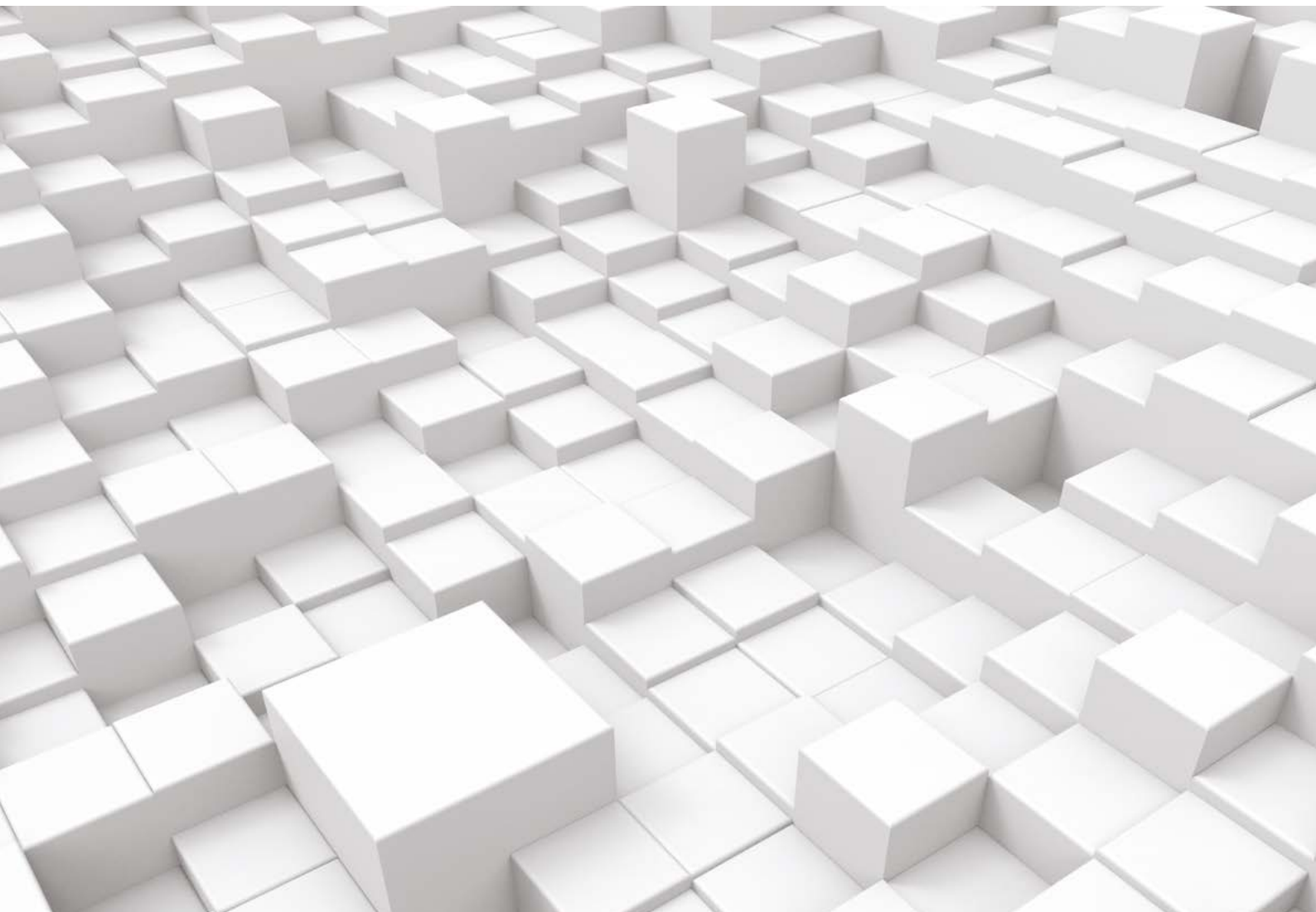




RICS professional standards and guidance, UK

# Dilapidations in England and Wales

7th edition, September 2016



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# RICS professional standards and guidance

## International standards

RICS is at the forefront of developing international standards. In addition to *RICS Valuation – professional standards*, other international standards are being developed. Working in coalitions with organisations around the world, acting in the public interest to raise standards and increase transparency within markets, International Property Measurement Standards (IPMS – ipmsc.org), International Construction Measurement Standards (ICMS), International Land Measurement Standards (ILMS), International Ethics Standards (IES) and others will be published and will be mandatory for RICS members. Most RICS professional statements link directly to these standards and underpin them. Where that is the case, RICS members are advised to make themselves aware of the relevant international standard(s) (see [www.rics.org](http://www.rics.org)) and the overarching principles with which the associated professional statement complies. Members of RICS are uniquely placed in the market by being trained, qualified and regulated by working to international standards and complying with professional statements.

## RICS guidance notes

This is a guidance note. Where recommendations are made for specific professional tasks, these are intended to represent 'best practice', i.e. recommendations that in the opinion of RICS meet a high standard of professional competence.

Although members are not required to follow the recommendations contained in the guidance note, they should take into account the following points.

When an allegation of professional negligence is made against a surveyor, a court or tribunal may take account of the contents of any relevant guidance notes published by RICS in deciding whether or not the member acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this guidance note should have at least a partial defence to an allegation of negligence if they have followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

It is for each member to decide on the appropriate procedure to follow in any professional task. However, where members do not comply with the practice recommended in this guidance note, they should do so only for good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice.

Also, if members have not followed this guidance, and their actions are questioned in an RICS disciplinary case, they will be asked to explain the actions they did take and this may be taken into account by the Panel.

In some cases there may be existing national standards that may take precedence over this guidance note. National standards can be defined as professional standards that are either prescribed in law or federal/local legislation, or developed in collaboration with other relevant bodies.

In addition, guidance notes are relevant to professional competence in that each member should be up to date and should have knowledge of guidance notes within a reasonable time of their coming into effect.

This guidance note is believed to reflect case law and legislation applicable at its date of publication. It is the member's responsibility to establish if any changes in case law or legislation after the publication date have an impact on the guidance or information in this document.

## Document status defined

RICS produces a range of professional guidance and standards documents. These have been defined in the table below. This document is a guidance note.

### Publications status

Type of document	Definition	Status
<b>Standard</b>		
International standard	An international high-level principle-based standard developed in collaboration with other relevant bodies.	<b>Mandatory.</b>
<b>Professional statement</b>		
RICS professional statement	A document that provides members with mandatory requirements or a rule that a member or firm is expected to adhere to.  This term also encompasses practice statements, Red Book professional standards, global valuation practice statements, regulatory rules, RICS Rules of Conduct and government codes of practice.	<b>Mandatory.</b>
<b>Guidance and information</b>		
RICS code of practice	Document approved by RICS, and endorsed by another professional body/stakeholder, that provides users with recommendations for accepted good practice as followed by conscientious practitioners.	Mandatory or recommended good practice [will be confirmed in the document itself].  Usual principles apply in cases of negligence if best practice is not followed.
RICS guidance note [GN]	Document that provides users with recommendations or approach for accepted good practice as followed by competent and conscientious practitioners.	Recommended best practice.  Usual principles apply in cases of negligence if best practice is not followed.
RICS information paper [IP]	Practice-based information that provides users with the latest technical information, knowledge or common findings from regulatory reviews.	Information and/or recommended best practice.  Usual principles apply in cases of negligence if technical information is known in the market.
RICS insight	Issues-based input that provides users with the latest information. This term encompasses thought leadership papers, market updates, topical items of interest, white papers, futures, reports and news alerts.	Information only.
RICS economic / market report	A document usually based on a survey of members, or a document highlighting economic trends.	Information only.
RICS consumer guide	A document designed solely for use by consumers, providing some limited technical advice.	Information only.
Research	An independent peer-reviewed arm's-length research document designed to inform members, market professionals, end users and other stakeholders.	Information only.



# Glossary of terms

**Dilapidations claim:** the overall process associated with an allegation of a breach of lease/tenancy in relation to the condition and/or use of the property, typically as identified in a Schedule of Dilapidations, Quantified Demand and/or Diminution Valuation.

**Diminution Valuation:** a valuation prepared in order to calculate the diminution in value of a landlord's property incurred as a result of alleged breaches. The document is usually prepared by a specialist valuation surveyor.

**Dilapidations Protocol ('the Protocol'):** pre-action protocol for claims for damages in relation to the physical state of commercial property at the termination of a tenancy (applicable to terminal dilapidations disputes).

**PDPAC:** practice direction pre-action conduct and protocols (applicable to dilapidations disputes unless the Protocol applies).

**Quantified Demand:** a document prepared for the purpose of and complying with part 4 of the Protocol, typically incorporating a Terminal Schedule of Dilapidations. The document is usually prepared by a building surveyor.

**Response:** a document prepared for the purpose of and complying with part 5 of the Protocol, typically incorporating a Scott Schedule. The document is usually prepared by a building surveyor.

**Schedule of Dilapidations:** a document that identifies:

- relevant lease/tenancy obligations
- alleged breaches of those obligations
- in certain circumstances remedial works that have been completed or are proposed in order to rectify each alleged breach and
- potentially the estimated or actual cost incurred in rectifying those breaches.

The document is usually prepared by a building surveyor.

Landlords' Schedules of Dilapidations are commonly referred to in the following manner:

- Interim Schedule of Dilapidations: a Schedule of Dilapidations prepared in contemplation of remedy of any alleged breaches during the contractual term of the lease, and not relating to yield-up obligations.
- Terminal Schedule of Dilapidations: a Schedule of Dilapidations prepared at or shortly after the end of the lease term. This phrase is also commonly used in relation to a Schedule of Dilapidations prepared in anticipation of the end of the lease term, which includes reference to yield-up obligations.

**Scott Schedule:** a Schedule of Dilapidations with additional columns to enable the parties to set out their respective views. The document is usually prepared by a building surveyor.

# 1 Scope

## 1.1 General

**1.1.1** The purpose of this guidance note is to provide practical guidance to RICS members when instructed in connection with dilapidations matters in England and Wales.

**1.1.2** The guidance note seeks to advise members on the factors they should take into consideration when producing Schedules of Dilapidations, Quantified Demands, Responses, Scott Schedules and Diminution Valuations for reference to or use by the client, the other party to the lease, third parties and tribunals.

**1.1.3** This guidance note is effective three months after publication.

## 1.2 Areas covered

**1.2.1** The situations in which surveyors can be asked to act or advise that are covered by this guidance note, are:

- dilapidations claims during the term
- dilapidations claims at the end of the term
- dilapidations claims by tenants against landlords and
- break clause situations.

## 1.3 Naming conventions

**1.3.1** The word 'tribunal' is used to mean courts, tribunals, arbitrations and referrals to independent experts.

**1.3.2** The physical subject of the dilapidations claim is referred to as the 'property', which should be taken to include part of a property or a demise.

