

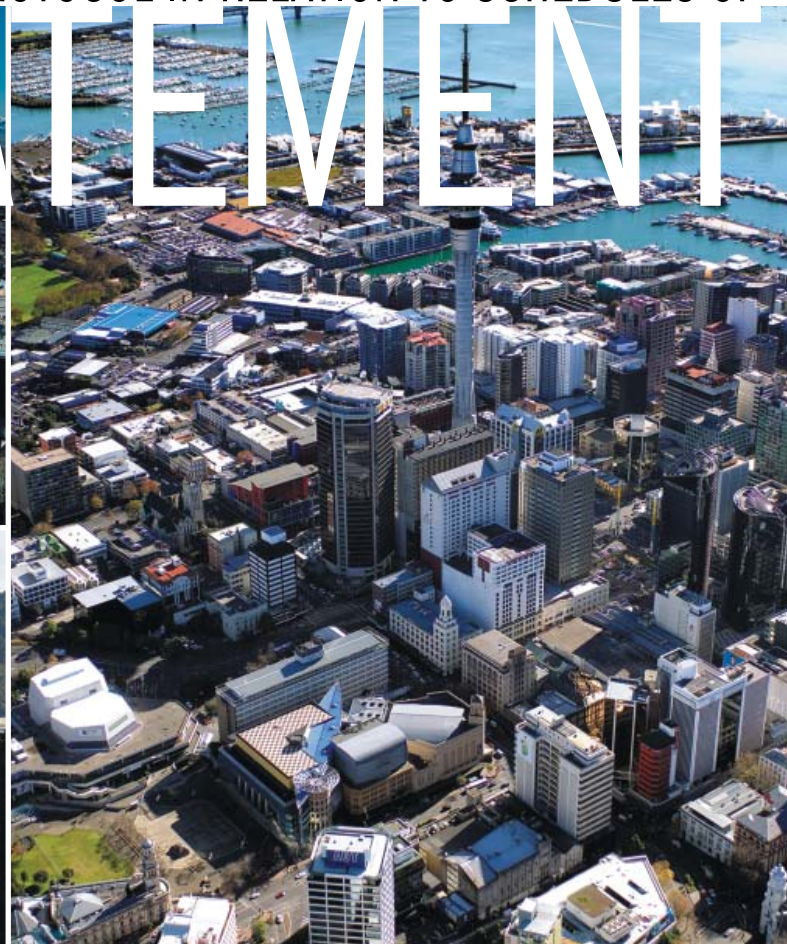


RICS

New Zealand

BEST PRACTICE GUIDANCE NOTE AND PROTOCOL IN RELATION TO SCHEDULES OF

REINSTATEMENT





BEST PRACTICE GUIDANCE NOTE AND PROTOCOL IN RELATION TO SCHEDULES OF REINSTATEMENT

Please note: References to the masculine include, where appropriate, the feminine.

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1. Foreward by RICS

RICS “Reinstatement” Guidance Note - 2007

This guidance note is based on the RICS' Dilapidations Best Practice Note, 4th edition, with the appropriate revisions for adoption in the New Zealand market. Reinstatement Schedules as they are known in New Zealand are commonly referred to as “Schedules of Dilapidations” in the UK and “Schedules of Make Good ” in Australia.

The guide is primarily aimed for use by practicing property professionals and encourages settlement by mediation when reinstatement disputes arise.

In addition it is expected that the guide will be useful for students on undergraduate and post graduate property related courses where commercial property leasing forms part of a core subject area.

It is important to note that the central document within a leasing transaction is the lease itself. It is essential therefore, that the framework of a lease at day one provides clarity with regard to the repair, decoration, maintenance and reinstatement obligations placed upon the parties to lease. Clarity within the lease will reduce the likelihood of protracted and costly disputes at lease end. It is the ultimate aim of this guide to reduce ambiguity in the leasing process at lease commencement, by providing a “Schedule of Condition” and at lease end a “Schedule of Reinstatement”.

It is expected that both landlords and tenants operating within the property industry in New Zealand will benefit from the professional objectivity which this document provides to the subject matter.

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2. Introduction

- 2.1 The preparation of a Reinstatement Schedule supports a set of procedures which, when employed correctly, can better serve landlords and tenants under their leases.
- 2.2 This Best Practice Guidance Note deals primarily with commercial and industrial property within New Zealand, it is not intended to be a comprehensive guide to the preparation and serving of Reinstatement Schedules.
- 2.3 For simplicity, this Best Practice Guidance Note (the Note) is drafted in the context of a "Terminal Schedule", that is a Schedule prepared in respect of works to be done at the expiry or earlier termination of a lease. However, the principles identified are to some extent applicable to Reinstatement Schedules at all stages of a lease and with respect to any negotiations in relation to a landlord's or tenant's obligations to repair and maintain.
- 2.4 In brief, the various types of Reinstatement Schedules are:

Schedule of Reinstatement means a schedule documenting the state of disrepair of a property and the required remedial action, where there is a legal liability for the condition of disrepair on either landlord or tenant;

Terminal Schedule means a Reinstatement Schedule usually served no more than 6 months before the expiry of the lease in relation to work to be done to the premises at the expiry or at earlier termination of a lease;

Interim Schedule means a Reinstatement Schedule detailing items of disrepair arising from the tenant's failure to comply with a repair covenant identified by the landlord during the term of the lease and which the landlord requires to be remedied during the term of the lease.

Tenants should be encouraged to manage their "Reinstatement" responsibilities throughout a lease term. This can be achieved by the tenant carrying out an assessment of their "Reinstatement" obligation during the course of the term to establish a suitable maintenance programme in compliance with their repairing covenants. The interim assessment will enable the tenant to comply with their repairing obligations during the term and reduce the risk of defaulting on their lease obligations.

Similarly, landlords should be advised to comply with their repairing obligations to prevent damage being caused to the tenant's demised premises. This will not only assist in maintaining the asset's capital value, but also prevent claims from the tenant for loss of their quiet enjoyment.

- 2.5 Other words and expressions used in this note are defined on the last pages as *Definitions and Interpretation*.

It should be noted that the Schedules should be prepared with reference to the lease covenants being breached. As such, only items that have either fallen into disrepair due to the tenant not performing its repairing obligations, or items that have not been undertaken due to the tenant not complying with their express covenants should be included in the Schedule. The greatest areas of contention are in respect to the definition of repair (i.e. to keep, maintain or put into repair) and the effect of fair wear and tear clauses. Careful consideration should be taken in interpreting these obligations and advice sought from legal counsel if there is any doubt as to their effect on the parties lease obligations.

Any claim against the other party will be under the law of contract. This means that the remedies being sought should return the party to the position they would have been in should the breaches not have occurred (please refer to the footnotes at the end of Part III below). In view of this, grossly overstated remedial works or estimations of the cost of repairs are discouraged and will only aggravate the other party. The claims should be fair and reasonable, backed up with factual evidence that can be upheld in a court of law.

The extent of a party's repair obligations will obviously depend on the wording of the lease. Sometimes it will be the case that neither landlord nor tenant is (on the wording of the lease) responsible for a particular item of maintenance or replacement.

