

**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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"DILAPIDATIONS PROTOCOL")**

1. Introduction

- 1.1 This protocol applies to commercial property situated in England and Wales. It relates to claims for damages for dilapidations against tenants at the termination of a tenancy. These are generally referred to as terminal dilapidations claims. There is a separate Pre-Action Protocol for Housing Disrepair cases.
- 1.2 This protocol sets out conduct that the court would normally expect prospective parties to follow prior to the commencement of proceedings. It establishes a reasonable process and timetable for the exchange of information relevant to a dispute, sets standards for the content and quality of schedules and Quantified Demands and, in particular, the conduct of pre-action negotiations.
- 1.3 If the landlord or tenant does not seek professional advice from a surveyor they should still, in so far as reasonably possible, fully comply with the terms of this protocol. In this protocol 'surveyor' is intended to encompass reference to any other suitably qualified person.
- 1.4 This protocol does not define 'dilapidations', 'repair', 'reinstatement' or 're-decoration.' Work to property which may be required will depend on the contractual terms of the lease and any other relevant documents.
- 1.5 Where the court considers non-compliance, and the sanctions to impose where it has occurred, it will, amongst other things, be concerned about whether the parties have complied in substance with the relevant principles and requirements and is not likely to be concerned with minor or technical shortcomings (see paragraphs 4.3 to 4.5 of the Practice Direction on Pre-Action Conduct).

2. Overview of Protocol – General Aim

2.1 The protocol's objectives are:

2.1.1 to encourage the exchange of early and full information about the dispute;

2.1.2 to enable the parties to avoid litigation by agreeing a settlement of the dispute before proceedings are commenced; and

2.1.3 to support the efficient management of proceedings where litigation cannot be avoided.

2.2 A flow chart is attached at Annex A, which shows each of the stages that the parties are expected to undertake before the commencement of proceedings.

THE PROTOCOL

3. The schedule of dilapidations (schedule)

3.1 The landlord should send the tenant a schedule in the form attached at either Annex B or C. It should set out what the landlord considers to be the breaches, the works required to be done to remedy those breaches and, if relevant, the landlord's costings.

3.2 Breaches should be separated into relevant categories e.g. repair, reinstatement, redecoration etc. They 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 Schedules should be sent within a reasonable time. What is a reasonable time will vary from case to case, but will generally be within 56 days after the termination of the tenancy.

3.4 The landlord may send a schedule before termination of the tenancy. However, if it does so, at the termination of the tenancy the landlord should:

3.4.1 confirm that the situation remains as stated in the schedule; or

3.4.2 send a further schedule within a reasonable time.

3.5 The schedule should be endorsed either by the landlord, or where it is prepared by a surveyor, by the landlord's surveyor. If the schedule has been prepared by the landlord's surveyor, then in endorsing the schedule, the surveyor should have regard to the principles laid down in the Royal Institution of Chartered Surveyors' Guidance Note on Dilapidations.

3.6 The endorsement should confirm that in the landlord's or the landlord's surveyor's opinion:

3.6.1 all the works set out in the schedule are reasonably required to remedy breaches referred to in paragraph 3.1 above;

3.6.2 where endorsed by the landlord, full account has been taken of its intentions for the property;

3.6.3 where endorsed by the landlord's surveyor, full account has been taken of the landlord's intentions for the property, as advised by the landlord; and

3.6.4 the costings, if any, are reasonable.

3.7 Wherever possible the schedule should be sent electronically to enable the tenant's comments to be incorporated in one document.

4. Quantified Demand

4.1 The Quantified Demand is not intended to have the same status as a statement of case in proceedings.

4.2 The Quantified Demand should:

4.2.1 set out clearly all aspects of the dispute, and set out and substantiate the monetary sum sought as damages in respect of the breaches detailed in the schedule as well as any other items of loss for which damages are sought. It should also set out whether VAT applies;

4.2.2 confirm that the landlord and/or its surveyor will attend a meeting or meetings as proposed under section 7 below;

4.2.3 be sent within the same timescale for sending the tenant a schedule (see paragraph 3.3 above); and

4.2.4 specify a date (being a reasonable time) by which the tenant should respond. This will usually be within 56 days after sending the Quantified Demand.

4.3 Where the monetary sum sought is based on the cost of works, it should be fully quantified and substantiated by either an invoice or a detailed estimate.

4.4 If the Quantified Demand includes any other losses, they must be set out in detail, substantiated and fully quantified. The landlord should explain the legal basis for the recovery of losses, e.g. whether they are sought as part of the damages claim or under some express or implied provision of the lease.