**1.3.3** The Civil Procedure Rules are referred to throughout this document as 'CPR'.

## 2 Role of the surveyor

### 2.1 General

**2.1.1** A surveyor can be offered instructions in a dilapidations dispute as an adviser, expert witness or dispute resolver.

**2.1.2** Professional objectivity is required in all roles and in the various types of advice given. The surveyor must act in accordance with RICS' Rules of Conduct and RICS' Professional and Ethical Standards.

**2.1.3** When advising a client on dilapidations matters, a surveyor should seek to understand fully the client's position, the reasons why the surveyor's advice is sought and how that advice might be used. The surveyor should try to ascertain the relevant factual and legal background insofar as it will impact on that advice.

### 2.2 Parties' and surveyors' behaviour

**2.2.1** The surveyor must be aware of the obligations and the expectations of their client's behaviour as set out in the Protocol and/or the PDPAC; should ensure that their client is aware of the presence of the Protocol or the PDPAC (whichever is relevant) and should offer to send a copy of (or a link) to their client.

**2.2.2** The surveyor should be aware that, pursuant to the CPR, the court has discretion as to whether costs are payable by one party to another.

'In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including:

- the conduct of all the parties
- whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
- any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

The conduct of the parties includes:

- (a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed the Practice Direction Pre-Action Conduct or any relevant pre-action protocol;
- (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
- (d) whether a claimant who has succeeded in its claim, in whole or in part, exaggerated its claim.'

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**2.2.3** Surveyors should be aware that the area of dilapidations involves many legal considerations and should avoid advising or taking steps outside their area of expertise.

**2.2.4** Surveyors should undertake their instructions in an objective, honest, polite, constructive and professional manner, acknowledging that others may hold valid opinions that differ from their own.

**2.2.5** Schedules of Dilapidations, Quantified Demands, Responses, Scott Schedules, Diminution Valuations and correspondence should not contain allegations of breaches that do not exist, remedies that are inappropriate (for instance, replacement of items when patch-repair would be sufficient), or figures that are exaggerated or understated. This is particularly important as any subsequent litigation carries with it the danger of a heavy costs order against the party who exaggerates or understates its position.

**2.2.6** It is possible that the Schedule of Dilapidations or Quantified Demand originally served, or the original Response, will be compared with that forming the basis of the dilapidations claim or defence and the finally determined liability. If the original Schedule of Dilapidations or Quantified Demand is found to be exaggerated, or the original Response found to be understated, the offending party may be at risk of a punitive order on costs.

**2.2.7** Surveyors should not allow their professional standards to be compromised in order to advance clients' cases. A surveyor should give proper advice even though the client might choose to ignore it.

**2.2.8** Either party should be entitled to assume that content is being put forward with integrity, in good faith and on sound advice.

## 2.3 Adviser

**2.3.1** The role of adviser can encompass surveyors using their expertise to identify or comment on breaches of covenant and appropriate remedies, prepare Schedules of Dilapidations, Quantified Demands or Responses, provide or comment on Diminution Valuations, provide valuation advice, negotiate with other parties with the aim of achieving a settlement, and providing advice on strategy and tactics in relation to an actual or potential dilapidations dispute.

**2.3.2** A surveyor who is appointed solely to prepare or comment on a Schedule of Dilapidations, Quantified Demand, Response and/or a Diminution Valuation is not yet an expert witness. The expert witness practice statement will therefore not apply until the surveyor is considering accepting instructions as an expert witness. Nonetheless, the surveyor should be influenced by the considerations relating to expert witnesses in advising his or her client, particularly to provide objective advice. It is important for the surveyor to keep in mind that his or her credibility as an expert witness at a future hearing may be undermined by any failure to follow the guidance in sections 2.2 and 2.3 when acting as an adviser.

## 2.4 Expert witness

**2.4.1** A surveyor acts as an expert witness once a formal instruction from a client to give or prepare evidence for the purpose of proceedings is accepted. An expert witness can only give evidence before a tribunal by direction of that tribunal. Strictly, the appointment of an expert witness can only be made after such direction is given.

In practice, however, this appointment is often done in anticipation of such direction at the request of the client/ legal adviser and the surveyor should act as an expert witness from the date of accepting any such instruction, even if no formal direction has been made.

**2.4.2** A surveyor appointed as an expert witness, whether appearing for one party or as a single joint expert witness, will be bound by the RICS practice statement and guidance note: *Surveyors acting as expert witnesses*. Under that document, and also under the CPR where it applies, the surveyor's duty to his or her client is overridden by a duty to the tribunal.

**2.4.3** The obligation of an expert witness to any tribunal is to give objective unbiased evidence. It follows that the evidence given by the expert witness would be the same whether appointed by the tenant, the landlord or as a single joint expert witness.

**2.4.4** In the context of court proceedings, surveyors' obligations are set out in Part 35 of the CPR and its accompanying Practice Direction.

**2.4.5** Surveyors appointed as expert witnesses should also act in accordance with RICS' *Rules of Conduct*, insofar as there is no conflict with their duty to the tribunal.

## 2.5 Dispute resolver

**2.5.1** A surveyor may be appointed as a dispute resolver by private agreement between the parties or by a formal appointing body such as the RICS Dispute Resolution Service.

**2.5.2** A surveyor appointed by a single party or as a single joint expert witness to provide services set out in sections 2.3 and/or 2.4 is not a dispute resolver.

## 3 Taking instructions

### 3.1 General

**3.1.1** As with any instruction, the surveyor should be aware of the RICS *Conflicts of Interest* guidance note and, when applicable, the RICS practice statement and guidance note: *Surveyors acting as expert witnesses*.

**3.1.2** Surveyors should bear in mind that, in addition to their duties to their clients, they have duties to RICS and to any tribunals to which they give evidence. Surveyors should inform clients of these additional duties.

**3.1.3** Surveyors should be confident that their clients understand the dilapidations process and, where applicable, the Protocol. The RICS consumer guide to dilapidations may be a useful resource in this regard.

**3.1.4** As with any instruction, the surveyor should make it clear to the client what is allowed-for and what is not allowed-for. For example:

- is the surveyor engaging specialists as sub-consultants
- which specialists are considered likely to be required
- will the surveyor be costing the remedial works
- is the surveyor preparing the Quantified Demand/Response, as well as the Schedule of Dilapidations/Scott Schedule
- is the surveyor also allowing for a re-inspection of the property at a later date (such as at lease end); what testing /opening up is proposed
- is the surveyor allowing for time to meet and discuss matters with the other party's surveyor
- what is the surveyor's proposed fee arrangement
- might the fee arrangement need to be changed if the surveyor is subsequently engaged as an expert witness and
- whether the surveyor is engaged to send documents to the other party, etc.

**3.1.5** Surveyors may engage other specialists to assist in the discharge of their role, such as a services engineer, cladding consultant, lettings agent, etc. These specialists are generally either engaged by the surveyor in a sub-consultancy role, or directly by the client.

**3.1.6** However the specialist is engaged, the surveyor should ensure that instructions are consistent with those of the surveyor and that the documentation produced by the specialist is consistent with the surveyor's work. The surveyor needs to be satisfied with the content of any documentation where incorporated within the Schedule of Dilapidations, Quantified Demand, Response, Scott Schedule or Diminution Valuation.

**3.1.7** The surveyor should consider carefully whether the specialists are being instructed to provide information and data that the surveyor should then apply to the question of the relevant party's dilapidations liability, or whether the specialists are themselves applying their knowledge of dilapidations to consider the relevance of that information and data to the relevant party's dilapidations liability. It is thought that the former arrangement would be the more frequently applied model. If the latter model is applied, (if an endorsement of a Schedule of Dilapidations, Quantified Demand, Response or Scott Schedule is required) it may be appropriate, in addition to the surveyor's endorsement, for the specialists to endorse their own work.

**3.1.8** When setting out the scope of their instructions, the surveyor may consider this to be a suitable opportunity to alert their client to potential future circumstances that may arise such as:

- the importance of early consideration of ADR and offers to settle
- the potential need for specialist lettings and valuation advice and
- the potential impact of litigation and pre-litigation costs and limits on recovery of costs from the other party, etc.

**3.1.9** As with all instructions surveyors should ensure that they and/or their sub-consultants have sufficient experience and professional indemnity insurance for the tasks undertaken.

**3.1.10** As the preparation of Quantified Demands and Responses is a relatively new service, it would be prudent for members to advise their professional indemnity insurers if they are preparing Quantified Demands and Responses as part of their dilapidations work.

**3.1.11** Building surveyors are also advised to review their terms and conditions of engagement and in particular to provide that they cannot be held responsible for the content of the information and/or advice provided by third party advisers (such as a valuer or lettings agent engaged by the client and whose opinions are included within a Quantified Demand or Response, or by a services engineer whose opinion is included in a Schedule of Dilapidations or Scott Schedule).

**3.1.12** When taking an instruction to act as a dispute resolver, the surveyor should follow the practices and procedures required by the particular ADR model being used.

## 3.2 Fees

**3.2.1** Fees for undertaking dilapidations instructions are a matter of contractual agreement between surveyors and their clients.

**3.2.2** Surveyors have an obligation to set out the basis of their fees in such a way that clients are aware of any financial commitments they are making by instructing the surveyor.

**3.2.3** It is not uncommon for surveyors to be appointed to negotiate the settlement of a dilapidations dispute on a conditional/contingency basis. There is nothing necessarily wrong or inappropriate with that. However, if the surveyor is appointed as an expert witness in order to give evidence to a future tribunal, the continuance of the conditional/contingency fee arrangement will not be allowable and cannot continue.

The surveyor should therefore ensure that the terms and conditions of engagement with their client set out how their (by then) prior involvement in negotiations will be reimbursed (e.g. on a time plus expenses incurred basis). Surveyors are also recommended to point out that the (by then) previous existence of a conditional/contingency fee arrangement might be a factor when the client's legal team considers who to appoint to take on the role of expert witness.

**3.2.4** As regards conditional/contingency fees for any instructions to act as an expert witness, surveyors must take note of the position and guidance set out in the RICS practice statement and guidance note: *Surveyors acting as expert witnesses*.

**3.2.5** Dispute resolver's fees are the subject of agreement between the dispute resolver and the appointing parties. It is likely that, in the first instance at least, the dispute resolver's fees will be split equally between the parties.

**3.2.6** Surveyors should keep an adequate record of time spent and costs incurred.

## 4 Documentation

### 4.1 General

**4.1.1** The surveyor should obtain complete copies of the lease and other documents.

**4.1.2** Other documents that might be necessary or desirable can include:

- head lease and any sub-leases
- scaled plans
- licences or other consents for alterations, with plans and specifications
- reinstatement notices
- any agreement for lease
- assignments and licences to assign
- side letters or other written agreements
- schedules of condition, together with appropriate photographs
- inventories
- any notices under the *Landlord and Tenant Act 1954*
- any other relevant applications for consent
- current or historic planning consents and the planning environment
- statutory notices relating to the property
- original or current letting or investment sale details
- evidence of rental values and yields
- other contemporaneous evidence and
- statement of the landlord's intentions.

