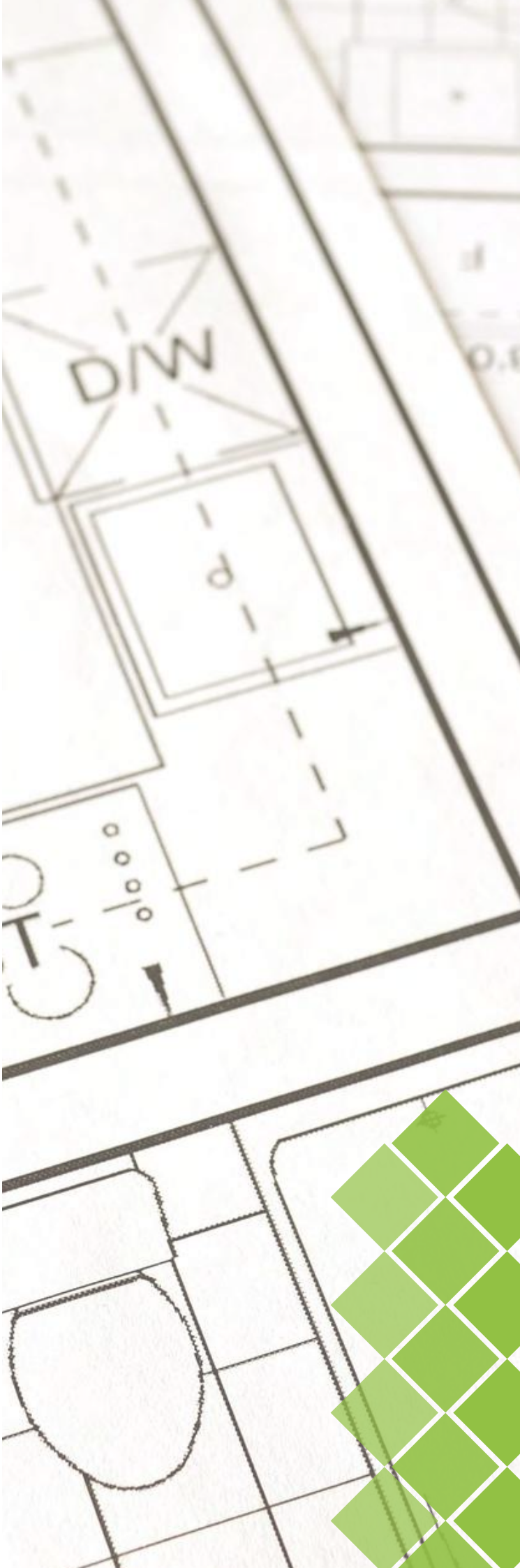
Whilst the Protocol has improved the ways in which Building Surveyors manage this process, they are not usually qualified or experienced in assessing the condition of complex mechanical and electrical equipment. This results in highly inaccurate assessments and generalised, non-technical statements being made. When you consider that mechanical and electrical equipment accounts for a significant proportion of the total dilapidation cost, whilst RICS have stated that a majority of assessments do not involve an M&E Engineer, this is an area that can no longer be ignored.

In this white paper we explore the role of the M&E Engineer in reducing dilapidations liabilities, a role which many parties agree has been greatly overlooked and underestimated to date.

THE DILAPIDATIONS PROTOCOL 2012

The Dilapidations Protocol came into force on 1st January 2012 to reduce costly legal bills through a less adversarial approach to resolving dilapidations disputes at the end of a lease. Central to the Protocol is the requirement for accurate cost assessments to be made on behalf of both landlord and tenant, to ensure a fair settlement.

The Protocol requires surveyors representing the two parties – landlord and tenant – to endorse a quantified demand to confirm that they have taken into account the landlord's intentions for the property and that the costs are reasonable. Paragraph 1.3 of the Protocol states that the term 'surveyor' is intended to "encompass reference to any other suitably qualified person" i.e. the M&E Engineer. So please ensure that your Engineer or you know exactly what you are signing up for.



THE IDEAL RELATIONSHIP - BUILDING SURVEYOR AND M&E ENGINEER

We suggest that the optimal solution would include using the combined services of a Building Surveyor and an M&E Engineer:

- The Building Surveyor should manage the dilapidations assessment. They need to interpret the lease and understand the RICS Dilapidations Guidance Note to be able to carry out an assessment of the physical condition of the premises. They also need to take into account the landlord's intentions, read and understand all documents such as the schedule of condition that was included at the start of the lease, and to consider any notice periods to advise the tenant of the landlord's intentions (for example, a licence to alter may have been granted or a clause in the contract might impose conditions about notice periods for the reinstatement of alterations). They should take into account the extent of their own experience, expertise and insurance cover regarding services installations. They should also be very aware of possible breaches of obligation with respect to mechanical and electrical equipment.

