

PROPERTY LITIGATION ASSOCIATION

PRE-ACTION PROTOCOL FOR CLAIMS FOR DAMAGES IN RELATION TO THE PHYSICAL STATE OF COMMERCIAL PROPERTY AT THE TERMINATION OF A TENANCY (THE "DILAPIDATIONS PROTOCOL")

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**PRE-ACTION PROTOCOL FOR CLAIMS FOR DAMAGES
IN RELATION TO THE PHYSICAL STATE
OF COMMERCIAL PROPERTY AT TERMINATION OF A TENANCY (THE
"DILAPIDATIONS PROTOCOL")**

1. Introduction

- 1.1 This protocol applies to commercial property situate in England and Wales. There is a separate Pre-Action Protocol for Housing Disrepair cases.
- 1.2 This protocol relates to claims for damages for dilapidations against tenants at the termination of a tenancy. These are generally referred to as terminal dilapidations claims.
- 1.3 It is not the purpose of this protocol to define "dilapidations", "repair", "reinstatement" or "re-decoration". The work to the property that may be required will depend on the contractual terms of the lease and any other licences or other relevant documents. However, as a guide:
 - 1.3.1 "dilapidations" might be said to be a claim for all breaches of covenant or obligation relating to the physical state of a demised property at the termination of the tenancy, and usually includes items of repair, redecoration and reinstatement.
 - 1.3.2 "repair" might be said to be a reference to a state of disrepair in a property, where there is a legal liability to remedy, or undertake, work to rectify it;
 - 1.3.3 "reinstatement" might be said to be a reference to returning a property to its former state prior to carrying out works of alteration, where there is a legal liability to remedy, or undertake, that work;
 - 1.3.4 "re-decoration" might be said to be a reference to a state of general finish or appearance of the property as required by the lease, where there is a legal liability to remedy, or undertake, that work.
 - 1.3.5 The tenant may also be required to carry out other works for example, renewal, replacement and maintenance. This is not an exhaustive list.
- 1.4 This protocol is not intended to be an exhaustive or mandatory list of steps or procedures to be followed regardless of the circumstances. Those will be determined by the facts of each case. It is also not intended to be an explanation of the law. In deciding the exact steps and procedures to be adopted regard should also be had to the Overriding Objective as set out in CPR Part 1 and the Practice Direction - Protocols.
- 1.5 This protocol is intended to improve the pre-action communication between landlord and tenant by establishing a timetable for the exchange of information relevant to a

dispute and by setting standards for the content of schedules and claims and, in particular, the conduct of pre-action negotiations.

- 1.6 Compliance with the protocol should enable both landlords and tenants to make an early informed judgment on the merits of their cases. The aim is to increase the number of pre-action settlements. If proceedings are commenced, the court will be able to treat the standards set out in this protocol as the normal reasonable approach to pre-action conduct when the court considers issues of costs and other sanctions under the CPR. When doing so, the court should be concerned with substantial compliance and not minor departures, e.g. failure by a short period to provide relevant information. In addition, minor departures should not exempt the "innocent" party from following the protocol. The court may also be invited to consider the effect of non-compliance on the other party when deciding whether to impose sanctions.
- 1.7 In complying with this Protocol the landlord and tenant and their professional advisers should have regard to the common law principles of how loss should be calculated and in relation to repairing covenants, s18(1) of the Landlord and Tenant Act 1927 ("s18(1)") (Appendix A).
- 1.8 If the landlord or tenant does not seek professional advice from a surveyor they should still, so far as possible, fully comply with the terms of this Protocol.
- 1.9 Where more than one surveyor is instructed by either the landlord or the tenant, where appropriate, any endorsement required by this Protocol should be given by one or both of the surveyors as appropriate.

2. Overview of Protocol – General Aim

- 2.1 The objectives of this protocol are :-
 - (a) to encourage the exchange of early and full information about the prospective legal claim;
 - (b) to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings;
 - (c) to support the efficient management of proceedings where litigation cannot be avoided.
- 2.2 A flow chart is attached at Annex B.