**4.1.3** Surveyors should satisfy themselves that the documentation obtained is sufficient for them to discharge their instructions. Any questions as to authenticity need to be addressed to the client or the client's legal adviser. Ambiguities in the documents or in instructions should be clarified as they arise.

**4.1.4** Surveyors should read and understand the documentation to a sufficient extent to enable them to discharge their instructions. While surveyors do not give legal advice, they should be mindful of the court's approach to the interpretation of contractual provisions generally, as well as the more specific treatment of the relevant lease clauses. Surveyors who are uncertain about any item contained in a document should bring the matter to the attention of the client and, if so instructed, to the client's legal advisers.

# 5 Inspection

## 5.1 General

**5.1.1** A surveyor who is instructed to inspect a property (especially in connection with a forfeiture or lease break situation) should check with the client or the client's legal advisers before making access arrangements, to ensure that no issue of waiver of rights will arise from making such arrangements.

**5.1.2** Surveyors should have regard to the terms of the lease when making access arrangements .

**5.1.3** Surveyors should acquaint themselves with any RICS guidance relating to inspecting property.

**5.1.4** It is advisable for the surveyor to note:

- the nature of the location when the lease was granted (if possible), as this information might be relevant to the assessment of the standard of repair and/or condition and
- the general standard of repair of properties in the locality and whether they are, for example, vacant, boarded up or refurbished, as this information might be relevant to the diminution in the value of the landlord's reversion.

**5.1.5** The inspection should be sufficiently thorough to enable an accurate record of the relevant breaches to be ascertained. The information recorded should be proportionate and also include all necessary data to enable quantities and costs to be calculated. The condition of the property might change after the surveyor's inspection so the surveyor's record may be required in the future as evidence for a tribunal. All site notes, sketches, measurements, photographs, videos or other transcriptions should be retained.

**5.1.6** Where further investigation or opening up is required and justified, the agreement of the client and, where appropriate, the tenant should be obtained, together with arrangements for making good to the property. Where the client is the tenant, it will be critical for the surveyor to obtain the landlord's consent before any invasive inspection is made.



## 6 Schedules of Dilapidations and Scott Schedules

### 6.1 General

**6.1.1** Schedules of Dilapidations record alleged breaches of covenant and therefore generally contain details of the contractual obligations alleged to have been breached.

**6.1.2** Schedules of Dilapidations would normally contain:

- details of documents relied upon
- an itemised numbered reference
- the relevant clause of the lease or other document
- the alleged breach
- the remedy required (when relevant) and
- the cost of the remedy (when relevant).

**6.1.3** Considerations specific to particular uses of Schedules of Dilapidations in different scenarios are dealt with in the relevant sections of this guidance note.

**6.1.4** The Schedule of Dilapidations will normally be costed if it is anticipated that the appropriate remedy is damages. There will also be other situations where the parties may require costing of the Schedule of Dilapidations. In any such case, the Schedule of Dilapidations should be costed with due reference to reliable and appropriate cost information, which is available from a number of sources, for example:

- invoices following completion of the remedial works
- the results of a competitive tender exercise
- price book data
- relevant and recent tender price information

- the advice of a quantity surveyor and
- the result of a consultation with and assistance from a contractor, which could be conducted on the basis of a full specification of works derived from the Schedule of Dilapidations.

**6.1.5** Costing should be undertaken in sufficient detail to enable full understanding by the client, the other party, their advisers, the tribunal, etc.

**6.1.6** The claimant's solicitor would usually formally 'serve' the Schedule of Dilapidations, most often where legal and statutory formalities apply. Where formal 'service' is not necessary it can be acceptable for the landlord's surveyor to send the Schedule of Dilapidations on a client's behalf. In such instances, surveyors should advise clients to satisfy themselves by consultation with their solicitors that service is not required. In each case, confirmation should be obtained from the client of the address to which the Schedule of Dilapidations should be sent.

**6.1.7** Surveyors should consider carefully circumstances where a notice (for example, to reinstate alterations) is required to be served.

**6.1.8** In most instances, the content of the Schedule of Dilapidations is negotiated between the parties with a view to reaching a settlement. By adding additional columns to the Schedule of Dilapidations both parties can record their respective positions, thereby developing it into a Scott Schedule.

**6.1.9** An example of a Schedule of Dilapidations format can be found in Appendix A. An example of a Scott Schedule format is included within Appendix D.

# 7 Dilapidations during the lease term

## 7.1 General

**7.1.1** On being instructed by a party in connection with a dilapidations liability during the term, the surveyor should ascertain the remedy or remedies being contemplated or pursued by the landlord or the tenant, and the role the surveyor is to play in pursuing/defending against that remedy/those remedies.

**7.1.2** The *Leasehold Property (Repairs) Act 1938* (the 1938 Act) sets out a number of important limitations on landlords' remedies in this context. It applies to any lease that was granted for a term of seven years or more and three or more years of the term remain unexpired. It does not, however, apply to all remedies (only to forfeiture and damages).

## 7.2 Remedies

**7.2.1** The remedies available to a landlord pursuing a dilapidations claim during the term can include:

- damages
- forfeiture
- specific performance and
- entry to carry out the work.

The considerations discussed below in relation to the remedies of damages and specific performance also apply in part where it is the tenant that is seeking to claim; see Section 9.2.

### *Damages*

**7.2.3** The damages are usually capped by reference to the diminution in the value of the landlord's reversion.

### *Forfeiture*

**7.2.4** The remedy of forfeiture, if successfully pursued, results in the lease coming to an end. This is a complex area, consequently it is strongly recommended that legal advice should be obtained by the client.

**7.2.5** The right to forfeit can be lost or waived by a landlord if it or its agents, after becoming aware of the relevant breach, take any step that unequivocally recognises the continuing existence of the lease, such as demanding or accepting rent. The issue of waiver might not be relevant to a continuing breach (such as of a repair covenant) but might be of importance where there has been a once-and-for-all breach, such as making alterations without the requisite consent.

**7.2.6** Before taking forfeiture proceedings, the landlord must serve a notice under section 146 of the *Law of Property Act 1925*, detailing the breaches, and must give a reasonable time for those breaches to be remedied. The 1938 Act imposes very important limitations on a landlord's ability to forfeit for disrepair. Where the 1938 Act applies, the landlord must so notify the tenant in the section 146 notice and then, if the tenant serves a counter notice within 28 days of service of the notice, the landlord must obtain the permission of the court before commencing proceedings.

### *Specific performance*

**7.2.7** Specific performance is the remedy whereby the court orders performance of a contractual obligation – in this context a repairing or similar obligation. This is an equitable remedy that is at the discretion of the court. However, there are well-established principles as to when the court may order specific performance (e.g. it may not usually be ordered where damages are an adequate remedy, where performance is impossible or would cause hardship to the defendant, where there has been unconscionable conduct by the claimant or prejudicial delay, etc.).

**7.2.8** Historically, the court would not order specific performance of a tenant's obligation to repair or similar obligations. This is no longer the law and specific performance can in theory be ordered in appropriate cases, including during the term of a lease. However, in practice, it is very rarely used and it is considered appropriate in very exceptional cases, such as where the work is required as a matter of urgency and can be clearly defined, where no adequate alternative remedy is available to the landlord (e.g. the right to enter and do work) and where no other factors point against specific performance (e.g. hardship to the defendant, delay etc.). It is also thought that, while the 1938 Act does not apply to specific performance, the court may well have regard to the same or similar criteria as under the 1938 Act to ensure that the landlord is not using specific performance as a means of by-passing the Act inappropriately.

*Entry to carry out work*

**7.2.9** Many leases contain a right for the landlord to enter the property without the consent of the tenant to undertake works the tenant should have carried out, that is, where the tenant is in default of their obligations. These are sometimes known as 'Jervis v Harris' clauses after the prominent case. These clauses are usually very specific about the circumstances under which landlords can operate the rights they contain, such as notice periods for landlords' inspections, and what covenants can be considered. Extreme caution is required when using these clauses; incorrect application by a landlord can lead to counterclaims from the tenant for trespass and breach of quiet enjoyment. Consequently, it is strongly recommended that legal advice is obtained by landlord and tenant clients.

**7.2.10** If the Jervis v Harris clause states that the landlord's costs are recoverable as a debt, provisions of the *Leasehold Property (Repairs) Act 1938* and section 18(1) of the *Landlord and Tenant Act 1927* are anticipated not to apply.

## 7.3 Interim Schedules of Dilapidations

**7.3.1** In addition to the general guidance set out above, the following points should be noted about a Schedule of Dilapidations served during the term:

- Where the Schedule of Dilapidations is to be attached to a section 146 notice and where damages and/or forfeiture are being pursued, the breach(es) should be stated in sufficient detail for the tenant to be able to understand what it has to do. The remedial work can also be set out although, under section 146, it is not strictly necessary to do so.
- Only if damages and/or forfeiture are being pursued is it likely to be appropriate for the Schedule of Dilapidations to be costed.
- Where the Schedule of Dilapidations is produced pursuant to a Jervis v Harris clause, it is similarly likely to be a requirement that breaches be specified rather than the remedy. Regardless of the manner in which the clause is drafted, its requirements should be closely followed.

# 8 Dilapidations at the end of the lease term

## 8.1 Remedies

**8.1.1** The only remedy usually available to a landlord after the end of a tenant's lease is damages.

**8.1.2** The rules for the assessment of damages in terminal dilapidations cases are complex. Generally speaking, damages are assessed to compensate the landlord for its loss. As a broad rule of thumb, the amount recoverable by a landlord will typically be the lower of the 'cost of the works' (i.e. the reasonable cost of the remedial works that would be necessary to remedy a tenant's breaches – as expressed within the Schedule of Dilapidations) and 'diminution in value' (i.e. the reduction in value of the landlord's reversion as a consequence of the tenant's breaches – as expressed if appropriate within a Diminution Valuation). This loss or the amount to be claimed is expressed initially as the 'likely loss' in the Quantified Demand.

**8.1.3** Section 18(1) of the *Landlord and Tenant Act 1927* limits the damages that are recoverable for breaches of the repairing covenant. This section is frequently expressed as having two 'limbs', as follows:

'Limb 1':

'Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid;'

'Limb 2':

'and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.'

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**8.1.4** Guidance on the application of limb 1 is given in chapter 10 'Diminution valuations'.

**8.1.5** Guidance on the application of limb 2 is given within paragraphs 8.3, 8.4 and 8.6. In broad terms, any impact should be expressed within the Schedule of Dilapidations and Scott Schedule.

**8.1.6** Section 18(1) of the *Landlord and Tenant Act 1927* does not apply to breaches of what are termed as 'non-repair' type lease obligations, including for example obligations relating to decoration, removal and reinstatement. These are subject to different rules regarding the assessment of damages.

