

## **PLA Dilapidations Protocol supported by surveyors, but they're still revolting...**

At their recent annual conference, the Royal Institution of Chartered Surveyors (RICS) Dilapidations Forum delegates soundly rejected any suggestion that the PLA Protocol should be scrapped. Inevitably though there are calls for the detail of the document to be revised (dilapidations surveyors are nothing if not persistent when it comes to finding disagreement!).

It is widely accepted that the introduction of the PLA Dilapidations Protocol improved dilapidations procedure immeasurably, and subsequent versions have refined matters further. There is still some concern that the procedures are slightly cumbersome for smaller claims; and there is one school of thought which suggests that, because the PLA Protocol has not yet been adopted by the CJC (although hopefully this will happen soon), the CJC Default Protocol should be followed instead.

However, the PLA Protocol is fully endorsed by the RICS, it being appended to the current edition of its Dilapidations Guidance Note.

There is currently also another issue vexing the dilapidations community: This to some extent stems from comments made in Forum conference keynote speeches (by Her Honour Judge Hazel Marshall QC and The Honourable Mr Justice Coulson) wherein the status of surveyors acting as "experts" in the dilapidations process has been touched upon. It is understood that certain surveyors currently practice on the basis of the presumption that surveyors acquire full expert status (that is to say, owing a duty to the court/tribunal to which they may give evidence in the future, as opposed to a duty owed merely to the client) from the outset of the dilapidations process. They therefore substitute the surveyor's endorsement of the schedule of dilapidations, with a full part 35 statement of truth. If acting for a tenant, this approach apparently leads these surveyors to require the landlord's surveyor to declare the nature of their own appointment. If those appointments are not on a similar expert basis and include an instruction to negotiate a settlement on behalf of the landlord (most do), the fee for that element being calculated as a percentage of the negotiated settlement figure (some do), then the Tenant's surveyor will claim a conflict of interest on the part of the landlord's surveyor. An unfortunate extension of this stance is for the tenants' surveyors apparently then to refuse to engage with the "conflicted" Landlord's surveyor.

Individual practitioners have driven this approach and promotion of the view has caused some confusion amongst their peers. The RICS is currently looking into the matter in order to provide settled advice to its members. Together with any modifications to the Protocol following discussions with the CJC, it is possible therefore that guidance and procedure might develop over the coming months.

### Further Reform?

The Forum discussed a number of other potential reforms at their conference. Greatest support was shown for three concepts:

1. An early meeting between Landlord and Tenant (or their representatives), before the Schedule of Dilapidations is prepared,
2. A dilapidations-specific ADR mechanism, and
3. Improved demise descriptions in leases.

The first two could be considered by the PLA for possible incorporation into the next edition of the Dilapidations Protocol?

### Early meeting

From a surveyor's perspective, such a meeting could be used by either party to present relevant information to the other side before the Schedule of Dilapidations is prepared; it could be an opportunity for tenants to ask (or maybe even require?) their landlords to serve any reinstatement notices in reasonable time; to ask their landlords to disclose their current intentions for the premises and their preference for discharge of the tenant's obligations. Early exchange of information in this way could well be of greatest benefit to smaller tenants (and those exposed to smaller claims) who might otherwise suddenly find a surprise Schedule of Dilapidations belligerently landing on their desks, along with the bill for its preparation, when all that was really needed was a discussion between the parties.

The tenant need not be obliged to accept the offer of a meeting, giving them the opportunity to keep the cost of preparation of the Schedule of Dilapidations to a minimum.

### Dispute Resolution

One of the greatest frustrations for both landlord and tenant clients is the uncertainty inherent in dilapidations (more of which later), and the lack of control available to them to bring the matter to a conclusion.

An ADR stage is identified in the current PLA Dilapidations Protocol but is not widely used. I suspect this is because, on occasions, the variance between the positions taken by the respective surveyors can be so large that losing control over the quantum of the settlement is the greater evil compared to a longer wait for the appointed surveyor to come up trumps and prove his opponent fundamentally wrong (if that ever happens). As we know, claims can go on for years and, whilst this keeps surveyors and litigators interested, is this really the best we can do for our clients?