There is often no difference between an obligation to "put" premises in good repair and an obligation to "keep and maintain" premises in good repair. The former may be implied anyway, having regard to the age and general character of the premises. Often the more important distinction is between "repair, renewal and rebuilding", as the renewal/rebuilding is often not the responsibility of the tenant.

Part I

3. Purpose

- 3.1 The purpose of this Note is to provide practical guidance to property professionals in New Zealand when advising landlords and tenants about compliance with legal obligations in a lease to repair, decorate, or reinstate leased premises or alterations that have been made to leased premises at the expiry or earlier termination of a lease.
- 3.2 It is essential, that both landlord and tenant are aware that the principle of a "Reinstatement Schedule" is to identify alleged breaches of covenant within a lease. These allegations are the first step of a legal process. During the course of a lease term the tenant will be able to repair, decorate and maintain the demise in accordance with their lease obligations. However, once the lease has ended the only form of remedy is damages. This is usually by means of financial damages. It is important therefore that both parties enter into dialogue at an early stage. This will allow both parties to consider their position and allow reasoned consideration as to how the "Reinstatement" matter will be resolved. This could be by means of financial settlement in lieu of a protracted dispute in relation to the quantum and quality of repair carried out by a tenant prior to lease end.
- 3.3 In addition it is intended that this note will:
 - (a) Introduce straightforward procedures to reduce areas for disagreement;
 - (b) Encourage and timetable the exchange of early and full information about a prospective claim;
 - (c) Enable parties to avoid litigation by encouraging mediation in agreeing a settlement of the claim prior to proceedings commencing;
 - (d) Support the efficient management of proceedings where litigation is unavoidable
- 3.4 If court proceedings are commenced, the court may be invited by any party to treat the standards set out in this note as the normal reasonable approach to pre-action conduct when the court considers issues of costs and other sanctions. When doing so, the court should be concerned with substantial compliance and not minor departures from this Guidance Note & Protocol. In addition, minor departures should not exempt the "innocent" party from following the notes. The court may also be invited by the parties to consider the effect of non-compliance on the other party when deciding whether to impose sanctions.

Part II

4. Best Practice at Lease Commencement

- 4.1 While this Note is not intended to deal exhaustively with pre-lease negotiations, the parties to a new lease should be advised to agree on the condition of the premises before a lease is entered into, particularly where premises are not let in 'as new' condition or have been fully refurbished.
- 4.2 The appropriate document to be signed is a Schedule of Condition. The preparation and agreement of a Schedule of Condition should be actively encouraged by all parties to a lease to reduce the likelihood of disputes occurring between landlords and tenants at lease end. This schedule is not intended to improve the position of either party but to clearly identify and record the condition of the premises at lease commencement. The Schedule should also make reference to or record the landlord's fixtures and fittings.
- 4.3 An example of the elements of a Schedule of Condition Report is set out in Appendix 3.

Part III

5. The Process for the Property Professional

5.1 Step 1 - Taking instructions

- (a) Notify the terms and conditions of your retainer to the client in writing, before engagement.
- (b) Set out the basis of fees.
- (c) Agree lines of communication between the parties.

5.2 Step 2 - Gathering information

Obtain a copy of:

- (a) The lease in its complete form with all plans and other attachments, coloured if originally coloured;
- (b) Any deeds of variation;
- (c) Scaled plans, coloured where appropriate;
- (d) Details of the new build construction (if the tenant is the first occupant) or pre-occupation fit-out/refurbishment;
- (e) Consents for alterations, with plans and specifications;
- (f) Any agreement for lease, if intended to survive the grant of the lease;
- (g) Assignments and consents to assign;
- (h) Licence agreements or subleases and the relevant consents;
- (i) Any written consents to alterations and details as to whether it was the landlord or tenant who met the cost of the works;
- (j) Side letters or other written agreements;
- (k) Schedules of condition, together with appropriate photographs, or other documentation that establishes the condition (of the premises) at lease commencement;
- (l) Schedules of fixtures and fittings;
- (m) Any current resource or building consents, compliance schedules or statutory notices relating to the property;
- (n) Current rent, insurance and rates charges (if applicable);
- (o) Recent operating expense/outgoings claims - care needs to be taken, when acting for a tenant, to ensure that the landlord is not seeking to upgrade/refurbish (or simply undertake major repairs to) the property at the tenant's expense at the expiry of the lease term – this point may require legal advice, so as to ensure that what is charged is appropriate, taking into account the period of time until the lease expires.

5.3 Step 3 - Reviewing the lease terms

- (a) Identify and accurately summarise all clauses in the lease which will or may have an impact on the obligations of the tenant. Particular emphasis should be given to the most relevant clauses, but other tenant obligations which may be pertinent should be considered.
- (b) A solicitor should be consulted to provide an opinion in relation to the scope of each particular clause and interaction between such clauses with reference to any underlying legal principles or laws. At this point instructions should also be sought as to any extraneous representations that have been made or other agreements between the parties which may be relevant and may be considered when interpreting the lease provisions. These instructions should be discussed with the client's solicitor so as to assess their impact (if any) on the lease provisions.

5.4 Step 4 - Consider reinstatement of alterations – further review of lease terms

It may be evident, either from the inspection of the premises or from the documentation, that the premises have been altered. In this case, consider whether and to what extent the tenant is obliged to reinstate the alterations.

5.5 Step 5 – Review all statutory and legal precedents

- (a) It is imperative that due consideration is given by both parties to statutory and legal precedents which may effect the basis of their position at an early stage. An indicative review of related current New Zealand precedent follows in the Footnote at the end of Part III.
- (b) The landlord's intentions for the property at, or shortly after, the termination of the tenancy including details of works proposed to the premises if appropriate may (in limited circumstances) affect the obligation of the tenant and rights of the landlord.
- (c) In a claim for damages by a landlord for a breach of the lease by the tenant, the intentions of the landlord at, or shortly after, the termination of the tenancy may be relevant to determining the amount of damages which may be awarded. The starting position (in New Zealand) for recovery of damages by the landlord at the expiration of the term, is damages equivalent to the costs of carrying out the work.
- (d) If it can be shown by cogent evidence that at, or shortly after the termination of the lease, the premises would be demolished, refurbished or such structural repairs made to render any tenants repairs value less, then damages may not be recoverable and the claim may be reduced accordingly.

5.6 Step 6 – Physical inspection of the premises

- (a) Comply with the terms of the lease when making arrangements for access.
- (b) Undertake the inspection with a copy of any available Schedule of Condition to hand for comparison with the physical state of the premises.
- (c) Retain site notes, measurements or other transcriptions. Sketches with a north point should be made, as required and photographs taken. Cross-reference those to the site notes, schedule and date.
- (d) Clearly identify all parts of the property.
- (e) Identify alterations and improvements with cross-reference to consents and approvals where appropriate.