## 8.2 Terminal Schedules of Dilapidations

**8.2.1** The surveyor should consider, in particular, the separation of various breaches of covenant so that, if required, breaches of the repairing obligation can easily be isolated.

**8.2.2** As a dilapidations claim after the end of the term is a claim for damages, costings will be essential. It is particularly important, and helpful to everyone concerned, if the costings are summarised on a single sheet either at the beginning or the end of the Schedule of Dilapidations (although that summary is not the same thing as the Quantified Demand).

**8.2.3** The requirements of the Protocol might helpfully be supplemented in some cases. For example, if there are adjustments to the cost of remedial works, it may be helpful for those adjustments to be shown on an item-by-item basis. They could be recorded, perhaps by adding further columns to the Schedule of Dilapidations, such that the whole nature of the dispute can be considered on an item-by-item basis by the parties and, should the matter go so far, at trial.

**8.2.4** Though the surveyor who prepares the Schedule of Dilapidations might exclude items from the version that is sent to the tenant, it is recommended that (unless the costs of so doing would be disproportionate) he or she makes and keeps a note of all breaches, as that information might be needed for an assessment of the diminution in the value of the landlord's reversion, or for review by a tribunal.

**8.2.5** Where appropriate, the following figures are typically considered when preparing the summary page of the Schedule of Dilapidations:

- professional fees in connection with preparation of the Schedule of Dilapidations
- legal fees in connection with the service of the Schedule of Dilapidations
- design and administration of the work envisaged by the Schedule of Dilapidations
- costs associated with compliance with the CDM Regulations
- any relevant statutory fees and
- an allowance for irrecoverable VAT.

## 8.3 Supersession

**8.3.1** While a standard definition is not universally adopted, it is common nowadays for building surveyors to consider the issue of 'supersession' when preparing or responding to schedules of dilapidations.

**8.3.2** The essence of supersession is that the landlord should only claim for the amount lost as a consequence of the tenant's breaches and that there is no such loss where items have been 'superseded'. However there is no universally accepted explanation as to when items can be said to have been 'superseded'. It is beyond the scope of this guidance note to attempt to provide such an explanation. Rather, this document seeks to give some basic guidance on those situations where supersession is most commonly accepted as arising or at least capable of arising. Parties who find themselves in unusual circumstances should, as always, take further specific advice.

**8.3.3** It is generally accepted that a landlord should not be claiming for the cost of repair work where the property is due to be, or has been, pulled down, or such structural alterations made therein as would render the repair work valueless. This situation might be regarded as an example of 'supersession' (although some might refer to this differently, e.g. as 'extinguishment').

**8.3.4** A more complex scenario where 'supersession' is sometimes said to arise is where a landlord completes remedial work that is more expensive or wider in scope ('grander remedial work') than the most economic method by which the contractually required work could be completed (the 'basic remedial works'). This scenario should be considered carefully, as sometimes the landlord's claim may have been superseded whereas at other times the landlord would still be able to claim for the cost of the basic remedial works.

**8.3.5** In this scenario, it may be useful to consider the following:

- (a) what the landlord would have done to the property had the tenant complied with its obligations. If the landlord would still have undertaken the grander remedial work (or other work such as structural alterations, pulling down of the building, works to comply with Minimum Energy Performance Standards, etc.) the landlord may find difficulty in demonstrating a loss as a consequence of the tenant failing to complete the basic remedial work and
- (b) what the market demands would have done to the property had the tenant complied with its obligations. If the market demands that grander remedial work (or other work such as structural alterations, pulling down of the building, works to comply with Minimum Energy Performance Standards, etc.) be undertaken, the landlord may find difficulty in demonstrating that they have suffered a loss as a consequence of the tenant failing to complete their basic remedial work.

**8.3.6** Where surveyors take supersession into account when preparing or responding to schedules, they should

keep the above guidelines in mind. In particular, it may be important to ensure that the full scope of the claim (and response) is clearly set out in the Schedule of Dilapidations (and Scott Schedule) and any comments or assessment by reference to 'supersession' should not hinder or obscure such clarity.

**8.3.7** Finally, it is worth reiterating here that a landlord who decides not to complete the outstanding remedial work is not thereby necessarily prevented from making a claim for the cost of remedial work. However, in such situations, evidence beyond just the cost of the remedial work is likely to be required in order to demonstrate the loss suffered (e.g. evidence as to the diminution in value of the reversionary interest caused by the tenant's breaches of the repairing obligations).

## 8.4 Surveyors' endorsements

**8.4.1** When engaged by a landlord to prepare a Schedule of Dilapidations, surveyors are expected to endorse their client's Schedules of Dilapidations.

**8.4.2** The endorsement can be given either by the surveyor in his or her own name, or in his or her own name stating 'for and on behalf of' XX firm or company, if appropriate.

**8.4.3** The requirement for the surveyor's endorsement is found in paragraph 3.6 of the Protocol, which specifies that the endorsement should confirm that in the opinion of the surveyor:

- all the works set out in the schedule are reasonably required to remedy the breaches identified [in the schedule]
- full account has been taken of the landlord's intentions for the property as advised by the landlord and
- the costings, if any, are reasonable.

**8.4.4** Before making the endorsement the surveyor should ask the landlord to confirm in writing what its intentions are/were for the property, and ensure that a written record of the reply is made and kept on file. Appendix E contains suggested text to be sent to landlord clients for this purpose.

**8.4.5** Where a Terminal Schedule of Dilapidations is prepared before the lease end date, the landlord's intentions on that date may not be known. Under these circumstances the endorsement should state that:

- all the works set out in the schedule are reasonably required to remedy the breaches identified [in the schedule] and
- the costings [if any] are reasonable.

**8.4.6** Subsequent Schedules of Dilapidations prepared after the end of the lease should be endorsed in the full form set out above.

**8.4.7** The Protocol also indicates that Schedules of Dilapidations should state that they contain the true views of [name] being the surveyor appointed/employed by the landlord to prepare the schedule.

**8.4.8** Before giving the endorsement, if there is a concern as to the landlord's entitlement reasonably to pursue an item, the surveyor should bring the matter to his or her client's attention and, if necessary, recommend that advice is sought from the client's solicitors.

## 8.5 Quantified Demand

### *Form of the Quantified Demand*

**8.5.1** The Quantified Demand is intended to set out the landlord's terminal dilapidations claim in sufficient detail and in particular on a quantified and substantiated basis (insofar as possible).

**8.5.2** The Protocol does not prescribe a specific format for the Quantified Demand but does set out guidance in section 4.

**8.5.3** The Quantified Demand does not need to be endorsed in order to comply with the Protocol, although the landlord and their surveyor may well see the merit in so doing.

**8.5.4** The Quantified Demand would normally refer to or attach a Schedule of Dilapidations that has been endorsed.

**8.5.5** If the Quantified Demand is to be endorsed, RICS recommends that the building surveyor only endorses their own content and (insofar as appropriate) any third parties who have provided additional information and/or advice (such as lettings agent, valuer or the landlord) endorse their content.

**8.5.6** A specimen format for a Quantified Demand is set out in Appendix B.

### *Content of the Quantified Demand*

**8.5.7** It is unlikely that a landlord will have fully and accurately calculated all its loss at the date for sending the Quantified Demand. Consequently, the Quantified Demand is expected to include a figure the landlord considers to be its 'likely loss', which can be refined as further evidence is obtained.

**8.5.8** There will be circumstances where the 'likely loss' does not equate to the cost of the works in the Schedule of Dilapidations:

- If the landlord has completed (or plans to complete) the necessary remedial work, the cost of those works is likely to form the principal element of the sum sought in the Quantified Demand. If consequential loss of rent (and/or other consequential losses) is sought, this should be substantiated, which may require separate professional advice.
- If the landlord has not completed (and does not plan to complete) the necessary remedial work, the cost of those works is likely to be only one of the factors that should be considered. In particular, the level of damages recoverable may be affected by s.18 of the *Landlord and Tenant Act 1927* and/or other limitations on damages (e.g. the principles of mitigation or disproportionality of the cost of proposed works). In such circumstances, the landlord should be advised that advice beyond that of a building surveyor (e.g.

from a lettings agent, a valuer and/or others) may be appropriate.

**8.5.9** Where relevant, the following losses may be incurred and might be included, quantified and sought as damages within the Quantified Demand, though the ability to claim these losses could be subject to specific lease requirements:

- holding costs expected to be incurred before re-letting or sale, as the case may be
- loss of rent until the end of any works and during any additional marketing period required as a consequence
- rates liability
- insurance, security, energy and cleaning costs not already reflected in the Schedule of Dilapidations
- loss due to lack of service charge recoupment
- finance costs (including interest) and
- other fees of the surveyors (including fees relating to assessment of rent and diminution in value).

**8.5.10** Each item in the Quantified Demand is to be fully quantified and substantiated with, where possible, an explanation of the basis for their inclusion (e.g. a reference to the Schedule of Dilapidations, a provision within the lease or additional evidence).

**8.5.11** Where a particular item or type of loss is unquantified at the time of sending the Quantified Demand, it is a matter of judgment for the person preparing the document how to deal with this. One option may be to send the Quantified Demand with this part of the quantum marked 'to be advised' with a note to say that this aspect will be quantified as soon as possible. However, this approach should be limited to where it is really necessary and where the relevant part cannot yet be properly quantified.

**8.5.12** In all the circumstances identified above, the building surveyor can prepare the Quantified Demand with assistance from other specialists as required. Where the Quantified Demand is prepared using information and/or advice from third parties and/or the landlord, this should be made clear and the relevant information/advice included insofar as appropriate (e.g. excluding any privileged advice).

**8.5.13** The Quantified Demand should be sent to the tenant within the timescale set out in the Protocol (i.e. typically the same time as sending the Schedule of Dilapidations).

## 8.6 The Response

**8.6.1** The tenant should respond to the landlord's Quantified Demand (referred to in the Protocol as the 'Response'). The Response is dealt with in section 5 of the Protocol.

### *Form and content of the Response*

**8.6.2** The Protocol does not prescribe a specific format for the Response. It should set out the tenant's response to

the alleged terminal dilapidations claim as fully as possible.

**8.6.3** The Response typically incorporates a Scott Schedule to respond to the Schedule of Dilapidations.

**8.6.4** The Response may include information in addition to that set out in the Scott Schedule. For example, if it is anticipated that the level of damages recoverable may be affected by s.18 of the *Landlord and Tenant Act 1927* or by other limitations on damages (e.g. the principles of mitigation or disproportionality of the cost of proposed works), this should be explained in the Response. In such circumstances, the tenant should be advised that other advice beyond that of a building surveyor may be appropriate (e.g. from a lettings agent, a valuer and/or others).

**8.6.5** The Response should contain an endorsement in the form required by the Protocol. RICS recommends that the building surveyor only endorses their own content and (insofar as appropriate) any third parties who have provided additional information and/or advice (such as lettings agent, valuer or the tenant) endorse that content.