THE PROTOCOL

3. The Schedule

- 3.1 Generally, the landlord shall serve a schedule in the form attached at Annex C. It shall (a) indicate the breaches of the tenant's covenants or obligations which have not been remedied at the termination of the tenancy, (b) state what in the opinion of the landlord or its surveyor is necessary to put the property into the physical state required by the terms of the lease and any licences or other relevant documents, and (c) the landlord's costings (which may be based on its estimate or on invoices if the works have been done).
- 3.2 Breaches should be separated into relevant categories eg repair, reinstatement, redecoration etc, and these should be listed separately in the schedule and should (where appropriate) identify any notices served by the landlord requiring reinstatement works to be undertaken.
- 3.3 The schedule shall be served within a reasonable time. A "reasonable time" will vary from case to case but generally will be not more than 56 days after the termination of the tenancy.
- 3.4 The landlord may serve a schedule before the termination of the tenancy. However, if it does so it should confirm either at the termination of the tenancy that the situation remains as in its earlier schedule or serve a further schedule within a reasonable time.
- 3.5 If possible the schedule should also be provided by way of computer disk or similar form to enable the tenant's comments to be incorporated in the one document.
- 3.6 The schedule should include an endorsement by the surveyor preparing it. The surveyor's endorsement should confirm that in the opinion of the surveyor all the works set out in the schedule are reasonably required in order to put the premises into the physical state referred to in paragraph 3.1 above; that full account has been taken of the landlord's intentions for the property at or shortly after the termination of the tenancy; and that the costs, if any, quoted for such works are reasonable.
- 3.7 In giving this endorsement the surveyor should have regard to the principles laid down in the Royal Institution of Chartered Surveyors' Guidance Note on Dilapidations.

4. The Claim

- 4.1 The schedule should set out what the landlord considers to be the breaches, the works required to be done to remedy those breaches and the landlord's costings (see 3 above). The claim should set out and substantiate the monetary sum the landlord is claiming as damages in respect of those breaches. This will include the items in

the schedule and also any other items of loss it may wish to claim (see 4.6 below). The claim should be limited to the landlord's actual loss (see 4.8 below).

- 4.2 The claim should indicate clearly how it has been made up. The claim should be set out separately from the schedule but may be part of the same document.
- 4.3 If the claim is in a separate document from the schedule then this should also be served within the timescale for service of the schedule (see 3.3 above).
- 4.4 If the claim is based on the cost of works, it should be fully quantified and substantiated. For example, each item of expenditure should, where possible and/or relevant, be supported by either an invoice or detailed estimate.
- 4.5 All aspects of the claim including the VAT status of the landlord, if appropriate, should be set out.
- 4.6 If the claim includes any other losses for example, (a) surveyor's fees for preparing the schedule; (b) professional or other fees or expenses incurred or to be incurred in connection with the carrying out of the remedial works (c) preliminaries; and (d) loss of rent, service charge or insurance rent, these must be set out in detail substantiated and fully quantified. The landlord should also explain the legal basis for any such claim i.e. whether it is made as part of the damages claim or under some express or implied provision of the lease.
- 4.7 The claim should generally contain the following information:
 - the landlord's full name and address;
 - the tenant's full name and address;
 - a clear summary of the facts on which the claim is based;
 - the schedule referred to above;
 - a clear summary of the monetary sums the landlord is claiming as damages in respect of the breaches. This may include the cost of the works, the consequential costs and fees, VAT, loss of rent and other losses (including any sums paid to a superior landlord);
 - any documents relied upon or required by this protocol, including copies of any receipted invoices or other evidence of such costs and losses;
 - confirmation that the landlord and/or its professional advisers will attend a meeting or meetings as proposed under section 7 below;
 - a date (being a reasonable time) by which the tenant should respond. In the usual case 56 days should be adopted as a reasonable time.