In seeking to identify alterations, have regard to:

- (i) obvious differences in construction and materials;
 - (ii) materials which are inconsistent with the age of the building;
 - (iii) parts of the property which directly identify with the trade or occupation of the tenant (for example an extension constructed to store chemicals);
 - (iv) plans, photographs or other documentary evidence;
 - (v) the existence of partitions and fitout;
 - (vi) any improvements that could increase the value of the property.
- (f) Obtain specialist input as required from a services consultant, structural engineer or environmental consultant.
 - (g) Where further investigation or opening up is required, the agreement of the client and, where appropriate, the tenant should be obtained. If no defects are discovered, then the cost of specialist inspections will not be recoverable.
 - (h) Prepare the schedule with reference to the repairing, reinstating, maintenance and re-painting obligations of the lease. With respect to Interim Schedules, the focus is likely to be on compliance with statutory requirements, prevention of deterioration and maintenance of asset value.

Footnote:

Current New Zealand Legal Precedent Relating to Damages For Non Reinstatement

1. *In New Zealand the rule in Joyner v Weeks still applies. This provides that the damages recoverable from a tenant as a result of the tenant failing to comply with its repair obligations at the end of the lease, are damages equivalent to the cost of carrying out the repairs. This is generally the case even if the landlord is not intending to carry out the work.*
2. *In the UK, New South Wales and Queensland the rule has been legislated against and there is a statutory limitation on the sum the landlord can recover, so that in no case can the damages exceed the diminution in value of the landlord's reversion.*
3. *The rule was last considered in New Zealand in the 1994 case of Maori Trustee v Rogross. The court supported the retention of the rule but said it is not an absolute rule. It is a "prima facie rule" which will apply unless the tenant can show "by sufficiently cogent evidence that in both the short and long term the landlord will definitely suffer no loss or loss assessable at less than the prima facie measure".*
4. *However, it is important to note that in the case of:*
 - (a) *an action by a landlord for damages in breach of a covenant to repair brought during the term of the lease; and*
 - (b) *an action for damages by a landlord for breach of the covenant to remove alterations/ fixtures and fittings*

the normal contract rules apply so that damages are designed to put the injured party, as nearly as possible in a position he or she would have been in if the contract had been performed – i.e. to ascertain the actual damage suffered. In such cases recovery of damages will often be limited to an assessment of the diminution in value of the landlord's reversion.

5. *In Maori Trustee v Rogross Farm Limited the court commented that "it has always been held that the measure of damages in a pre-termination claim is generally a diminution in value of the reversion rather than the cost of effecting the necessary repairs...". However a number of English cases (James v Hutton and J Cook & Sons Limited and Tito v Waddell) have held that this is not conclusive, where a calculation of damages referenced to diminution in value would act as a limitation of the sum recoverable and the landlord can demonstrate the sufficiently fixed intention to carry out the work.*
6. *It should also be noted that the cases relating to the quantum of damages for failure to remove alterations/fixtures and fittings are English, although there is no reason to think a New Zealand court would not come to the same conclusion.*

In summary, therefore, the landlord's intentions at the end of the lease should be requested as these may have a bearing on the sum recoverable. However, the general starting point will be recovery based on the costs of carrying out the works.

Part IV

6. Preparing and costing the schedule

6.1 Step 1 – Choosing the type of Schedule /Layout

A recommended form of a Reinstatement Schedule and a completed example of a Terminal Schedule, in the form of the extended Scott Schedule, are provided in Appendices 4 and 5. When serving an Interim Schedule "Landlord's Costing" shown in Appendix 4 would not be required.

6.2 Step 2 - Costing

- (a) The Terminal Schedule may need to be costed if it is anticipated that there will be a financial settlement in lieu of physical reinstatement.
- (b) Costing should be done with due reference to reliable and appropriate cost information, for example:
 - (i) current professionally recognised price books (to which the appropriate regional variations should be applied);
 - (ii) relevant and recent tender price information (on projects of a similar nature and size and envisaged by the claim); and
 - (iii) the result of a competitive tender exercise (which could be conducted on the basis of a full specification of works derived from the Reinstatement Schedule).

6.3 Step 3 – Making the claim

- (a) Serve the claim in a separate document indicating how the claim is compiled.
- (b) Append the Terminal Schedule to the claim.
- (c) Prepare a summary of the costings which make up the claim.
- (d) Set out the claim on one sheet which is expandable, so that the other party can provide corresponding figures.
- (e) Consider adding to the Terminal Schedule:
 - (i) fees for the preparation of the Terminal Schedule;
 - (ii) fees for the supervision of the work;
 - (iii) loss of rent;
 - (iv) loss of operating expenses and/or insurance premium;
 - (v) fees in relation to negotiation of the Terminal Schedule; and
 - (vi) solicitor's costs and interest (subject to consultation with the client's solicitor);
 - (vii) GST.
- (f) The ability to recover all or any of the costs will depend on the terms of the lease and the particular circumstances. The client's solicitor should first be consulted.
- (g) The claim letter must be sent and should generally contain the following information:
 - (i) the landlord's full name and address;
 - (ii) the tenant's full name and address;
 - (iii) a clear summary of the facts on which the claim is based;
 - (iv) the Terminal Schedule referred to above;
 - (v) a clear summary of the claim which may include the cost of the works, and (subject to comments of (f) above), the consequential costs and fees, loss of rent and other losses (including any sums paid to a superior landlord);

- (vi) any documents relied upon or required by these notes, including copies of any receipted invoices or other evidence of such costs, eg. a Schedule of Condition taken at lease commencement;
- (vii) confirmation that the landlord and/or its professional advisers will attend a meeting or meetings;
- (viii) a date (within 28 days or as prescribed in the lease) by which the tenant should respond;
- (ix) subject to any lease process to the contrary, the letter should provide that if the parties cannot agree, that they will appoint an independent expert as mediator or arbitrator and provide two names to agree for such purpose.

6.4 **Step 4 – Diminution and Redundant works**

- (a) Consider the need for a Diminution Assessment.
- (b) Consider the effect of any Redundant Works on the costs.
- (c) Record "Redundant Works".
- (d) The completed Scott Schedule, will indicate the entire nature of the dispute on an item by item basis, whether the dispute is about the aptness of an item, its costing or whether it is to be superseded.
- (e) A schedule of "Redundant Works" does not avoid the need for a Diminution Assessment of costs.

Footnote:

When dealing with the tenants failure to repair at lease expiration the starting point for the landlord's recovery of damages will be the actual cost of the works not carried out.

Part V

7. Service of the claim and behaviour of the parties

7.1 Introduction

- (a) This part of the Best Practice Guidance Note, the 'Protocol', sets out the views on effective and appropriate standards to be adopted for the efficient conduct of pre-action litigation. It should be read together with the rest of the document.
- (b) This Protocol is not intended to be an exhaustive or mandatory list of steps or procedures to be followed. Those will be determined by the facts of each case. In deciding the exact steps and procedures to be adopted, regard should also be given to the individual scenario.
- (c) This Protocol is intended to improve the pre-action communication between landlord and tenant by establishing a timetable for the exchange of information relevant to the Reinstatement dispute and by setting standards for the content of claims and correspondence and the conduct of pre-action negotiations.
- (d) The elements of the protocol are:
 - Service
 - Response
 - Negotiations/Dialogue
 - Disclosure/Discovery
 - Stocktake

7.2 Service

- (a) The claim letter must be properly served on the tenant. The client's solicitor will be able to advise as to what methods of service are provided for under the lease. The lease may also stipulate the address at which services must be effected and the timing to be adhered to.
- (b) The claim letter must be served in a reasonable time. A suggested reasonable time is approximately 6 months before the determination of the tenancy in order to give the tenant ample opportunity to affect the repairs.
- (c) The formalities of the lease must be followed in relation to service.
- (d) The claim letter will often be served by the client's solicitor.
- (e) The claim letter may also be provided by way of computer disk. It is not recommended that service is effected **only** by e-mail or similar form but this can be useful as a duplicate communication so as to enable the tenant's comments to be incorporated into one document that may be passed back and forth.