**8.6.6** The requirement for the surveyor's endorsement is found in paragraphs 5.4 and 5.5 of the Protocol, which specify that the endorsement should confirm that in the opinion of the surveyor:

- 'the works detailed in the response are all that were reasonably required for the tenant to remedy the alleged breaches of its covenants or obligations;
- any costs quoted in the response are reasonably payable for such works; and
- account has been taken of what the tenant or tenant's surveyor reasonably believes to be the landlord's intentions for the property.'

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**8.6.7** The Protocol states that if the surveyor considers that any items in the Schedule of Dilapidations or Quantified Demand are likely to be superseded then this should be stated in the Response, and particulars should be given as to why this view is taken and the relevant items identified.

**8.6.8** A specimen format of a Response (with appended Scott Schedule) is set out within Appendix C.

**8.6.9** In all the circumstances identified above, the building surveyor can prepare the Response, with assistance from other specialists as required. Where the Response is prepared using information and/or advice from third parties and/or the tenant, this should be made clear and the relevant information/advice included insofar as appropriate (e.g. excluding any privileged advice).

## 8.7 Sending/service

**8.7.1** The Protocol refers to the 'sending' of documents to the parties. The landlord may require the Quantified Demand to be 'served' formally but in practice the Quantified Demand may be sent less formally (i.e. by sending to the other party's surveyor). Surveyors should be aware that the lease may require greater formality.

**8.7.2** Surveyors should consider whether the Schedule of Dilapidations or Quantified Demand is intended to act as a notice (e.g. a notice to reinstate alterations), in which case formal 'service' may be a requirement.

## 8.8 Dialogue/stocktake

**8.8.1** Both the courts and RICS encourage dialogue between parties to a dispute. In order to achieve this, it is desirable that surveyors of like disciplines should meet during the course of the dispute, in order to clarify the nature of the dispute and, if possible, to agree aspects of it.

**8.8.2** As stressed at section 10 of the Protocol, where the dispute has not been resolved by dialogue, the surveyors should undertake, prior to the issue of proceedings, a further review of their respective positions and ideally attend a stocktake meeting to see if either proceedings can be avoided, or at least the outstanding issues narrowed.

## 9 Dilapidations claims against landlords

### 9.1 General

**9.1.1** Generally, a tenant cannot enforce a landlord's covenant/obligation to repair within the property unless the tenant has first given the landlord notice of the breach. In respect of repairs outside the property (e.g. within the common parts of the building), no notice is generally required.

**9.1.2** Any notice should be in writing. The landlord does not generally need to be given exact details of the disrepair, or of the remedial works required, so long as the contents are sufficient to put the landlord on notice that works are required.

**9.1.3** In addition to carrying out works of repair for which it is liable, the landlord would generally be obliged to make good any consequential damage to the property caused by such works of repair.

**9.1.4** On being instructed by a party to a dilapidations claim by a tenant against a landlord, the surveyor should make many of the same enquiries and take most of the steps that would have been made and taken in a dilapidations claim by a landlord against a tenant.

**9.1.5** The surveyor should seek to understand the remedy or remedies being sought or pursued by the tenant.

**9.1.6** If the landlord's breach is a simple one, a Schedule of Dilapidations might not be required. If, however, there are numerous items of breach, the tenant's dilapidations claim may be better set out in a Schedule of Dilapidations format.

### 9.2 Remedies

**9.2.1** The remedies available to a tenant for breach by the landlord of their repairing obligation include:

- damages
- set-off
- self-help and
- specific performance.

#### *Damages*

**9.2.2** Where there has been a breach of a landlord's covenant, the tenant may choose to:

- remain in the property
- temporarily vacate or
- sell their interest in the property or sublet.

**9.2.3** The appropriate heads of damages will vary depending on which of these actions the tenant takes.

**9.2.4** A tenant who remains in the property might claim for:

- inconvenience and discomfort, which might be assessed by reference to the rental value of the property
- ill health
- damage to personal belongings
- damage to the property and/or
- loss of profits.

**9.2.5** A tenant who vacates might claim for:

- cost of alternative accommodation
- cost of moving
- redecoration and cleaning costs and/or
- loss of profits.

**9.2.6** While an award of damages is one of a number of possible remedies available during the term, it is the only remedy available at or after the end of the term.

**9.2.7** Section 18(1) of the *Landlord and Tenant Act* 1927 does not apply to a tenant's dilapidations claim for damages.

**9.2.8** The amount of damages tenants are entitled to is that which, so far as money can, would put them in the position they would have been had there been no breach by the landlord.

**9.2.9** A tenant who sells or sublets might claim for any reduction in price/rent achieved due to the breach.



#### *Set-off*

**9.2.10** Set-off is deduction from rent and other sums payable to the landlord under the lease. The tenant might wish to recover the damages they have suffered by way of set-off, along with any sum the tenant has reasonably spent remedying the breach through self-help.

**9.2.11** However, the right of set-off can be expressly excluded by the terms of the lease.

#### *Self-help*

**9.2.12** Where the breach relates to part of the property, the tenant could consider carrying out the required works itself and seek to recover the cost from the landlord. Even in such a case, however, the tenant should be cautious: the landlord may be able to argue that the tenant had no right to do so, or adopted the wrong methods. Where the disrepair is in areas outside the property, for example, within the common parts of the building, in the absence of an express right, the tenant should be even more cautious about undertaking the work. There could be no implied right of entry, and the tenant could be committing a trespass.

#### *Specific performance*

**9.2.13** Specific performance has been dealt with previously in the context of landlords' remedies during the term (see paragraphs 7.2.7 and 7.2.8). The courts have shown a slightly greater willingness to order specific performance of a landlord's obligation to repair. In this context, there is no equivalent of the 1938 Act, a tenant is unlikely to have any alternative remedy (save for damages) and the impact on the tenant of the landlord's failure may be more obvious and profound. Even so, the general principles apply and specific performance would probably only be appropriate in serious or exceptional cases along the same lines as outlined above.

## 9.3 Subsequent steps

**9.3.1** The subsequent course of the dispute depends on the remedy being pursued by the tenant. If the tenant is pursuing a damages and/or set-off claim, it may be that the parties' surveyors can discuss a settlement without the further need for the involvement of solicitors other than to document any settlement reached. In contrast, if self-help is being pursued, the landlord's reaction to the threatened use of the remedy could require legal advice, as could the manner in which the remedy is to be implemented.

# 10 Diminution valuations

## 10.1 General

**10.1.1** A 'diminution valuation' is a valuation prepared to assist the quantification of the landlord's damages claim (i.e. the loss caused by the breaches alleged against the tenant). Specifically, such valuations seek to identify the loss by reference to the diminution (i.e. reduction) in value of the property (i.e. the landlord's reversion) as a consequence of the tenant's breaches. This measure of loss can be contrasted with the 'cost of works' measure, i.e. the reasonable cost of the remedial works necessary to remedy the tenant's breaches. The two measures may differ depending on the circumstances.

**10.1.2** In theory, a diminution valuation might be required to assess a landlord's damages claim in either an interim or a terminal dilapidations claim. In practice, the former are very rare and so the commentary below focusses on diminution valuations in terminal claims only.

**10.1.3** Diminution valuations in terminal claims are required for two purposes:

- (a) to assess the statutory cap on damages for disrepair under section 18(1) of the *Landlord and Tenant Act 1927* and
- (b) to quantify damages for breach of non-disrepair covenants (e.g. decorate and reinstatement covenants) where diminution in value is the appropriate measure of loss.

**10.1.4** In theory, two separate valuations might be prepared. In practice, it is more common for a single valuation to be prepared covering all alleged breaches (although the valuer should always check what exactly is required).

## 10.2 Taking instructions

**10.2.1** On commencing any instruction to prepare a diminution valuation or generally to advise on diminution, valuers should:

- (a) have particular regard to the nature of the instructions given and the type of advice/report that is requested
- (b) should ensure that they are familiar, and comply with, Part 35 of the Civil Procedure Rules and the RICS practice statement and guidance note: *Surveyors acting as expert witnesses*, if an expert witness report is requested
- (c) have in mind at the outset that, in due course, they may be called to give evidence as an expert witness and
- (d) ensure that they work as an integral part of the client's professional team and become involved at an early stage – liaising with other team members is recommended.

**10.2.2** The starting point for all diminution valuations is market value. Valuers should therefore ensure that they have, or have access to, relevant knowledge of the property market and are familiar with the valuation of the subject class of property. This should include its potential for alternative uses. Advice from local agents may be appropriate.

**10.2.3** A 'diminution valuation' may be carried out for a range of purposes. These include the provision of preliminary 'desk top' advice, in support of negotiations relating to a claim and in contemplation of and associated with litigation. Irrespective of the purpose, the form and content of the advice / report it is not covered by the requirements of the *RICS Valuation – Professional Standards* (Red Book).

**10.2.4** Notwithstanding the above, many aspects of the Red Book usefully transpose themselves into the valuation and reporting process. As a matter of good practice, valuers are therefore expected to be familiar with the Red Book.

## 10.3 Enquiries

**10.3.1** In addition to any relevant documents identified above, valuers should also obtain:

- freehold or leasehold title, where appropriate
- the Schedule of Dilapidations and associated photographs
- the current Scott Schedule
- details of all breaches, including those not identified in the published Schedule of Dilapidations as a consequence of the application of the landlord's intentions
- details of any works that have been carried out
- the building surveyor's description of the property 'in compliance' and
- advice from the building surveyor regarding the cost of any improvement/refurbishment/upgrade/redevelopment, etc. work that the valuer considers may be relevant.

**10.3.2** Valuers acting for the landlord should establish whether the property has been subject to a marketing exercise. If so, they are recommended to obtain copies of relevant marketing reports provided to the landlord and should discuss the marketing with the agent in order to understand the market reaction to the availability of the property. The valuer should not approach the valuation in isolation of marketing data.

**10.3.3** Inspection is recommended at as early a stage as possible and in particular as close as practicable to the termination date of the lease ('the valuation date').

It is important that the valuer obtains a very clear view of condition at that date. While it is accepted that the late instruction of the valuer after the end of the lease term may result in them having to rely on schedules and photographs, this should not rule out an inspection of the property.

**10.3.4** It is important that as part of the inspection of the property the valuer also carries out an inspection of the immediate locality in which the property sits. In particular the following should be noted:

- the general character of the area
- recent changes in the area, such as redevelopment and
- the use of surrounding properties.

**10.3.5** Enquiries should include those normally associated with carrying out any formal valuation. In particular relevant recent planning applications, both in relation to the property and the locality should be recorded, together with a review of the Local Plan/LDF and relevant changes in government (planning) policy.

**10.3.6** In considering the future use of the site, valuers should attempt to obtain written confirmation of the landlord's intentions and consider how these might be representative of the general market.