4.8 Landlord's Loss

- 4.8.1 The landlord's claim should be restricted to its loss. This is not necessarily the same as the cost of works to remedy the breaches.
- 4.8.2 The claim should not include items of work that are not required because they are likely to be superseded by works to be carried out by the landlord at or shortly after the termination of the tenancy or items likely to be superseded by the landlord's intentions for the property at or shortly after the termination of the tenancy (sometimes called "supercession")
- 4.8.3 In preparing the claim the person preparing it should have regard to the principles laid down in the Royal Institution of Chartered Surveyors' Guidance Note on Dilapidations (if a surveyor) and in any case to the matters set out in paragraph 1.7 above.
- 4.8.5 A formal quantification of the landlord's loss based on either a formal diminution valuation or an account of the actual expenditure or a combination of both must be provided by the landlord to the tenant prior to issuing proceedings. (See section 10 below.)

5. The Response

- 5.1 The tenant must respond to the claim within a reasonable time. In the usual case 56 days should be adopted as a reasonable time.
- 5.2 The tenant should respond using the schedule provided by the landlord, where appropriate, in sufficient detail to enable the landlord to understand clearly the tenant's views on each item of claim.
- 5.3 The response should take account of what works, in the opinion of the tenant's surveyor, are reasonably required for the tenant to comply with its covenants or obligations, what amount is reasonably payable for such works and what payment is reasonable for the other amounts claimed. It should also take account of what the tenant's surveyor believes to be the landlord's intentions for the property at or shortly after the termination of the tenancy.
- 5.4 If the tenant's surveyor considers that any items in the claim 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, the surveyor should state this in the response and should give particulars of that on which the surveyor relies e.g.

correspondence or minutes of the landlord company (see 6 below), and the surveyor should also state the items in the landlord's claim to which this view is relevant.

6. Disclosure of Documents

Disclosure will generally be limited to the documents required to be enclosed with the claim letter and the tenant's response. The parties can agree that further disclosure may be given. If either or both of the parties consider that further disclosure should be given but there is disagreement about some aspect of that process, they may be able to make an application for pre-action disclosure under CPR Part 31.

7. Negotiations

7.1 The landlord and tenant and/or their respective professional advisers are encouraged to meet before the tenant is required to respond to the claim and must generally meet within 28 days of service of the tenant's response. The meetings will be without prejudice and preferably on site, to review the schedule to ensure that the tenant understands fully all aspects of the landlord's claim and the parties should seek to agree as many of the items in dispute as possible.

7.2 In a complex matter it may be necessary for more than one site visit or without prejudice meeting between the parties to take place. These ought to be conducted without unnecessary delay.

8. Alternative Dispute Resolution

8.1 The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the landlord and tenant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.

8.2 It is not practicable in this protocol to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for resolving disputes without litigation:

- Discussion and negotiation.
- Early neutral evaluation by an independent third party (for example, a lawyer experienced in that field or an individual experienced in the subject matter of the claim).

- Mediation - a form of facilitated negotiation assisted by an independent neutral party.

The Legal Services Commission has published a booklet on "Alternatives to Court", CLS Direct Information Leaflet 23 (www.clsdirect.org.uk/legalhelp/leaflet23.jsp), which lists a number of organisations that provide alternative dispute resolution services. The RICS and PLA websites also list a number of experienced mediators.

It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR.

9. **Stocktake**

Where a claim is not resolved when the protocol has been followed, the parties might wish to carry out a "stocktake" of the issues in dispute, and the evidence (including technical evidence) that the court is likely to need to decide those issues, before proceedings are started.