7.3 The Response

- (a) The tenant should respond to the claim letter within the timescale as per the provisions of the lease or in the absence of such reference, within 28 days of service.
- (b) The tenant should respond having regard to the Terminal Schedule provided by the landlord, where appropriate, in sufficient detail to enable the landlord to understand clearly the tenant's views on each item of claim.
- (c) If the tenant relies upon the Schedule, it should state its case for so doing and provide a costing where appropriate. If appropriate, and if not provided by the landlord, the tenant should also request the landlord to provide proportionate and reasonable disclosure of documents relevant to the landlord's intention to carry out works to the premises. Please refer to Footnotes at the end of Parts III and IV.

7.4 Negotiations/Dialogue

- (a) Conduct dialogue/negotiations:
 - (i) Timetable
 - (a) The tenant's response to the claim letter in relation to a Terminal Schedule and the subsequent progress of negotiations should be undertaken in a reasonable time.
 - (b) At all times, the property professional is advised to seek to advance the dialogue, through correspondence and meetings, in a timely manner.
 - (ii) Responses and meetings
 - (a) Dialogue is encouraged between parties to a dispute. In order to achieve this, it is highly desirable that the landlord and tenant, (if they have sufficient knowledge and experience in these matters), or their property professionals of like disciplines should meet during the course of the dispute, in order to clarify the nature of the dispute and if possible, to settle aspects of it. This process will often reveal that the areas of disagreement are relatively few, and the areas of agreement many. This often permits the claim to be settled or, if it is not settled, to ensure that the dispute focuses on those matters that are truly not agreed, as opposed to those areas where the parties do not understand one another.
 - (b) Due to the high costs of going to court, the parties should try to settle the matter between themselves, it should be the parties' objective, as well as the court's, that the matter should be settled instead of being tried, if at all possible.
 - (c) The landlord and tenant and/or their respective professional advisers are encouraged to meet if possible before the tenant is required to respond to the claim or as soon as possible after the response is lodged. The meetings should be on a "without prejudice" basis, preferably on site. The purpose being to review the schedule to ensure that the tenant fully understands all aspects of the claim.
 - (d) In a complex matter it may be necessary for more than one meeting between the parties to take place. These should be conducted without unnecessary delay.
 - (e) Negotiations should focus on matters objectively with consideration on the parties legal position/strength, commercial reality and costs (particularly with regard to the litigation risk).
 - (f) All dialogue and discussion should be recorded and agreed by the parties unless undertaken in a 'without prejudice' capacity.

7.5 Disclosure

- (a) Disclosure will generally be limited to the documents required to be enclosed with the claim letter and the tenant's response. If either or both of the parties consider that further disclosure should be given but there is disagreement about some aspect of that process, through their solicitors, they may be able to make an application for pre-trial discovery under the relevant court rules of the intended court. In New Zealand this is very unusual and not generally considered appropriate to these types of proceedings.
- (b) The tenant should also request the landlord to provide proportionate and reasonable disclosure of documents relevant to the landlord's intention to carry out works to the premises. Please refer to the Footnotes at the end of Part III and IV.

7.6 Review of Position

When the Protocol has been followed and the claim is not resolved, the parties may wish to carry out a "review" of the issues in dispute, including the evidence that the court is likely to need to decide those issues, before proceedings are started.

8. Alternative dispute resolution

- 8.1 Most disputes involving "Reinstatement" are settled between the parties out of court. However, a few do lead to a court case and it should be noted that the court and not the parties, will actively manage the case listed for hearing and in so doing this will encourage the parties to explore alternative dispute resolution procedures. It is very common in New Zealand for reinstatement disputes to be dealt with by arbitration or by third party proceedings.

9. Disclaimer

These notes are not provided as professional advice and should not be substituted for specific professional advice. Adherence to the Notes is also no guarantee that Reinstatement negotiations will succeed in producing an out of court settlement. They are intended as a guide to behaviour only.

10. Definitions and interpretation

The following definitions apply unless the context requires otherwise:

Claim means a claim made by the landlord against the tenant in relation to reinstatement works under a lease, and may take the form of a claim for a financial payment or (most usually in New Zealand), for the doing of work and is the landlord's assessment of their loss;

Claim Letter means a letter from a landlord to a tenant setting out a claim;

Schedule of Condition: In the context of reinstatement claims, means a Schedule prepared at or immediately prior to the lease commencement and prior to any of the tenant's works being carried out (whether by the landlord or the tenant) and will usually;

- (a) comprise a written description of each element of the property;
- (b) be accompanied by photographs or drawings;
- (c) record the standard of condition of the premises, including any relevant surrounding area;
- (d) will be issued to all parties with interests in the condition of the premises;
- (e) if prepared at lease commencement, be signed by both parties to the lease and dated as an acceptance of it as a true record;
- (f) if prepared at lease commencement, be appended to the signed lease document and will then form part of the legal document, unless contained in a video or graphics file.

Costing means the process of putting a value to the work forming part of a claim.

Diminution Assessment means an assessment of the value of the reversionary interest. In New Zealand (unlike the UK and parts of Australia), there is no statutory provision that this is to form the upper limit of a claim for damages, on the basis that in some jurisdictions a landlord cannot recover for breach of a covenant to repair beyond the loss to its reversionary interest.

Fair Wear and Tear Provides relief to the tenant from express covenants of repair or replacement liability if the fair wear and tear is from reasonable use as opposed to damage.

Reinstatement means a state of disrepair in a property, or a condition of that property that requires work to rectify it, and there is a legal liability to remedy, or undertake, that work.

Redundant Work means those works which are overtaken by the probable occurrence of another, such as a substantial refurbishment.