## 10.4 Valuation methodology

**10.4.1** Before considering how diminution valuations are commonly done, it is worth pointing out that the key objective is to assess 'diminution' (i.e. the reduction in value of the landlord's reversion as a consequence of the covenantor's breaches). Assessing the value of the property is only an element of that task.

**10.4.2** In theory, there are two main ways of undertaking a diminution valuation:

1. Using a comparative valuation approach (i.e. by references to actual market comparables for two properties similar to the property in question – one in repair and one out of repair). In theory, this is possible. In practice, there is rarely sufficient information on the state of repair of market comparables and, since the cost of remedying breaches is often only a fraction of the property's value, the effect on value of the breaches can be difficult to isolate.
2. Carrying out valuations of the relevant property both 'in compliance' and 'out of compliance'. This is by far the more common approach and the one that has received more scrutiny in reported cases. This approach is what is most commonly envisaged when a 'diminution valuation' is requested. The guidance below focusses primarily on this valuation approach.

**10.4.3** It is also common for valuers to prepare what are sometimes called 'residual or remaining items' valuations. This approach entails a quick form assessment of 'diminution' by reviewing the Schedule of Dilapidations and removing items that are superseded by whatever works the market demands. The 'remaining' or 'residual items'

are then quantified and that is equated with diminution. This is a recognised approach and has been referred to in cases. This approach may well be useful to give a quick and inexpensive view at the outset of a case/instruction. It should however be kept in mind that it is ultimately a short form valuation and it would generally be better to undertake a full 'in compliance' and 'out of compliance' valuation where a case is proceeding to trial.

**10.4.4** When preparing a diminution valuation (i.e. 'in compliance' and 'out of compliance' valuations), valuers typically approach the exercise in the following way:

- Assessing the market value of the property in each condition is the relevant starting point.
- There is no definition of 'value' in section 18(1) of the *Landlord and Tenant Act 1927* or the common law although this is generally taken to mean 'open market value'.
- While the Red Book definition of 'Market Value' can be used to assist the valuation approach, valuers should be wary of circumstances where this may not be appropriate. There is, for example, no reason why the bid of a special purchaser should not be considered, whereas in normal circumstances this would be at odds with the Market Value definition.
- To assess market value, valuers should identify the likely purchaser of the property in each condition. This may include the landlord. For example, potential purchasers could be:
  - i. an owner occupier
  - ii. an investor
  - iii. a developer or
  - iv. a speculator.
- Each type of purchaser may have different future uses in mind for the property, each requiring varying degrees of works of repair, refurbishment, reconstruction or redevelopment. This requires the valuer to have an understanding of what is acceptable to the market at the valuation date and how the property in compliance compares with its peers. It may be the case that even when in compliance, the property is unacceptable to some classes of purchaser; the in-compliance value may be exceeded by the value resulting from upgrading of the property for existing use or a change to an alternative use; or by its site value.
- Where there are a number of credible potential classes of purchaser and/or uses, valuations may be required in relation to each scenario to assess the highest value after deduction of the cost of the works the purchaser would be expected to incur.
- Valuations in relation to each scenario should be based on the usual market methodology. In this respect valuations may be carried out on an investment, residual, comparative, or other appropriate basis.
- Consideration should be given to ancillary costs such as finance costs and profit.

- The valuation date is the date the lease expires or terminates. Valuers can still have regard to both post and pre-valuation events but they need to consider the weight which they attach to such matters. In general, the further away from the valuation date that the event occurs the less likely it is to have an impact on the valuation.
- The diminution in value exercise is a consideration of how the alleged breaches affect value, if at all. Valuers should therefore:
  - a. carry out a careful analysis of the Schedule of Dilapidations, and/or latest Scott Schedule, to establish whether items individually, or cumulatively, are likely to have an effect on value and what that effect might be
  - b. analyse and assess how the cost of remedial work is reflected in value, if at all – and not simply assume that it will be. Whether it is appropriate to deduct the cost of remedying all breaches, or a reduced number of breaches, is a matter of judgement for the valuer and should be justified. In such instances it may be appropriate and desirable to act in conjunction with the building surveyor or other appropriate professional, such as a mechanical and electrical engineer
  - c. consider the extent to which supersession may apply to remedial works and the effect that excluding superseded items may have on value and
  - d. where there is disagreement as to the scope of and/or cost of remedying the alleged breaches, either undertake the exercise using each set of breaches/costings or (if the parties confirm this approach) await the views of a dispute resolver as to the scope of breaches, appropriate remedial works and the cost of those works.

**10.4.5** If the valuer proposes to use a methodology that departs from that suggested above, the valuer should inform their client of that departure and should be prepared to justify the alternative approach.

## 10.5 Reports

**10.5.1** Reports should reflect the basis of the valuer's instruction. This may be:

- on the basis of a preliminary report for the client on a privileged basis
- to support a Quantified Demand or Response or
- to support subsequent discussions between the parties; as an expert witness report, etc.

It may be sensible to request a formal instruction through the client's lawyers where the valuation is to be privileged.

**10.5.2** It is expected that a valuation report should contain all relevant information that is necessary to support the valuer's opinion. In this respect the minimum contents of valuation reports set out in the RICS Red Book are a reasonable guide to content, though the valuer should always be mindful of proportionality of costs.

**10.5.3** If prepared as an expert witness report the format should comply with CPR Part 35 and relevant protocols and include all matters required by the current RICS practice statement and guidance note: *Surveyors acting as expert witnesses*.

**10.5.4** All diminution valuations should clearly set out valuation calculations and conclusions, along with whether the valuer believes that the diminution cap applies. To this extent, valuers should be aware of the impact that changes to the scope or cost of remedial works may have on their valuation figures if the building surveyors update the Schedule of Dilapidations or Scott Schedule.

**10.5.5** The valuer should be prepared to endorse a report that is intended to be shared with the opposing party (or their representatives) and which is not an expert witness report, although this is not a requirement of the Protocol or PDPAC. RICS considers the following text to be appropriate:

*'This document contains the true views of [name] being the valuer appointed/employed by the landlord/tenant.*

DATED.....

SIGNED.....'

# 11 Break clauses

## 11.1 General

**11.1.1** Many leases contain clauses giving either landlord or tenant the right to determine the lease before the end of the contractual term. These are also known as options to determine or, more commonly, break clauses.

**11.1.2** Surveyors are often instructed in connection with break clause situations. Surveyors should be aware of the need to recommend that their clients obtain legal advice when dealing with any break clause situation.

### *Conditional break clauses*

**11.1.3** Break clauses are typically conditional on the tenant or the landlord complying with specified conditions. Critically, any conditions relating to the exercise of a break should be complied with for the break clause to operate. It is for the party operating the break clause to ensure it has complied with the relevant conditions. If one or more of the conditions attached to a break are not satisfied, the lease would continue past the break date, unless the parties agree otherwise.

**11.1.4** Conditions often found in leases include:

- service of a notice by a stated date before the break
- payment of money
- providing vacant possession and
- compliance with lease obligations (in particular obligations relating to the physical condition of the property – such as repair, decoration and reinstatement).

### *The surveyor's role in break clause situations*

**11.1.5** Surveyors are typically asked to advise on what work is required to comply with a condition relating to the condition of the property and/or to achieve vacant possession.

**11.1.6** When instructed on such matters, the surveyor should ideally only advise in conjunction with the solicitors advising on the legal matters. It is recommended that specialist legal advice be sought in such cases (especially if there is any uncertainty over the lease wording or requirements).

**11.1.7** Surveyors should also not assume that other conditions, about which the surveyor is not advising (such as notices, timings or payment of money), have been satisfied, unless the client or the client's solicitor confirms the point. The surveyor should give the client appropriate warnings if the position is unclear.

**11.1.8** It is strongly recommended that surveyors, on being instructed in connection with a break clause, immediately obtain and read the lease to make themselves aware of any relevant time limits and conditions. Many negligence actions have arisen from professional advisers failing to spot such time limits or conditions through not reviewing the lease at an early stage. Extreme care should be taken to ensure that the interplay between the legal position, the client's objectives and the physical state of the building is handled correctly; legal advice should be sought by the client on every occasion.

**11.1.9** The objectives of the client with regard to the break and the property should be ascertained, as should the objectives of the other party, insofar as the client is aware of them.

**11.1.10** The further steps that are taken by the surveyor depend on the objectives of the client and the client's preferred strategy for dealing with the break. It may or may not be in the client's best interests for the surveyor to inspect the property, to make enquiries of his or her counterpart at an early stage, or to produce a schedule. No steps of this nature should be taken without legal advice.

**11.1.11** If the surveyor is instructed by the tenant and if the break is conditional upon the works being completed prior to the termination date, they should be wary of entering into open-ended discussions regarding a financial settlement with the landlord, if that takes their focus away from concentrating on compliance with the break.

## 11.2 Sending/service of documents

**11.2.1** Surveyors should not serve break notices. The service of a break notices is a specialised legal task and should be dealt with by the lawyer acting for the relevant party.

**11.2.2** When advising a landlord, the surveyor should give thought to whether a Schedule of Dilapidations should be sent to the tenant before the break date. The landlord's surveyor should only do so following specific instruction from their client, normally after the client has received legal advice.

**11.2.3** Where a landlord wishes to send a Schedule of Dilapidations to make the tenant aware of the works, it considers need to be completed before a break, it is likely that the Schedule of Dilapidations would not need to be costed. If, however, the landlord is seeking to agree a financial settlement with the tenant, it should probably be costed and include any relevant consequential losses.

**11.2.4** The response by a tenant to the receipt, or non-receipt, of a Schedule of Dilapidations depends on the tenant's objectives and preferred strategy for dealing with the break.

## 11.3 Negotiations

**11.3.1** The nature and extent of any negotiations depend on the parties' objectives and strategies. The surveyor is reminded that the courts and RICS encourage parties to be open and reasonable in the manner in which they conduct themselves in disputes and that, where parties fail to be open or they conduct themselves in an unreasonable manner and matters proceed to court, they could suffer cost sanctions.

**11.3.2** That said, current expectations are that a landlord, for example, is not obliged or expected to respond to or assist a tenant wishing to exercise a break option.

# 12 Settlement of disputes

## 12.1 General

**12.1.1** The majority of dilapidations disputes are settled privately between the parties, usually with the assistance of their respective surveyors. However, any actual or potential dilapidations dispute has the potential for reference to and determination by the courts and so the parties and their surveyors should be mindful of possible future litigation throughout their involvement.

**12.1.2** Surveyors are reminded that communication between client and surveyor is not necessarily 'privileged' and so could be disclosed to the other party in advance of a court hearing. Surveyors and their clients should therefore consider corresponding and reporting via the client's solicitor, if the maintenance of privilege is considered to be of importance.

## 12.2 Negotiations

**12.2.1** Often, surveyors are engaged by their respective clients to engage in negotiations with the other party, or their surveyor, in order to narrow any differences and to attempt to find common ground and/or a settlement figure acceptable to both parties. Those negotiations could involve face-to-face meetings, preferably at the property.