10. **Formal Diminution Valuation and Quantification of the Claim prior to Issue of Proceedings (NB See flowchart at Annex C)**

10.1.1 Any technical evidence which might be presented to the Court should be prepared in an appropriate manner by an appropriately qualified Expert. Attention is drawn to Civil Procedure Rules rule 35.4(1) 'No party may call an expert or put in evidence an expert's report without the Court's permission. There is a Protocol for the Instruction of Experts to give Evidence in Civil Claims which can be found at:
http://www.dca.gov.uk/civil/procrules_fin/contents/form_section_images/practice_directions/pd35_pdf_eps/pd35_prot.pdf

10.1.2 The landlord must quantify its loss by providing to the tenant a detailed breakdown of the issues and consequential losses based on either a formal diminution valuation or an account of the actual expenditure or a combination of both. For these purposes a formal diminution valuation is a valuation showing the diminution in value to the landlord's reversionary interest in the property due to the fact that the tenant has not complied with its covenants or obligations relating to the physical state of the property.

10.1.3 If a formal diminution valuation is produced it should be prepared by a valuer. Only one valuation is required which takes account of both s18(1) in relation to breaches of covenants or obligations to repair, and common law principles of loss for other covenants or obligations.

10.2.1 If the landlord has carried out the work it considers should have been done to remedy the breaches of covenant or obligations, it is not usually required to provide a formal diminution valuation but may base the claim on an account of the actual

expenditure. However, the landlord should provide a formal diminution valuation if in all the circumstances it would be reasonable to do so.

- 10.2.2 If the landlord has carried out some of the work but not all of it, it is not usually required to provide a formal diminution valuation in relation to the work which has been done but may base the claim for those works on an account of the actual expenditure. However, the landlord should provide a formal diminution valuation if in all the circumstances it would be reasonable to do so. With regard to the remaining works it should comply as in 10.2.3 or 10.2.4 below depending on whether or not it intends to carry out those remaining works.
- 10.2.3 If the landlord has not carried out the work but intends to, it must state when it intends to do the work, and what steps it has taken towards getting the work done, e.g. preparing a specification or bills of quantities or inviting tenders. The scope of the landlord's proposed works should be clearly shown to enable any effect on the dilapidations claim to be identified. The landlord should provide a formal diminution valuation unless, in all the circumstances, it would be reasonable not to.
- 10.2.4 If the landlord does not intend to carry out the work, then it should provide a formal diminution valuation for comparison with the schedule based claim in order to establish whether the claim is capped by the valuation unless, in all the circumstances, it would be reasonable not to.
- 10.3 If the tenant relies on a defence on the basis of diminution, it must state its case for so doing and provide a diminution valuation to the landlord. If a formal diminution valuation is produced only one valuation is required which takes account of both s18(1) in relation to breaches of covenants or obligations to repair, and common law principles of loss for other covenants or obligations.
- 10.4 The tenant's diminution valuation shall be served within a reasonable time. A "reasonable time" will vary from case to case but generally will not be more than 56 days after the landlord has served his quantified claim under 10.1.2.

11. **Court Proceedings**

If the parties cannot reach a settlement after complying with the protocol then the final step will be for the dispute to be referred to the Court.