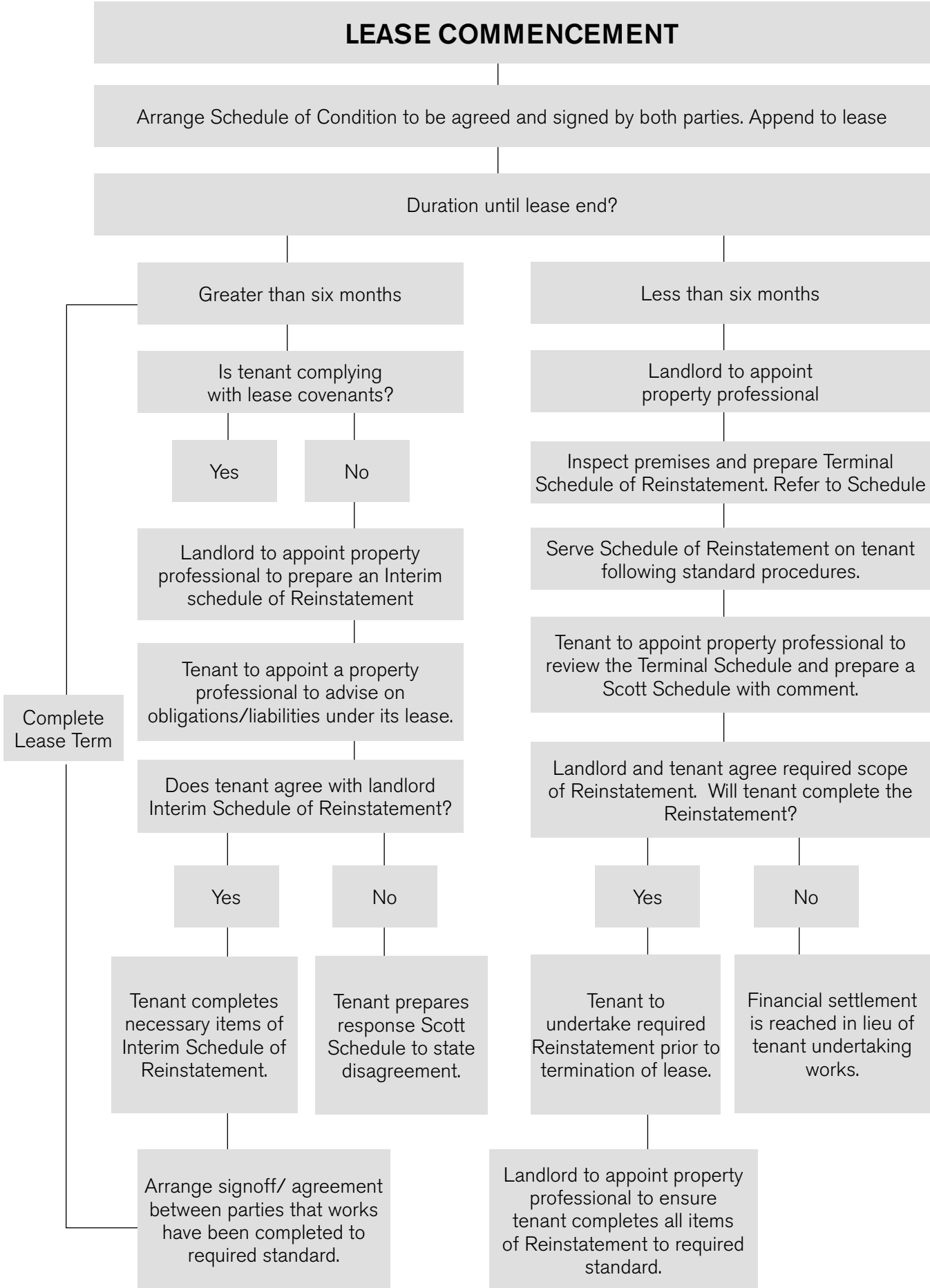
The property professional assessing diminution in the value of the landlord's reversion needs to distinguish between items that will and will not be superseded. For example, if a wall needs to be re-plastered in fact and in accordance with the lease obligations, then this item will legitimately appear in the Schedule of Reinstatement and be costed. The tenant's property professional may agree that it falls within the covenant to repair, and may agree with the costing. However, there may be an argument that because, for instance, the wall is due to be demolished or altered in some way by the landlord, the work of replastering is redundant by the intention to alter or demolish the wall. Please refer to Footnotes to Parts III & IV.

Property Professionals means all professionally trained and suitably qualified advisers in relation to the maintenance and repair of buildings. Chartered Surveyors are specialists in preparing and negotiating Reinstatement Schedules.

Without Prejudice means a statement made without the intention of affecting the legal rights of any person.

11 Appendices

Appendix 1: The Reinstatement Process



Appendix 2: Checklist

FOR PREPARATION OF TERMINAL SCHEDULE AND MANAGEMENT OF REINSTATEMENT NEGOTIATIONS IN COMMERCIAL AND INDUSTRIAL LEASING

NOTE: The following Checklist should be read together with the Guidance Notes which provide a more detailed guide to the reinstatement negotiation process. The Checklist, as with the Guidance Notes, is a guide only and is not intended to be exhaustive. Nor is the Checklist to be construed as advice.

- Take instructions from landlord or tenant
- Ascertain the landlord's intentions at the end of the lease
- Gather information
 - the lease in its complete form with all plans and other attachments, coloured if originally coloured;
 - any deeds of variation
 - scaled plans, coloured where appropriate
 - licences or other consents for alterations, with plans and specifications
 - any agreement for lease, if intended to survive the grant of the lease
 - assignments and consent to assign
 - licence agreements or subleases and the relevant consents
 - side letter or other written agreements
 - schedules of condition, together with appropriate photographs, or other documentation that establishes the condition (of the premises) at lease commencement
 - schedules of fixtures and fittings
 - any current planning consents or statutory notices relating to the property
- Review the lease terms and in particular mechanisms governing dispute resolution
- Consider if reinstatement of alterations is required
- Inspect the premises
 - Obtain consent of landlord to inspect (if necessary)
 - Give notice to tenant, as required by the lease of intention to inspect
 - Retain site notes
 - Obtain input from services consultants, engineers, environmental consultants, etc
 - Choose the type of Terminal Schedule Layout, i.e. a Scott Schedule.

- Complete the Terminal Schedule
- Cost the Terminal Schedule
- Quantify the Claim
- Append the Terminal Schedule to the Claim
- Include in the Claim letter:
 - the landlord's full name and address
 - the tenant's full name and address
 - a clear summary of the facts
 - the terminal schedule referred to above
 - any documents relied upon or required by these notes
 - the date
 - the independent expert (if applicable)
- Undertake diminution assessment if required
 - Record of Service of Claim
 - Date of Service of Claim on Tenant/Landlord
 - Date of Service on Tenant's/Landlord's Solicitor
 - Date of Response
 - Date of dialogue/negotiation
- Record of documents disclosed

- Review of unresolved issues

- Execute Deed recording the terms of any settlement

**Appendix 3:
Example of Schedule of Condition**

**HAMILTON PLACE
BRONWYN
WELLINGTON**

For the lease agreement between

JB Developments

and

CS International Corporation

[Date]

EXAMPLE OF SCHEDULE OF CONDITION (continued)

CONTENTS

SECTION 1.0 GENERAL

- 1.1 INTRODUCTION
- 1.2 PREMISES
- 1.3 LEASE AGREEMENT
- 1.4 DEFINITIONS
- 1.5 REPORT CONDITIONS

SECTION 2.0 EXAMPLE OF SCHEDULE OF CONDITION

- 2.1 EXTERNAL FABRIC
- 2.2 BASEMENT STORES
- 2.3 GROUND FLOOR OFFICES
- 2.4 FIRST FLOOR OFFICES
- 2.5 SECOND FLOOR OFFICES
- 2.6 WAREHOUSE

SECTION 3.0 CERTIFICATION

- 3.1 CERTIFICATION
- 3.2 SIGNATURES

APPENDICES

- APPENDIX A** PHOTOGRAPHS – EXTERNAL FABRIC
- APPENDIX B** PHOTOGRAPHS – BASEMENT STORES
- APPENDIX C** PHOTOGRAPHS - GROUND FLOOR
- APPENDIX D** PHOTOGRAPHS - FIRST FLOOR
- APPENDIX E** PHOTOGRAPHS – SECOND FLOOR
- APPENDIX F** PHOTOGRAPHS - WAREHOUSE
- APPENDIX G** FLOOR PLANS

EXAMPLE OF SCHEDULE OF CONDITION (continued)

SECTION 1.0 GENERAL

1.1 INTRODUCTION

This Schedule of Condition accurately details the condition and layout of the premises to be occupied by the Tenant on [date].