- The M&E Engineer would be able to significantly reduce risk and add clarity once the initial review has taken place, bearing in mind most of the services are often hidden above the ceiling. The Building Surveyor should appoint an engineer who is technically qualified in this area, provide them with some context about the building, the contract, present and future intended use. If the M&E Engineer understands dilapidations law, is trained, experienced and fully insured appropriately then they will be best placed to sign a quantified demand relating to their area of expertise.

WHAT LEVEL OF EXPERTISE IN DILAPIDATIONS IS REQUIRED BY THE ENGINEER?

Disputes are much less likely to escalate when an experienced Surveyor, in appropriate circumstances, appoints an M&E Engineer with experience in dilapidations.

If the Engineer is appointed by the Surveyor solely to provide technical advice, then the Surveyor will interpret the information in order to produce a dilapidations schedule and will endorse the whole schedule based on that advice received.

If more than one schedule is produced, or more than one endorsement made, then all involved will need to coordinate their content.

EXAMPLES OF INCORRECT EQUIPMENT ASSESSMENTS

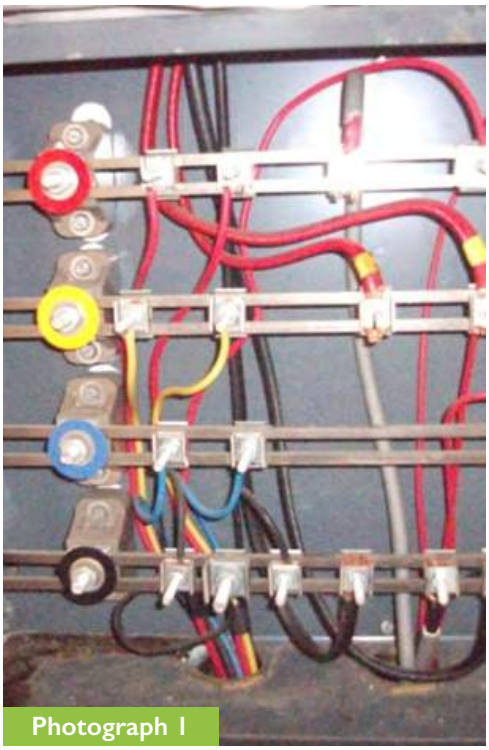
Currently, there are many instances where Building Surveyors do not involve M&E Engineers to carry out an assessment of the services installations, often resulting in inaccurate cost assessments and lengthy and costly disputes, especially if the tenant appoints an Engineer to defend them.

For example, the Building Surveyor may write 'the tenant is to replace all fan coil units. The cost of remedy and replacement is £30k.' This level of detail is very difficult for the Landlord's contractor to cost and for the tenant to understand the extent of their liability, and very unhelpful considering the onus is on the Landlord to prove the extent of the loss.

The following examples illustrate the types of situation in which assumptions are often made incorrectly when assessing dilapidations:

Firstly, a 25 year old electrical main intake (photograph 1) inside the enclosure showing evidence of corrosion. When tested, we established that the unit is well earthed, all connections are solid and there is therefore no breach reference to the lease as whilst it is old, it is still working. However, during a fit-out the electrical contractor may not want to sign it off and say it is non-compliant with the latest codes and standards.

Photograph 2 is a series of 25 year old refrigeration coolers with a manufacturer's recommended life of 15 years, which initially appear in good repair. The units were found to include R22 refrigerant, which has since been banned as a CFC gas which can deplete ozone in the atmosphere. Whilst these refrigerants were phased out in 2013, the tenant was not obliged to convert the equipment to run on a different coolant, because the systems were in full working order, leak-free, at the end of the lease. The Landlord's only request was that the units should be cleaned and serviced.



Photograph 1

25 Year Old Electrical Mains Intake

A series of 25 Year Old Air Conditioning Heat Pumps

Photograph 2

Photograph 3

10 Year Old Cooling Unit

Another example (photograph 3) is of a 10 year old cooling unit which on first inspection appeared to be in good working order. The unit was in an exposed position on the roof and when the cooling fins were examined, it was clear that extensive corrosion had taken place and tests showed a reduction in performance of over 50%. The tenant would therefore be obliged to replace this unit, five years before the end of the manufacturer's recommended life.