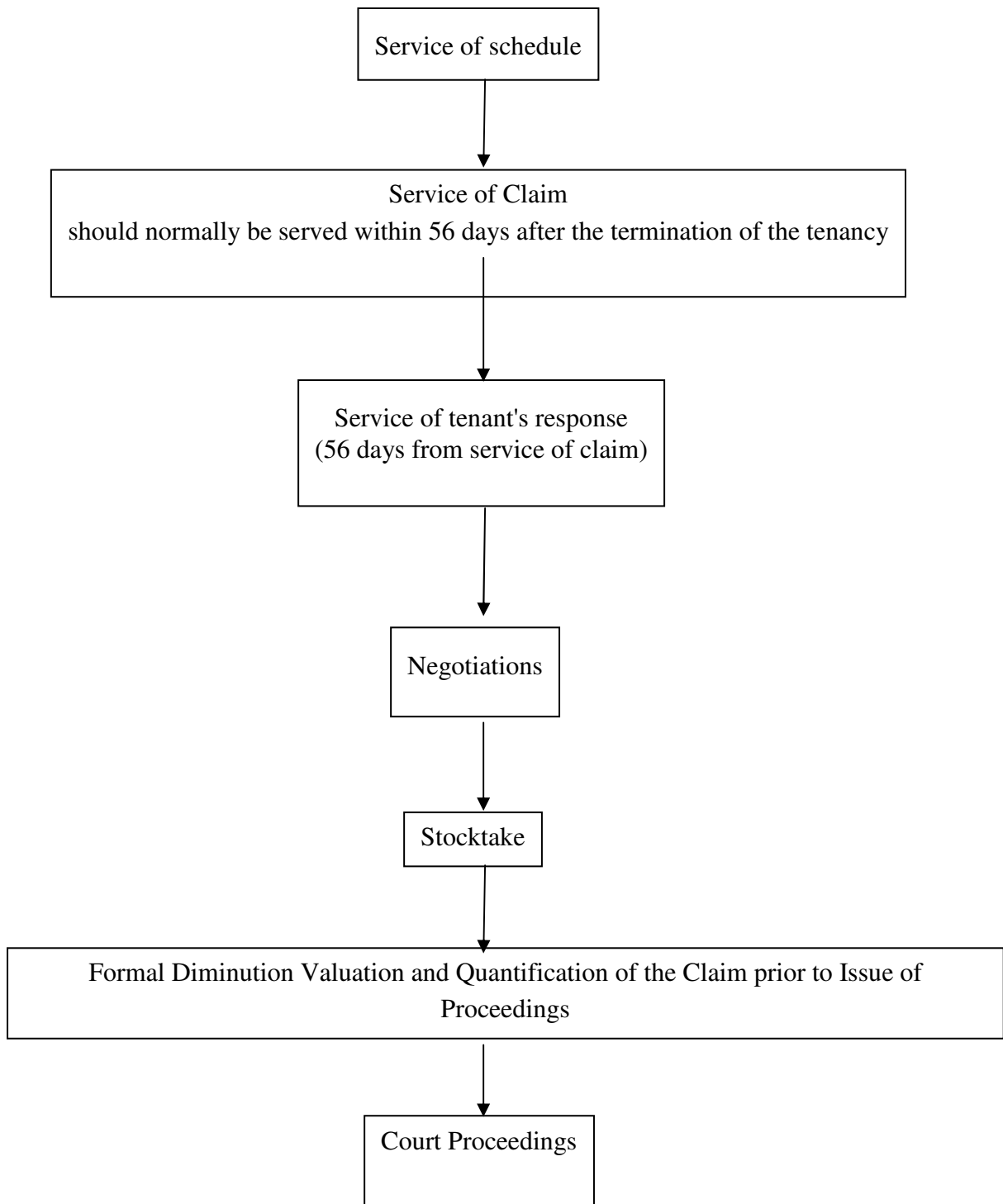
Annex A

Section 18(1) of the Landlord and Tenant Act 1927

Provisions as to covenants to repair

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; 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.

ANNEX B



NB:

1. The provisions of this Protocol should be adopted in respect of each of the stages detailed in this flowchart.
2. The parties should consider throughout this process whether ADR would assist in settling the dispute.
3. Service in this context means the issuing of the relevant document to the tenant or landlord by the other party, its surveyor or solicitor as appropriate, and should be in accordance with any provisions laid down in the lease as to service.

Annex C

Schedule of Dilapidations

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

It records the works required to be done to the property in order that they are put into the physical state the property should have been put 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 with which the tenant should have complied are as follows:-

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

The following schedule contains:

- reference to the specific clause (quoted above) under which the 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,
- the landlord's view on the cost of the works.

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

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

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

<p>DATED [.....]</p> <p>SIGNED [.....] [Name and address of surveyor appointed by landlord]</p>	
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