The report is to be referenced by the parties to the lease in assessing the condition of the premises at lease commencement and, as such, establish the level of repairs and reinstatement both during the term of the lease and upon lease expiry.

The report covers all elements to the demised premises to the Tenant.

The Schedule in Section 2.0 must be read in conjunction with the photographs in the appendices to provide a complete representation of the condition of the premises. Floor plans of the demised premises are provided in Appendix G which details the existing arrangement and fit-out of the premises.

1.2 PREMISES

The Tenant is understood to be taking possession of the whole building consisting of Basement, Ground Floor, First Floor and Second Floor offices along with the Warehouse to the rear of the building. The Tenant is responsible for the maintenance of the external and internal areas of the demised premises, but not the common parts such as roadways and landscaped areas.

1.3 LEASE AGREEMENT

This document is to be appended to the lease agreement and read in conjunction with the terms thereof.

1.4 DEFINITIONS

The following defines the condition comments of the elements surveyed.

Good: Items which have suffered minimal weathering, wear or decay and are free from any visual defects.

Satisfactory: Items that have worn through 'normal' use and weathering, and are in commensurate condition to the building age and use.

Poor: Items that are worn, decayed or weathered either due to the age, abnormal use or lack of maintenance.

1.5 REPORTING CONDITIONS

This report is based on a visual inspection and covers the building fabric, super-structure and permanently fixed items only and does not cover any temporary fixtures, fittings or chattels on or at the property.

For the avoidance of any doubt, this report is not a structural or geotechnical survey and does not cover the inspection or testing of any services unless specifically identified in the main body of the report. All comments relating to services are as a guide only and should not be taken as verification that they are installed in accordance with current regulations.

SECTION 2.0 EXAMPLE OF SCHEDULE OF CONDITION (continued) (EXTRACT SAMPLE ONLY)

LOCATION	DESCRIPTION	CONDITION
2.1 EXTERNAL	This section is to be read in conjunction with the photographs in Appendix A.	
Roof	Galvanised corrugated steel roof sheeting with matching flashings.	Satisfactory condition. Minor rust staining to lower sections where water ponds. 11 No sheets damaged from foot traffic to service plant locations.
		Flashings in satisfactory condition except for one section to the north-east corner which is missing.
Rainwater System	Central box-section valley gutter lined with butynol.	Satisfactory condition. Dressing to the south elevation rain-head has been poorly finished.
	Painted galvanised steel rain-heads and downpipes.	Corroded to its connection with the downpipes. Outlets blocked with leaves.
Walls	Concrete tilt slabs to the Warehouse section.	Satisfactory condition. Anti-graffiti paint applied to lower sections in good condition. Sealant to joints open to south elevation to 3 No. joints, up to 1.7m high.
	Glazed walling to front elevation.	Good condition.
	Rendered concrete block walls with paint finish to all other elevations.	Satisfactory condition. Minor crazing and hairline cracks to approx. 22 sq/m to the east elevation at first floor level. Minor efflorescence at low level to the west elevation at its junction with the soft landscaping, approximately 5m in length.
Windows	Powder-coated aluminium single-glazed windows to all elevations.	Powder-coating is faded, particularly to second floor level, west elevation. Rubber seals displaced to 8 No. windows.
Doors	Powder-coated aluminium double doors to the main entrance.	Satisfactory condition.
	Timber egress doors to the east and south elevations.	Satisfactory condition. Door jamb to the south elevation door has been impact damaged.

SECTION 2.0 EXAMPLE OF SCHEDULE OF CONDITION (continued)

LOCATION	DESCRIPTION	CONDITION
2.2 FIRST FLOOR	This section is to be read in conjunction with the photographs in Appendix D	
Reception	1200 x 600 suspended ceiling with mineral fibre lay-in tiles.	Satisfactory condition albeit slightly uneven. 2 No. ceiling tiles are scuffed and 1 No. ceiling tile is damaged.
	1200 x 600 recessed fluorescent light fittings with prismatic diffusers.	Good working order. Prismatic diffusers are faded and 2 No. fluorescent tubes are defective
	Flush plaster walls and metal stud partitions.	Good condition.
	Anodised aluminium windows.	Satisfactory condition.
	Roller blinds to all windows.	Satisfactory condition. 1 No. blind missing.
	Timber solid core doors with door closers and vision panel inserts.	Good working order. Minor scuff marks to the leading edge. Door jamb damaged to lower section.
	Concrete floor overlaid with broadloom carpet.	Carpet is generally worn and marked from previous furniture.
	Paint finish to all walls.	Poor condition and generally faded. Pin holes to internal partitions.
	Varnish finish to doors.	Satisfactory condition.
	Main Offices Open Plan	1200 x 600 suspended ceiling with mineral fibre lay-in tiles.
1200 x 600 recessed fluorescent light fittings with prismatic diffusers.		Good working order. Prismatic diffusers are faded and 1 No. fluorescent tube is defective
Flush plaster walls and metal stud partitions.		Good condition.
Anodised aluminium windows.		Satisfactory condition.
Roller blinds to all windows.		Satisfactory condition.
Timber solid core doors with door closers and vision panel inserts.		Good working order.

SECTION 2.0 EXAMPLE OF SCHEDULE OF CONDITION (continued)

LOCATION	DESCRIPTION	CONDITION
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**3.1
CERTIFICATION**

We the undersigned agree that this Schedule of Condition is a true representation of the condition of the premises at the date of inspection.

**3.2
SIGNATURES**

Signed:

Signed:

Name:

Name:

Position:

Position:

On behalf of the Lessor:

On behalf of the Lessee:

Date:

Date:

Appendix 4: Example of a Reinstatement Schedule

The Pre-amble

[The Property]

This schedule has been prepared by [name, individual and firm], upon the instructions of [name the landlord]. It was prepared following [name i.e. same name as above]'s inspection of the premises known as [property] on [date].

It records the works required to be done to the premises in order that they are put into the condition the premises should have been put if the tenant [name] had complied with its covenants contained within its lease of the premises dated [].

The covenants of the said lease with which the tenant should have complied are as follows:-

[Set out clause number of the lease and quote the clause verbatim].

The following schedule contains:

- reference to the specific clause (quoted above) under which the repairing obligation arises,
- the breach complained of,
- the remedial works suggested by the landlord's Property professional [name i.e. same name as above] as suitable for remedying the breach complained of,
- the landlord's view on the cost of the works.

