

## **DILAPIDATIONS**

Tenants who enter into a commercial lease, will be required prior to the end of the lease to carry out rectification or repair works, commonly referred to as dilapidations.

Whilst it is recommended that Tenants seek professional advice in respect of dealing with dilapidations, this is not always possible and in many instances, the Tenant will simply try and negotiate the lowest possible sum and settle with the landlord.

This form of action has advantages and dis-advantages, with Tenants often reluctant to employ the services of a professional surveyor experienced in dilapidations procedures. In an effort to assist in these matters and in trying to avoid legal action by both parties, a Protocol has been recently drafted by the Property Litigation Association.

This protocol is intended to improve the pre-action communication between Landlord and Tenant by establishing a timetable for the exchange of information relevant to the dilapidations dispute and by setting standards for the content of claims and correspondence and the conduct of pre-action negotiations

It is likely that in the event of a disputed dilapidations claim reaching the courts where the protocol has not been followed, Surveyors may risk having to pay both sides legal costs.

The Protocol is arranged in a logical sequence, comprising of 7 principal activities and a format for presentation of the dilapidations schedule.

### **1. The Schedule**

1.1 The landlord will serve a schedule which should indicate what in the opinion of the landlord or his surveyor is necessary to put the premises into repair in accordance with the terms of the lease.

1.2 The schedule shall be served within a reasonable time which generally will be not be more than 2 months after the determination of the tenancy. The landlord may serve a schedule before the determination of the tenancy.

1.3 The schedule should be in a standard form and if possible issued in an electronic format to enable the tenant's comments (example form attached)

1.4 If it is intended to claim for breaches of reinstatement or other obligations, these should be listed separately and should identify any notices served by the landlord requiring reinstatement works to be undertaken.

### **2. The Claim**

2.1 The claim should be quantified in a separate document indicating clearly how that claim is made up.

2.2 Generally, if the claim is based on the cost of works, it should be fully quantified and substantiated. For example, each item of expenditure should be supported by either an invoice or estimate.

2.3 If the landlord has carried out the work, it is not required to provide a valuation under Section 18(1) of the Landlord and Tenant Act 1927 ("section 18(1)"). 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 and the landlord should provide a Section 18(1) valuation unless, in all the circumstances, it would be reasonable not to.

2.4 If the landlord does not intend to carry out the work, then it must provide a section 18(1) valuation which should provide sufficient costing of the works to demonstrate that the cost of the works would exceed the section 18(1) valuation. The nature and detail of the section 18(1) valuation will depend upon the circumstances in each case.

2.5 If the claim includes any other losses such as, (a) projected surveyor's fees for negotiating the claim, (b) for lost profits, (c) preliminaries, (d) overheads and loss of rent/service charges, and (e) surveyor's fees in preparing the schedule, these must be set out in detail fully quantified and substantiated.

2.6 The claim letter must be sent and 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 claim which 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:
- confirmation that the landlord and/or its professional advisers will attend a meeting or meetings as necessary.
- a date (being a reasonable time) by which the tenant should respond.

### **3. The Response**

3.1 The tenant must respond to the claim letter in a reasonable time. In the usual case 2 months should be adopted as a reasonable time.

3.2 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.

3.3 If the tenant relies upon section 18(1), it should state its case for so doing and provide a valuation where appropriate. If appropriate, and if not provided by the landlord, the tenant should also request the landlord to provide proportionate and reasonable disclosure of documents relevant to the landlord's intention to carry out works to the premises.

### **4. Disclosure of Documents**

4.1 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, through their solicitors, be able to make an application for pre-action disclosure.

### **5. Negotiations**

5.1 The landlord and tenant and/or their respective professional advisers are encouraged to meet before the tenant is required to respond to the claim letter and must generally meet within 1 month 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 fully understands all aspects of the landlord's claim and the parties seek to agree as many of the items in dispute as possible.

5.2 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

### **6. Stocktake**

6.1 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 that the court is likely to need to decide those issues, before proceedings are started.

### **7. Alternative Dispute Resolution**

7.1 Both parties are to explore the possibilities of mediation or other alternative dispute resolution process.

## Annex A

### 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 premises known as [property] on [date].

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

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

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

The following schedule contains:

- reference to the specific clause (quoted above) under which the repairing obligation arises,
- the breach complained of,
- the remedial works suggested by the landlord's 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.

A summary of the Protocol is given, the full text of which is available from the web site of the Property Litigation Association at <http://www.pla.org.uk/documents/ProtocolforTerminalDilapidationsClaimsforDamages.pdf>

For further information on how the odbggroup can assist in all aspects of property refurbishment and fitting out works, please contact us at [info@odbggroup.com](mailto:info@odbggroup.com) and see our web site at <http://www.odbggroup.com>

### SCHEDULE OF DILAPIDATIONS

1 Item No.	2 Lease Clause No	3 Breach complained of	4 Remedial works required	5 Landlord's comments on breach	6 Tenant's comments on breach	7 Landlord's comments on works required	8 Tenant's comments on works required	9 Landlord's view on cost of works	10 Tenant's view on cost of works	11 Other comments

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