These examples illustrate the extent of specialist knowledge required to assess the need for repair and or replacement. They clearly demonstrate that well maintained equipment can exceed manufacturers' recommended life periods and poorly maintained equipment can often fail in advance. Building Surveyors cannot, therefore, solely rely on manufacturers' recommended life tables.

On a more basic level, even pipework or luminaires could have been installed by the tenant in contravention of a tenancy agreement. The M&E Engineer is likely to notice new makes and models of equipment, whereas a Building Surveyor might overlook these modifications. With help, the Engineer can build up a good picture of the installation and tenants work during the lease.

RECOVERING THE COSTS OF A M&E ENGINEER

Landlords' Building Surveyors must understand the limitations of their experience and qualifications in respect of electrical and mechanical installation. M&E Engineers can be used to look at installations where the Building Surveyor isn't comfortable and these professional costs can usually be recovered from the tenant as long as they are 'reasonable'.

For the majority of equipment, initial appearance can be misleading. The assumption that "old age equates to disrepair" is often wrong and M&E Engineers will understand the implications of case law such as West Castle Properties v. Scottish Ministers [2004] SCLR 899.

This case ruled that the tenant was not obliged to return the premises to the landlord in as good condition as they were at the start of the lease, or with the same remaining life expectancy. What is required is for the tenant to put and keep items in repair, and an old piece of equipment which is working perfectly well will probably be in 'repair'. Engineers need to be aware that schedules which state that items are 'beyond their economic life and should be replaced' (or words to that effect) are an open invitation for a tenant to argue that, consequently, the unit is working in reference to the lease and therefore no sums will be paid in respect of that item, whatever its state of repair.

POST-OCCUPANCY ASSESSMENTS AND VALIDATION REPORTS CAN IMPROVE ACCURACY

Cost assessments are not an exact science and there will always be scope for inaccurate assessments to be made. Using an M&E Engineer will significantly increase the accuracy of these assessments and to further improve accuracy, a post-occupancy assessment (or validation report) can be conducted, using manufacturers and specialist contractors. These valuation reports, supported by pictures, provide clear evidence of condition and provide clarity further down the line.

For example when tenants are in occupation and do not grant access for detailed inspection, the initial visual assessment should, in appropriate circumstances, be followed up by a more detailed inspection and/or testing once the tenants have left the building and before the dilapidations dispute is settled. Validation reports must be completed as soon as possible to get the correct condition at Lease end as the tenant is not responsible for reports after Lease end.

HOW TO APPOINT AND BRIEF AN M&E ENGINEER TO SUPPORT DILAPIDATIONS ASSESSMENT

The possibility for costings to be inaccurate when M&E Engineers are not appointed or not correctly briefed is extensive.

To supplement the Dilapidations Protocol as well as the RICS Dilapidations Guidance Note, the following process shown in Fig 1. is recommended to be adopted by the Landlord's and Tenant's teams.

FIG 1. DILAPIDATIONS – SUGGESTED PROCEDURES FOR ENGINEERING INSPECTIONS

1. Interpret the legal documents (building surveyor / legal advisor)

2. Initial inspection of premises (building surveyor only, or, where it is known that an engineer will be required, a joint inspection)

2a. Formal brief from building surveyor to engineer, to include:
i. Scope of reinstatement obligations and how these affect the drafting of the schedule (if at all)
ii. Landlord's intentions for the building
iii. Commentary on standard of repair required of the tenant
iv. Commentary on tenant's obligations to comply with statute.
v. Any other relevant information

3. Inspection of premises by M&E Engineer (if not already completed)

4. Engineer to remain involved in negotiations between landlord's and tenant's surveyors, if required

5. Engineer to be available to discuss the dispute with the client's legal team and, if required, to; prepare CPR Part 35 Joint Statement; expert witness report; give evidence in court.

Engineers undertaking this work should be appointed based on their experience as well as their awareness of the RICS approach to dilapidations, as outlined in the RICS Dilapidations Guidance Note, Issue 6, 2012.

In our experience, this sequence of events rarely happens, but when the Building Surveyor and the M&E Engineer work closely together in this way, the resulting schedule, quantified demand and tenant's response can be prepared more efficiently and accurately, leading to earlier resolution of the dispute and, of course, avoiding court proceedings.

Simon Green is a practising building services engineer with over 10 years' experience in assessing dilapidations claims. Simon is Owner & Director of Green Building Design Consultants, a company specialising in dilapidations assessments. As well as lecturing about the subject, Simon advises major surveying practices on how to improve the accuracy of costings from an engineer's perspective.

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