4.5 The figures set out in the Quantified Demand should be restricted to the landlord's likely loss. This is not necessarily the same as the cost of works to remedy the breaches.

4.6 The Quantified Demand should not include items of work that are likely to be superseded by the landlord's intentions for the property.

4.7 If the landlord's surveyor prepares the Quantified Demand, the surveyor should have regard to the principles laid down in the Royal Institution of Chartered Surveyors' Guidance Note on Dilapidations.

5. The Response

- 5.1 The Response is not intended to have the same status as a defence in proceedings.
- 5.2 The tenant should respond to the Quantified Demand within a reasonable time. This will usually be within 56 days after the landlord sends the Quantified Demand.
- 5.3 Where appropriate, the tenant should respond using the schedule provided by the landlord. The Response should be set out in sufficient detail to enable the landlord to understand clearly the tenant's views on each item.
- 5.4 The Response should be endorsed either by the tenant or, where it is prepared by a surveyor, by the tenant's surveyor. In endorsing the schedule, the tenant's surveyor should have regard to the principles laid down in the Royal Institution of Chartered Surveyors' Guidance Note on Dilapidations.
- 5.5 The endorsement should confirm that in the tenant's or tenant's surveyor's opinion:
- 5.5.1 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;
 - 5.5.2 any costs set out in the Response are reasonably payable for such works; and
 - 5.5.3 account has been taken of what the tenant, or tenant's surveyor, reasonably believes to be the landlord's intentions for the property.
- 5.6 If the tenant or tenant's surveyor considers that any items in the schedule or Quantified Demand 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:
- 5.6.1 this should be stated in the Response;
 - 5.6.2 particulars should be given of the material on which the tenant or tenant's surveyor relies; and
 - 5.6.3 the items to which this view is relevant should be identified.

6. Disclosure of Documents

6.1 Disclosure will generally be limited to the documents required to be enclosed with the Quantified Demand 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 31. Parties should assist each other and avoid the necessity for such an application.

7. Negotiations

7.1 The landlord and tenant and/or their respective surveyors are encouraged to meet before the tenant is required to respond to the Quantified Demand and should generally meet within 28 days after the tenant sends the Response. The meetings will be without-prejudice and the parties should seek to agree as many of the items in dispute as possible.

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 the 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 the court will take into account the extent of the parties' compliance with this protocol when making orders about who should pay costs (see CPR rule 44.3(4) and (5)(a)).

8.2 Information on mediation and other forms of alternative dispute resolution may be found through the following: www.justice.gov.uk/guidance/mediation/index.htm. The Royal Institute of Chartered Surveyors (www.rics.org/) and Property Litigation Association (www.pla.org.uk) websites also list a number of experienced mediators.

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

9. Quantification of Loss

9.1 Prior to issuing proceedings, the landlord should 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, where it has carried out some but not all remedial action, a combination of both; unless, in all the circumstances, it would be unreasonable to do so.

9.2 If a formal diminution valuation is produced, it should be prepared by a valuer.

9.3 If the landlord has not carried out all the works specified in the schedule but intends to carry out some or all of them, the landlord must:

9.3.1 identify which works it intends to carry out;

9.3.2 state when it intends to do such proposed works;

9.3.3 state what steps it has taken towards getting such proposed works done, e.g. preparing a specification or bills of quantities or inviting tenders; and

9.3.4 clearly show the scope of such proposed works to enable any effect on the dilapidations claim to be identified.

9.4 In a case falling within paragraph 9.3, or in a case where the landlord has not carried out all the works specified in the schedule, and does not intend to carry out some or all of the works so specified, then it should provide a formal diminution valuation unless, in all the circumstances, it would be reasonable not to.