A simple dilapidations-specific ADR requirement within a future PLA dilapidations protocol could be very useful. Along with the traditional forms of ADR there are various models from other arenas that could be adapted, such as:

1. A "third surveyor" approach similar to that from the Party Wall Etc Act, where either party can refer the dispute to a pre-agreed third surveyor;
2. An "adjudication" approach similar to that from the Construction Act where either party can call for a quick and binding temporary resolution to distinct elements of a dispute;
3. A "single joint surveyor" approach whereby a single building surveyor is appointed jointly by both Landlord and Tenant to prepare the Schedule of Dilapidations; either party (and probably also the single joint surveyor) would have the right to refer the case to a valuer to determine whether that cost claim should be capped;
4. Expert determination; the RICS already has a panel of trained individuals ready to resolve disputes but uptake has been very low.

My own preference would be for the adjudication model to be adapted. However, the nature of dilapidations disputes means that evidence from a number of specialists might be necessary and so a single building surveyor, valuer or solicitor probably wouldn't be able to resolve more complex cases on their own. We would therefore have to have an eye on potentially disproportionate costs of any such ADR mechanism.

Perhaps a dilapidations-specific ADR mechanism could be drafted and a number of landlords and tenants approached to see whether they would agree to their impending dilapidations case being managed with this trial ADR mechanism in the background, to be used if the usual surveyor-lead process did not yield results within a reasonable time? It would be surprising if the prospect of the case being referred to a third party didn't focus the surveyors' minds towards resolving things themselves (as well as potentially improving evidence gathering).

Of course the Protocol as it is currently drafted already allows the parties to agree to any of these forms of ADR but it is my view that a pre-determined timetable towards an established dilapidations-specific ADR mechanism, available for all cases and with the facility to be triggered by either party, would improve the pre-litigation stage substantially; and with an adjudication-style approach, the option to litigate in the future is also retained. All that said, adding to the complexity of the Protocol or the cost of compliance should be avoided unless the benefits outweigh these effects. The impact on smaller claims should be considered most carefully.

#### Dispute avoidance; improved demise descriptions

Surely though the best thing to do is to try to avoid disputes in the first place? There is no expectation that we will suddenly find a silver bullet to remove all contentious dilapidations disputes overnight, but removing as much opportunity as possible for us surveyors to find genuine disagreement with each other has to be sensible.

To my mind there are two aspects to any dilapidations disputes; quantitative and qualitative arguments. The former include; the cost of work, the condition of the premises and, most notably, the extent of the demised premises at the start of the lease. Clarifying this last issue would reduce time

taken to resolve claims and would make settlements more accurate<sup>1</sup>. We would, of course, still be left with the qualitative debates such as the standard of repair, the selection of the repair method, the effect on value etc.

Improving demise descriptions would entail recording (within the lease itself) very basic details of the demised premises. Consequently, in an office context, the dilapidations surveyors would know whether the Landlord or Tenant installed the carpets, floor boxes, blinds, kitchenettes and (always most contentiously) the partitions. In a warehouse context the equivalent contentious items are typically the heating, lighting and presence of mezzanine floors.

Normally, leases are silent on these important facts, tying the dilapidations surveyors' hands behind their backs when it comes to determining an accurate level of liability.

This proposal probably means engaging a surveyor to assist with the drafting of the demise description; increasing costs if not time taken. But, given that the research referenced above also indicated that 0% of clients can predict dilapidations settlements sufficiently accurately in terms of either quantum or timescales; that clients would fund the improved demise description given the apparent benefits; and given that this proposal was regarded by the Dilapidations Forum Conference delegates as the single most effective reform presented to them, progress really should be made to incorporate this into all new leases.

The RICS has been approached in its capacity as joint author of the Code of Practice for Commercial Leases in England and Wales, with a view to incorporation of this guidance into the next edition.

#### Summary

1. The most effective way to improve dilapidations settlements appears to be for leases to include a bespoke demise description;
2. The results of the PLA's discussions with the CJC and the RICS's guidance on the question of the expert status of surveyors might well prompt changes to dilapidations guidance and procedures;
3. There are potential benefits (particularly for smaller claims) of a meeting between Landlord and Tenant, prior to the Schedule of Dilapidations being prepared;
4. Most clients would probably welcome being able to refer disputes to a dilapidations-specific ADR mechanism. Trials of a proposed structure could be implemented.

**Jon Rowling is a building surveyor and Partner at Malcolm Hollis LLP.**

**[jon.rowling@malcolmhollis.com](mailto:jon.rowling@malcolmhollis.com)**

**0131 718 6345**

**020 7627 9865**

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<sup>1</sup> According to research completed by the author, refer to a summary at <http://malcolmhollis.com/WebSite/MHWebSnippet.nsf/0/C0393FEA36099C058025765F003C6485?opendocument>