The schedule contains the true views of [name, i.e. the same name as above] being the Property professional appointed/employed by the landlord to prepare the schedule.

Upon receipt of this schedule the tenant should respond within 28 days to enable the landlord to understand clearly the tenant's views on each item of claim.

Appendix 4: Example of a Reinstatement Schedule

ITEM NO.	CLAUSE NO.	BREACH COMPLAINED OF
CAR PARKING AREA		
1	4 (6) (a)	Floodlighting is provided within the planting area to light the front elevation of the building. Floodlight fittings are corroded and broken. None of the 4No. fittings are in working order.
2	4 (6) (a)	Car parking and hardstanding to east of the north wing. Precast concrete paving slabs to paths adjacent to building. 30No. slabs are cracked and broken. 50No. slabs are displaced and uneven.
3	4 (6) (a)	Grass covered banks between perimeter paving and footpath to roadway. Grass has died.
4	4 (6) (a)	Gas stop enclosure adjacent to directors' parking bays is damaged.
5	4 (6) (a)	Asphalt surfacing to car park areas with thermoplastic markings to car park bays. There is localised damage to asphalt surface including pot holes approx 300mm diameter particularly adjacent to storm water gullies.
6	4 (6) (a)	The marking to car parking bays are worn and missing in places.
INTERNAL GROUND FLOOR – WEST WING		
7	4 (6) (a)	4No. new infill bays following removal of tenant blockwork. Glazing not tinted to match existing.
8	4 (7)	Split system air conditioning units installed by tenant.
9	4 (7)	Ducted skirting to perimeter. Not laid against the floor leaving uneven gap.

REMEDIAL WORKS REQUIRED

LANDLORD'S COSTING

Renew 4No. floodlight fittings and check switchgear and wiring.

1,200.00

Take up and dispose of damaged slabs. Lay new slabs to match existing. Take up and re-lay uneven and displaced slabs.

1,750.00

Prepare top soil base and lay new turf.

450.00

Repair damaged gas stop enclosure.

600.00

Patch repair asphalt to damaged areas.

1,875.00

Burn off all residual markings and apply new thermoplastic markings to all parking bays; re-design and set out to standard size parking bays.

2,000.00

Replace glass with tinted glass- 16No. windows in total.

3,200.00

Refix units that have not been securely mounted on external walls.

1,500.00

Take up. Refit at lower level to close up the gap; make good finishes; redecorate.

1,750.00

Appendix 4: Example of a Reinstatement Schedule

(continued);

Property Address;
Repair and Decoration

ITEM NO.	CLAUSE NO.	BREACH COMPLAINED OF
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INTERNAL GROUND FLOOR - WEST WING (cont'd)

10	4 (7)	Ceiling tiles: damp staining already showing from roof leaks above. 2No. tiles missing.
11	4 (7)	Plasterwork is damp damaged particularly at high level in lobbies adjacent to curtain wall enclosure.
12	4 (7)	Decorative finishes to wall surfaces have been damaged and are soiled.

ESCAPE STAIRS TO WEST WING

13	4 (6) (b)	Plasterwork is damp damaged particularly at high level in lobbies adjacent to curtain wall enclosure.
14	4 (6) (b)	There is extensive cracking to plastered surfaces.
15	4 (6) (b)	Decorative finishes to wall surfaces have been damaged and are soiled.
16	4 (6) (b)	Ceiling tiles are generally discoloured. Many tiles are damaged, chipped or stained.
17	4 (6) (b)	Carpets have widespread staining as a result of spillage and poor maintenance.

Total - repair and decoration

REMEDIAL WORKS REQUIRED

LANDLORD'S COSTING

Replace missing and damaged tiles.

100.00

Hack off damp damaged plasterwork and make good.
Repair wall surfaces and prepare for redecoration.

1,685.00

Apply under coat and two full coats emulsion paint finish to all previously decorated surfaces.

2,025.00

Hack off damp damaged and cracked plasterwork and make good.

3,685.00

Hack off damp damaged and cracked plasterwork and make good.

Incl. above.

Repair wall surfaces and prepare for redecoration. Apply undercoat and two full coats emulsion paint finish to all previously decorated surfaces.

2,025.00

Renew all suspended ceiling tiles (replacement of damaged tiles only will result in a patchy and inconsistent appearance).

1,585.00

Take up and dispose of all carpet tiles. Supply and lay new carpet tiles of a grade and quality to match existing tiles.

5,600.00

31,030.00

Appendix 5: The Scott Schedule

A Scott Schedule is essentially an expanded version of the original Schedule of Reinstatement. The original schedule will have a series of items on it, often considerable in number. The Scott Schedule must address the parties' positions on each of these items individually. The first four columns - Item number; Clause number; Breach complained of; and Remedial works required - will all have appeared on the original schedule of reinstatement, as will column 7 - 'Landlord's costing'. The additional columns introduced at the Scott Schedule stage are numbered 5, 6, 7, 8, 9 and 10: Tenant's comments on the landlord's item; Landlord's comments on the response; Tenant's costing of the landlord's item; Landlord's costing of the tenant's item (which may be different from the landlord's); and Tenant's costing of its own item.

The thrust of the four cost columns – number 7 to 10 – is to identify the character of the dispute on each item. After all, there are four possible positions that a tenant might take in relation to a landlord's item:

- 1) Agreement;
- 2) Agreement with the item, but not with the costing;
- 3) Agreement with the costing but not with the item; and
- 4) Agreement with neither the costing nor the item.

The four columns of figures are intended to clarify into which category the dispute on each item falls. If the matter reaches trial, the figures provided under 2 and 3 above will be particularly helpful to the judge. If the item is agreed, he can simply determine the costing. If the costing is agreed, he can just decide whether the item is appropriate.

It is essential that there should be a reference number for each item. As the dialogue over the Scott Schedule progresses, a number of items may be eliminated from the claim. They should nonetheless continue to appear on the Scott Schedule, no doubt with zeros against them, in order to record the history of the negotiations between the parties and the reason why items have been eliminated.

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LANDLORD'S ITEM**TENANT'S ITEM**

Landlord's comments

Landlord's
costingTenant's
costingLandlord's
costingTenant's
costing

Renewal is closer to the standard contemplated by the covenant.	1,200.00	1,000.00	1,200.00	1,200.00
\$1,200 will not meet the requisite standard.	1,750.00	1,200.00	1,750.00	1,200.00
The grassed area should have been put into and kept in the condition contemplated by the covenant.	450.00	450.00	300.00	150.00
The minor damage nonetheless requires a major repair.	600.00	100.00	600.00	100.00

Appendix 5: Example of a Scott Schedule (continued)

Property Address

1	2	3	4	5
Item No.	Clause No	Breach complained of	Remedial works required	Tenant's comments

CAR PARKING AREA

5	4 (6) (a)	Asphalt surfacing to car park areas with thermoplastic markings to car park bays. There is localised damage to asphalt surface including pot holes approx 300mm diameter particularly adjacent to gullies.	Patch repair asphalt to damaged areas.	Item disagreed – generally the asphalt hardstanding is in reasonable order with the exception of small number of pot holes. The areas identified in the landlord's schedule are excessive. Approximately 10No. pot holes to all car parks require attention in order to return them into good condition. Landlord's claim is excessive. Allow for making good.
6	4 (6) (a)	The markings to car parkings bays are worn and missing in places	Burn off all residual markings and apply new thermoplastic marking to all parking bays; re-design and set out to standard size parking bays.	Item agreed – the road markings to the rear car park area are aged, weathered and require to be renewed. The landlord's claim is excessive.