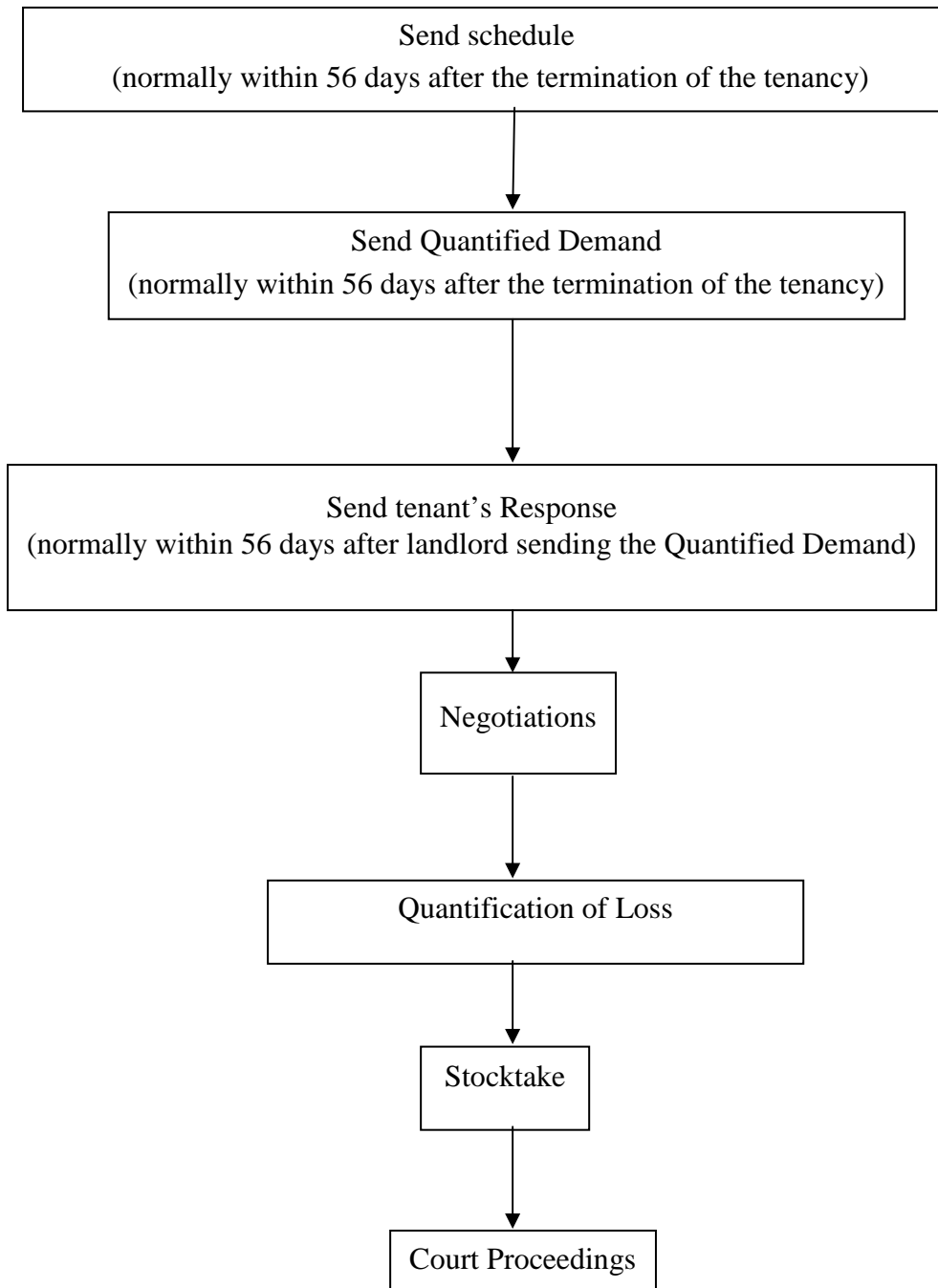
9.5 If the tenant relies on a defence on the basis of diminution, it must state its case for so doing and provide a diminution valuation to the landlord.

9.6 The tenant's diminution valuation shall be sent to the landlord within a reasonable time. A "reasonable time" will vary from case to case but generally will be within 56 days after the landlord sends the tenant a detailed breakdown of issues and losses under paragraph 9.1.

10. Stocktake

10. Where the procedure set out in this protocol has not resolved the dispute between the landlord and tenant, they should undertake a further review of their respective positions. The parties should consider the state of the papers and the evidence in order to see if proceedings can be avoided and, at the least, narrow the issues between them.

Annex A



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 alternative dispute resolution would assist in settling the dispute.

Annex B

Schedule of Dilapidations where prepared by a surveyor

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 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 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						

ENDORSEMENT

I [name, i.e. the same name as above] 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; and
- the costings, if any, are reasonable.

<p>DATED [.....]</p> <p>SIGNED [.....] [Name and address of surveyor appointed by landlord]</p>	
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1	2	3	4	5						
Item No.	Clause No.	Breach complained of	Remedial works required	Landlord's costings						

ENDORSEMENT

I [name, i.e. the same name as above] 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 [my] [the landlord's] intentions for the property; and
- the costings, if any, are reasonable.

<p>DATED [.....]</p> <p>SIGNED [.....] [Name of the person signing and address of landlord]</p>	
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