**12.2.2** It is normal for negotiations to be held on a 'without prejudice' basis so that the parties can explore possible settlement options without prejudicing their position on disputed issues at any future tribunal.

**12.2.3** The law surrounding 'without prejudice' is beyond the scope of this guidance note but surveyors should be aware that, just because correspondence is marked 'without prejudice' does not mean that a tribunal would hold it to be so and the correspondence might still be disclosable to the tribunal. In broad terms correspondence is most likely to be held to be 'without prejudice' if it is exploring a settlement.

**12.2.4** Surveyors should undertake negotiations in an objective, honest, polite, constructive and professional manner, acknowledging that others may hold valid opinions that differ from their own. Surveyors should ensure they are in a position to justify their opinions.

## 12.3 Alternative Dispute Resolution (ADR)

**12.3.1** The courts strongly encourage parties to consider and engage in ADR in advance of litigation, and a party who fails properly to consider the option of ADR, or fails to respond to a request to engage in ADR, is likely to be at risk of a punitive costs award by the court.

**12.3.2** Consequently, within the Quantified Demand and Response templates included as appendices B and C

to this guidance note, optional text has been included to prompt clients and their surveyors to consider ADR at an early stage, and to demonstrate to the other party that there is willingness to engage in ADR.

**12.3.3** ADR is described in the glossary to the CPR as the 'collective description of methods of resolving disputes otherwise than through the normal trial process'. ADR offers distinct advantages over litigation, such as speed, privacy, informality and economy.

**12.3.4** The main types of ADR are:

- independent expert determination
- mediation
- arbitration and
- early neutral evaluation.

Negotiations (while important and to be encouraged) are not normally categorised as a form of ADR.

### *Independent expert determination*

**12.3.5** As the name suggests, this is a determination by an expert in the field. The process is contractual and takes its form and nature from the relevant agreement to submit to expert determination.

**12.3.6** Independent experts will base their decision on their own knowledge and experience, and are not obliged to receive, or even consider, any evidence adduced by the parties, unless the lease (or agreement between the parties) so requires or allows.

**12.3.7** The independent expert's decision, known as a determination, is final and binding, and there is no right of appeal. However, the independent expert can be held liable in damages for any provable loss sustained by a party through the expert's negligence.

**12.3.8** RICS has developed a form of ADR specifically for end-of-lease dilapidations disputes. RICS' Dilapidations Dispute Resolution Scheme is largely based on independent expert determination and early neutral evaluation.

### *Early neutral evaluation*

**12.3.9** Here, the 'neutral' considers both parties' evidence and produce a non-binding evaluation that may be persuasive for the parties when they deliberate on how a tribunal may consider the dispute.

### *Mediation*

**12.3.10** This is a form of structured and mediated negotiation. There are several factors that make mediation different from most other forms of dispute resolution:

- No decision can be imposed upon the parties by the mediator, nor does the mediator express any personal view on the dispute unless the parties so request.

- During mediation the parties are able to freely discuss the strengths and weaknesses of their case and those of the other side with the mediator, without prejudicing their position should a settlement not be reached.
- The mediator encourages and helps the parties to generate and consider their options, and develop these into viable courses of action.

#### Arbitration

**12.3.11** The process is partly contractual and partly governed by legislation. The arbitrator issues an Award that, in limited circumstances, can be appealed. That Award is based upon the evidence heard by the arbitrator, or obtained by enquiry. RICS has developed Fast Track Arbitration Rules that may be suitable for some dilapidations disputes.

**12.3.12** Further information on ADR can be obtained through the RICS Dispute Resolution Service, which maintains registers of accredited independent experts, mediators and arbitrators who are experienced in the field of dilapidations disputes.

## 12.4 Litigation

**12.4.1** It is possible, if litigation cannot be avoided, that the surveyors previously engaged as advisers may be asked to take on an appointment as an expert witness to report to the court.

**12.4.2** Further comment about this role is made elsewhere in this guidance note but, if the surveyor is engaged by one of the parties in this way, in general terms, they should expect to be asked to meet the other party's expert witness in order to:

- narrow differences
- prepare a joint statement together
- prepare a report for the court
- potentially give evidence to the court in person and
- be cross-examined during the hearing.

**12.4.3** Similar scopes of involvement could be required if the surveyor accepts an appointment to act as an expert witness for an alternative tribunal such as arbitration, expert determination or the RICS Dilapidations Dispute Resolution Scheme.

## 12.5 Settlement of break option disputes

**12.5.1** If the surveyor's client is engaged in a break clause dispute, the matter in dispute relates to whether or not the lease term is continuing. Surveyors should be careful not to prejudice their client's case by acting in a way that could be interpreted as undermining that case. For example (and this is not an exhaustive list) surveyors acting for landlords should not send 'terminal' Schedules of Dilapidations to tenants or engage in discussions with tenants without the specific approval of their client.

**12.5.2** Surveyors acting for a tenant client who wishes to exercise a break option are recommended to get permission to obtain assistance from the landlord or their surveyor, but should not be distracted from advising their client that compliance with any conditions is paramount, and that the client should not be delayed from so doing by any apparent progress in negotiations with the landlord.

## 12.6 Offers to settle

**12.6.1** Much of the commentary above is relevant to and overlaps with the issue of 'offers to settle' as such offers can be made at many different stages of a dilapidations dispute (i.e. during discussions, during ADR, before or during litigation). Whatever stage has been reached, offers to settle raise many complex legal issues. If there is any doubt about the appropriate form or consequences of an offer to settle, such offers should be prepared or at least reviewed by the client's lawyer. This is most obvious where proceedings have been issued and the matter is being run by lawyers. For example, if it is intended to make an offer in accordance with Part 36 CPR, this would certainly require legal input as such offers have very specific requirements and consequences that need expert legal advice for the client. However, this point applies equally in the stages before proceedings are issued and clients should ideally be advised to get legal advice whenever offers are being formulated, prepared or reviewed.

**12.6.2** It is not possible to set out all the surveying, legal and commercial considerations that might be relevant to any particular offer to settle. However, by way of outline guidance, where surveyors are involved in formulating, preparing and/or reviewing an offer to settle, the key considerations would include:

- Who is/are your client(s) and do you have the appropriate authority to make/accept any offer? Has the client approved the express terms of the offer? Have the nature, effect and consequences of the offer or acceptance been fully explained to the client?
- Is the offer 'subject to contract' and what is appropriate given the terms proposed? If the offer is 'subject to contract', would acceptance be followed by a separate agreement or deed of settlement and does the offer need to explain that? If the offer is not 'subject to contract', how should acceptance of the offer be undertaken and what happens on acceptance? Should acceptance be 'subject to contract'?
- Is the offer 'without prejudice' or 'without prejudice save as to costs'? Is this appropriate and has this been explained to the client?
- Is the offer intended to be or actually in accordance with Part 36 CPR? If yes, is it appropriate and have the consequences (e.g. as to costs) been explained to the client?
- Is the offer clearly formulated and drafted?
- Who are the appropriate parties to any deal?
- What disputes/claims are being settled by the offer? Does the offer settle just dilapidations (and how is that defined) or is it wider (such as a complete settlement



of all claims relating to the lease or property)?

- If the offer is for a monetary sum, are ancillary matters covered? How, when and to whom should the sum be paid? If not paid, does it attract interest?
- Does the offer include costs?
- If the offer terms provide that steps beyond payment of money are to be undertaken, are ancillary matters covered (i.e. what, when, how and by whom)? What is to happen on default and how would 'default' be assessed?
- If there are aspects of the offer that 'are to be agreed', what happens if they are not agreed → does the offer provide for a default, such as reference to an expert?
- Are there other ancillary issues to consider (such as termination of proceedings, termination of the lease or termination of other obligations) and, if so, how should that be provided for?

## 12.7 Settlement agreements

**12.7.1** It is important that surveyors do not formalise settlements without the consent and authority of their client.

**12.7.2** If a dilapidations claim is settled between the parties, they should record the terms of the agreement precisely in order that, if necessary, it can be enforced by commencement of court proceedings for breach of the agreement.

**12.7.3** A settlement agreement should:

- be in writing, identifying:
  - the parties (i.e. the landlord and the tenant)
  - the relevant lease and
  - the Schedule of Dilapidations and Quantified Demand to which the settlement applies.
- be open, i.e. not marked 'without prejudice'
- be stated to be in full and final settlement of the dilapidations claim
- deal with each and every part of the dilapidations claim, including, where appropriate, any interest and costs
- state the date by which:
  - if appropriate, any payment pursuant to the agreement is to be paid and/or
  - if appropriate, works are to be conducted, inspected and signed off (including, if appropriate, a procedure for agreement and signing off of any 'snagging items').
- be dated and
- be signed by each party, or signed for and on behalf of each party by a duly appointed surveyor, lawyer or agent authorised to bind the party for whom they sign.

# Appendix A Format of a costed Schedule of Dilapidations

It should be noted that the Protocol identifies an example format of a Schedule of Dilapidations. However, it is anticipated that minor variations from that example would be considered acceptable, such as those identified herein.

## *Preamble*

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

It records the works required to be done to the property in order that the property is put into the physical state in which it would have been if the tenant [name] had complied with its covenants or obligations contained within its lease of the property dated [ ].

The covenants or obligations of the said lease [and other documents] with which the tenant should have complied are as follows:

[Set out clause numbers of the documents and quote the clauses verbatim].

The following schedule contains:

- reference to the specific clause (quoted above) under which the obligation arises
- the breach complained of
- the remedial works suggested by the landlord's surveyor [name, i.e. same name as above] as suitable for remedying the breach complained of and
- the landlord's surveyor's view on the cost of the works. [Surveyors should note that the Protocol refers to the 'landlord's view on the cost of the works' but, for the sake of drafting this example format: (i) it is anticipated that the landlord will be guided by their surveyor and (ii) it is the surveyor that is endorsing the document, not the landlord.]

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

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

*Schedule*

<b>Item</b>	<b>Clause no.</b>	<b>Breach complained of</b>	<b>Necessary remedial works</b>	<b>Cost</b>
<b>Repair works</b>				
1				
2				
3				
<b>Other works</b>				
4				
5				
6				
7				
8				
9				

*Summary page*

Cost of works (inclusive of contractor's preliminaries, overheads and profit)	£
Design and contract administration fees	£
Professional fees for preparation of Schedule of Dilapidations	£
Legal fees for service of Schedule of Dilapidations	£
Sub-total	£
Allowance for VAT	£
<b>TOTAL</b>	<b>£</b>

*Endorsement*

I [name] confirm that in my opinion:

All the works set out in the schedule are reasonably required to remedy breaches complained of.

Full account has been taken of the landlord's intentions for the property, as advised by the landlord.

The costings, if any, are reasonable.

Dated .....

Signed .....