INTERNAL: GROUND FLOOR - WEST WING

7	4 (6) (a)	4No. new infill bays following removal of tenant blockwork. Glazing not tinted to match existing.	Replace glass with tinted glass – 16No. windows in total.	Item agreed- the glazing panes to the new replacement curtain walling to the ground floor west wing do not match the tint and colour of the original curtain walling sections.
8	4 (7)	Split system air conditioning units installed by tenant.	Refix units that have not been securely mounted on external walls.	Item agreed.

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7

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LANDLORD'S ITEM**TENANT'S ITEM**

Landlord's comments

Landlord's
costingTenant's
costingLandlord's
costingTenant's
costing

Agreed, and cost reduction agreed.	1,875.00	875.00	1,875.00	875.00
\$1,500 will not meet the requisite demand.	2,000.00	1,500.00	2,000.00	1,500.00

Agreed.	3,200.00	3,200.00	3,200.00	3,200.00
Agreed.	1,500.00	1,500.00	1,500.00	1,500.00

Appendix 5: Example of a Scott Schedule (continued)

Property Address

1	2	3	4	5
Item No.	Clause No	Breach complained of	Remedial works required	Tenant's comments
CAR PARKING AREA				
9	4 (7)	Deducted skirting to perimeter. Not laid against the floor leaving uneven gap.	Take up. Refit at lower level to close up the gap; make good finishes; redecorate.	A nominal gap between the floor slab and underside of the new ducted skirting is noted. The new ducted skirting installed at the time of the reinstatement works has been lined through with the head of the original skirting trunking in situ to provide an even finish to the floor plate. Ducted skirting operable and has been provided with test certification. Therefore, no breach of covenant or disrepair has been identified by the landlord. Allow for providing cloaking pieces to base of new infill sections of ducted skirting.
10	4 (7)	Ceiling tiles: damp staining already showing from roof leaks above. 2No. tiles missing.	Replace missing and damaged tiles.	Item agreed. Cost excessive.
11	4 (7)	Plasterwork is damp damaged particularly at high level in lobbies adjacent to curtain wall enclosure.	Hack off damp damaged plasterwork and make good. Repair wall surfaces and prepare for redecoration.	Areas of damp and rainwater penetration have been recorded within the main stairwell at high level around the junction of curtain walling and flat roof soffit. We anticipate that there is an approximate 5m ² in total patch repairs to be undertaken to the plaster finishes throughout this area. The landlord's claim and costs are excessive.

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LANDLORD'S ITEM**TENANT'S ITEM**

Landlord's comments

Landlord's
costingTenant's
costingLandlord's
costingTenant's
costing

Agreed, but cost would be \$1,750.	1,750.00	875.00	1,750.00	1,050.00
\$100 reasonable.	100.00	20.00	100.00	20.00
The area in question is more like 12m2.	1,685.00	1,050.00	1,500.00	1,050.00

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LANDLORD'S ITEM**TENANT'S ITEM**

Landlord's comments

Landlord's
costingTenant's
costingLandlord's
costingTenant's
costing

Agreed.	2,025.00	2,025.00	2,025.00	2,025.00
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Area is about 60m2.	3,685.00	2,300.00	3,685.00	2,300.00
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See above.	Inc. above.	Inc above.	Inc above.	Inc above.
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Agreed.	2,025.00	2,025.00	2,025.00	2,025.00
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Disrepair is significant.	1,585.00	Nil	Nil	Nil
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Agreed and reduced cost agreed.	5,600.00	4,200.00	4,200.00	4,200.00
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	31,030.00	22,495.00	27,710.00	22,395.00
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Appendix 6:

Statutory Table - New Zealand & UK Law Comparison

This table is intended as a preliminary guide only. The legislative provisions referred to may vary from jurisdiction to jurisdiction (even where broadly comparable). A detailed consideration should be made if relevant.

UK	NEW ZEALAND
<p>Section 146(1) – Law of Property Act 1925; Right of re-entry or forfeiture for breach of covenant is not enforceable unless the lessor serves on the lessee a notice specifying the breach, the remedy (if there is one) and giving a time frame for remedy of the breach.</p>	<p>Section 118 of the Property Law Act 1952</p>
<p>Section 146(2) – Law of Property Act 1925 ; Specifies lessee's right to relief by application to the court.</p>	<p>Section 129 of the Conveyancing Act 1919 Section 118 of the Property Law Act 1952</p>
<p>Section 146(3) – Law of Property Act 1925; A lessor shall be able to recover as a debt all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor, surveyor, valuer, etc in reference to a breach of the lease.</p>	<p>None Exists</p>
<p>Section 146(4) – Law of Property Act 1925; Power of court to protect under-lessee</p>	<p>Section 119 of the Property Law Act 1952</p>
<p>Section 18 – Landlord and Tenant Act 1927; Provisions as to covenants to repair</p>	<p>None Exists</p>
<p>Section 1 – Leasehold Property (Repairs) Act 1938; Restriction on enforcement of repairing covenants in long leases (being leases of three years or more)</p>	<p>None Exists</p>
<p>Section 51 – Landlord and Tenant Act 1954; As per Section 1 of the Leasehold Property (Repairs) Act 1938 (above), but extending it to non-residential property</p>	<p>No equivalent provision</p>
<p>1.1.5 – Civil procedure rules require that parties exchange full information prior to instigation of proceedings to attempt settlement as an alternative to litigation</p>	<p>No requirements for dispute resolution to be undertaken prior to litigation</p>

REINSTATEMENT

Reinstatement Working Party, RICS New Zealand

This best practice guidance note is written for any property professional involved in Reinstatement during or at the end of a lease term. It deals with every stage of involvement in the process, including:

- Taking instructions and clarifying terms of engagement;
- Determining the different types of schedule and when they might be served;
- Understanding the different roles in which the property professional might be required to act;
- Preparing the layout and content of a Schedule of Reinstatement;
- Quantifying the claim and preparing an assessment of costs;
- Providing advice regarding the preferred timetable for serving of notices and ongoing dialogue, responses and meetings.

With contributions from experienced RICS practitioners and a New Zealand property lawyer. The intent of the guidance note is to:

- Clarify the process of Reinstatement to encourage an early settlement between landlord and tenant;
- Encourage property professionals to note and understand the exact provisions of the lease;
- Reinforce the need for professional objectivity;
- Encourage property professionals to act in accordance with 'best practice' procedures;
- Enable parties to a lease to avoid litigation by following a workable process to agree a claim OR to support the efficient management of proceedings where litigation cannot be avoided.

This edition has been written to apply to the New Zealand property market.

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