

## The Dilapidations Protocol: Playing By The Rules

*James McAllister, Director of The Dilapidations Consultancy, takes a look at the impact of the revised Dilapidations Protocol, which was formally adopted under the Civil Procedure Rules (CPR) in January 2012.*

### [Abstract]

After a ten year campaign, predominantly by the Property Litigation Association and a select group of RICS members, the formal adoption of the Dilapidations Protocol<sup>1</sup> is upon us. In January 2012<sup>2</sup>, the Dilapidations Protocol<sup>3</sup> became part of a growing series of pre-action protocols as an adjunct to the Practice Direction on pre-action conduct designed to regulate the behavioural dialogue of disputing parties at the outset of proceedings. In commercial terms, the formalisation of the protocol is well timed; the current economic conditions have accentuated the gulf between desperate landlords and impecunious tenants leading to a proliferation in dilapidation claims failing to be resolved by the traditional, and usually cordial, 'horse deal'. The disparity in respective positions between the disputants has traditionally left the matter to be resolved by any which way the parties can find resolution, litigation being the obvious last resort.

It has long been recognised that claims for damages under the banner of 'terminal schedules of dilapidations' have an unsavoury reputation. This has not been helped by the 'have a go' endeavours of the dilettante, when the complexity of the subject area is perhaps best left to the experts. The invariable absence of landlords being able to stand by the loss they avidly proclaim they have suffered, the inherent opportunities for fraud and the sometimes unnecessary litigation of claims, on poor advice, that could (or should) have been settled by more amicable means has catalysed the need for some rules.

Previous drafts of the Protocol prior to formal adoption were considerably more verbose. The latest edition has trimmed down the content and, in keeping with Protocol 'protocol', has avoided a discourse on the very issues that have kept the courts busy for the last two centuries.<sup>4</sup> Whilst simplifying the obligations and duties of the covenanting parties, and their representatives,<sup>5</sup> the Protocol is, predictably, rigidly prescriptive to the point that only time will tell whether it is commercially viable. The Protocol may not herald a significant modification in the way things are done, but it has ushered in a litany of strictures in terms of timing and disclosure of information in the interests of transparency and integrity. Whilst this is welcomed, it may restrict the pace at which end of term dilapidations claims can be processed and settled. This comes with its own set of problems...

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<sup>1</sup> The formal name for the Dilapidations Protocol is the '*Pre-Action Protocol for Claims for Damages in Relation to the Physical State of Commercial Property at the Termination of a Tenancy*'.

<sup>2</sup> The common commencement date is 6 April 2012.

<sup>3</sup> Hereinafter referred to as the 'Protocol'.

<sup>4</sup> This was at the behest of the Civil Justice Council and Rule Committee to ensure consistency with other protocols.

<sup>5</sup> The Protocol assumes the covenanting parties will be represented by a Surveyor, although clarifying that this encompasses any 'suitably qualified person'; para 1.3.