[Name and address of building surveyor appointed by landlord]

Alternative formats of Schedule

Item	Clause no.	Breach complained of	Necessary remedial works	Cost of repair works	Cost of other works
1					
2					
3					
4					
5					
6					
7					
8					
9					

Item	Clause no.	Breach complained of	Necessary remedial works	Cost of works	Landlord's proposed remedial works (if different)
<b>Repair works</b>					
1					
2					
3					
<b>Other works</b>					
4					
5					
6					
7					
8					
9					

Item	Clause no.	Breach complained of	Necessary remedial works	Cost of repair works	Cost of other works	Landlord's proposed remedial works (if different)
1						
2						
3						
4						
5						
6						
7						
8						
9						

## Appendix B Format of a Quantified Demand

### Quantified Demand

Landlord:

Tenant:

Property:

Lease:

Summary of facts:

Schedule of Dilapidations:

Recoverability of VAT:

Summary of monetary sums:	As per Schedule of Dilapidations	£
	Loss of rent	£
	Loss of service charge	£
	Void rates	£
	Loss of insurance rent	£
	Other sums as appropriate	£
	Deductions	£
	Allowance for VAT	£
	TOTAL	£

Supporting documents [as applicable] (attached as appendices):

- Schedule of Dilapidations
- invoices or contractors' estimates
- invoices for professional fees incurred
- reinstatement notices (if appropriate)
- statement of Landlord's intentions
- advice on likely loss incurred [if works not completed or not planned to be completed], etc.

Further explanation: (if appropriate)

Meetings: The Landlord confirms that they and/or their professional advisers will attend a meeting/meetings as proposed under section 7 of the Protocol.

Response: The Tenant and/or their professional advisers should respond to this Quantified Demand within a reasonable time, the Landlord considers that period will have expired by [date].

*[The following additional entry is not identified within the Protocol but the landlord and landlord's surveyor may consider it to be appropriate:]*

This Quantified Demand contains the true views of [name(s) of the building surveyor/lettings agent/valuer/landlord\*] appointed/employed by the landlord to prepare the document.

Signed: .....

For/on behalf of [name]

Date: .....

*[\*repeat signatures for each that has contributed to the Quantified Demand]*

*[The following additional entry is not identified within the Protocol but the landlord may consider including it:]*

Alternative Dispute Resolution (ADR):

The Landlord confirms that it has considered ADR and proposes that, if the matter is not capable of immediate resolution following receipt of the Tenant's Response, the matter be referred to:

[delete as appropriate]

- RICS Dilapidations Dispute Resolution Scheme
- mediation
- expert determination
- arbitration
- early neutral evaluation
- [add alternative]

## Appendix C Format of a Response

### Tenant's Response

Landlord:

Tenant:

Property:

Lease:

Summary of facts:

Scott Schedule:

Recoverability of VAT:

Summary of monetary sums:	As per Scott Schedule	£
	Loss of rent	£
	Loss of service charge	£
	Void rates	£
	Loss of insurance rent	£
	Other sums as appropriate	£
	Deductions	£
	Allowance for VAT	£
	TOTAL	£

Supporting documents (attached as appendices):

- Scott Schedule
- additional legal documents not referred to by Landlord
- contractors' estimates
- supporting material regarding supersession / Landlord's intentions
- comment on likely loss incurred and/or diminution in value, etc.

Further explanation: (if appropriate)

Meetings: The Tenant confirms that they and/or their professional advisers will attend a meeting/ meetings as proposed under section 7 of the Protocol.

*Endorsement*

This Response contains the true views of [name(s) being the building surveyor/lettings agent/valuer/tenant\*] appointed/employed by the Tenant to prepare the document.

The works detailed in the Response are:

- all that were reasonably required for the Tenant to remedy any breaches of its covenants or obligations
- any costs set out in the Response are reasonably payable for such works; and
- account has been taken of what the Tenant, or Tenant's surveyor, reasonably believes to be the Landlord's intentions for the property.

Where it is considered that items in the Quantified Demand are likely to be superseded by works to be carried out by the Landlord, by the Landlord's intentions for the property, or by market expectations then:

- this has been stated in the Response
- particulars have been given of the material on which the Tenant or Tenant's surveyor relies; and
- the items to which this view is relevant have been identified.

Signed: .....

For/on behalf of [name]

Date: .....

*[\*repeat signatures for each that has contributed to the Response]*

*[The following additional entry is not identified within the Protocol but the tenant may consider including it:]*

Alternative Dispute Resolution (ADR):           The Tenant confirms that it has considered ADR and proposes that, if the matter is not capable of immediate resolution, the matter be referred to:

[delete as appropriate]

- RICS Dilapidations Dispute Resolution Scheme
- mediation
- expert determination
- arbitration
- early neutral evaluation
- [add alternative]



## Appendix D Format of a Scott Schedule

### Scott Schedule format (stand-alone or appended to a Tenant's Response)

Item	Clause	Breach complained of	Necessary remedial works	Landlord's costs	Tenant's comments (including cross-references to other material - for items considered to be superseded)	Tenant's costs	Etc.
<b>Repair</b>							
1							
2							
3							
4							
5							
6							
<b>Other obligations</b>							
7							
8							
9							

#### Summary Page

Cost of works (inclusive of contractor's preliminaries, overheads and profit)	£
Design and contract administration fees	£
Professional fees for preparation of Schedule of Dilapidations	£
Legal fees for service of Schedule of Dilapidations	£
Sub-total	£
Allowance for VAT	£
<b>TOTAL</b>	<b>£</b>

#### Endorsement

The Scott Schedule contains the true views of [name] being the building surveyor appointed/employed by the Tenant to prepare the document.

I [name] confirm that in my opinion:

All the works set out in the Scott Schedule are reasonably required to remedy any breaches of the Tenant's covenants or obligations.

Where it is considered that items in the Schedule of Dilapidations are likely to be superseded by works to be carried out by the landlord or are likely to be superseded by the landlord's intentions for the property then:

- this has been stated in the Response/Scott Schedule
- particulars have been given of the material on which the tenant or tenant's surveyor relies and
- the items to which this view is relevant have been identified.

The costings [if any] are reasonable.

Dated .....

Signed .....

[Name and address of building surveyor appointed by Tenant]

## Appendix E Suggested text to send to landlords to request confirmation of intentions

Dear [Landlord]

[DEMISED PREMISES] – POTENTIAL DILAPIDATIONS CLAIM AGAINST [TENANT]

I am writing as regards your instructions to prepare a terminal Schedule of Dilapidations in respect of the above premises.

As you may know, there is guidance on best practice in relation to the preparation of terminal schedules of dilapidations. Firstly, there is the 2012 Dilapidations Protocol that has been issued by the Ministry of Justice and forms part of the Civil Procedure Rules. Secondly, there is the RICS *Dilapidations* guidance note.

The Dilapidations Protocol requires that we (or you) endorse (i.e. state) that the schedule has been prepared having taken into account the landlord's intentions for the demised premises as at the end of the lease. While there has been some academic debate about the exact relevance of intentions, it is generally accepted that they may be relevant to the existence or extent of any claim.

To that end and to assist my firm in preparing the schedule, please could you confirm the following:

1. Do you/did you have an intention as at the end of the lease to pull down the premises?
2. Do you/did you have an intention as at the end of the lease to carry out structural alterations that would render valueless any of the repairs set out in the attached draft schedule?
3. If the tenant handed back the premises as shown in the attached 'summary of in-compliance specification', would you make any changes to the premises before disposing of them, whether by way of use by yourself, sale or letting?

The guidance note *Dilapidations* requires us to record your answers and you should be aware that your answers may form part of the evidence that could be disclosed to the tenant in due course. Of course, you have the option of just appending your answers to the Schedule of Dilapidations; please could you confirm whether you are in agreement to this?

Once we have received your answers to the above points we will finalise the Schedule of Dilapidations [and commence preparation of the Quantified Demand].

Yours sincerely

[name]

Enc: Draft Schedule of Dilapidations

Summary of in-compliance specification

## Appendix F VAT

**F.1** The question of whether a landlord can properly claim VAT as part of its damages claim often arises.

**F.2** A sum equivalent to the VAT a landlord has incurred on costs (or is likely to incur) is recoverable as damages where the landlord does, or intends to do, work the tenant failed to do, and incurs, or will incur, VAT on the cost of those works but is unable to reclaim that VAT as input tax from HMRC.

**F.3** Generally, the services required by a landlord from contractors and professional advisers to deal with dilapidations will be standard rated 'supplies'. So those contractors and advisers will (unless they are very small businesses) have to add VAT to the charge for their services. A VAT charge will, therefore, be incurred by the landlord.

**F.4** Whether that VAT incurred can then be recovered by the landlord from HM Revenue & Customs (HMRC) as input VAT depends on its own tax position and the nature of the property. The precise details of the circumstances in which a landlord will be able to recover VAT incurred on its costs is beyond the scope of this statement. However, if the landlord is unable to recover (in part or whole) the VAT incurred, an amount equivalent to the irrecoverable VAT incurred can properly be added to the damages claim. Conversely, if a landlord can fully recover the VAT incurred as input tax from HMRC, it will not have suffered a loss as a consequence of VAT incurred. In this latter situation, the landlord cannot properly reclaim an equivalent amount as damages from the tenant.

**F.5** It is for the landlord to demonstrate that it cannot recover the VAT incurred for whatever reason.

**F.6** A further question that often arises is whether a tenant can require the landlord to provide a VAT invoice in respect of the dilapidations payment it makes to the landlord.

**F.7** HMRC has given clear guidance (see *Notice 742: land and property*, paragraph 10.10) that a bona fide dilapidations claim represents a claim for damages by the landlord against the tenant and that the payment involved is not the consideration for any 'supply' for VAT purposes and so is outside the scope of VAT. So, a VAT invoice for dilapidations must not be raised by the landlord. As a consequence, the tenant, even if VAT registered, cannot recover from HMRC any 'embedded' VAT element of the damages payment to the landlord equal to the landlord's irrecoverable VAT.

**F.8** In view of this, if the landlord cannot recover VAT incurred, there could be a financial advantage to a VAT registered tenant in undertaking dilapidations works before the end of the term.

**F.9** The tenant might then be able to recover the VAT that their contractors and professional advisers charge, as overhead VAT incurred on the tenants business. By doing the works themselves, the tenant would avoid liability for any proportion of damages equivalent to the landlord's irrecoverable VAT.



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We accredit 118,000 professionals and any individual or firm registered with RICS is subject to our quality assurance. Their expertise covers property, asset valuation and real estate management; the costing and leadership of construction projects; the development of infrastructure; and the management of natural resources, such as mining, farms and woodland. From environmental assessments and building controls to negotiating land rights in an emerging economy; if our members are involved the same professional standards and ethics apply.

We believe that standards underpin effective markets. With up to seventy per cent of the world's wealth bound up in land and real estate, our sector is vital to economic development, helping to support stable, sustainable investment and growth around the globe.

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