

**Four months on....****What difference has been made by  
the updated Pre-action  
Protocol on Dilapidations?**

Regular readers of the articles on this page of the Russell-Cooke website will know that there are a number of ways the Civil Procedure Rules (CPR, effective April 1999) encourage litigants and potential litigants to resolve their disputes as soon as reasonably possible.

Perhaps the most significant is by “threatening” litigants with sanctions for failing to deal reasonably with a dispute (including attempting resolution), most notably by imposing costs orders that might not otherwise have been made.

The question often to consider is whether the parties have in fact acted reasonably in the dispute. An important element of the CPR was the introduction of pre-action protocols, being guidelines to the steps that parties ought to take before they actually commence proceedings. If they do not follow those guidelines without good reason, then, if they launch into litigation and, in due course, the court comes to consider how the costs of the case should be determined, there is a risk that it might not make the usual order. In other words, in, say, a case where the claimant claims damages and succeeds in obtaining an award, whereas the court might otherwise also make an order that the losing party pay the costs of the claimant (albeit subject to an assessment as to the amount), if the claimant is shown not to have made reasonable efforts to resolve the case without going to trial, the judge might limit the percentage of the costs ordered in favour of the claimant so that its recovery would be less than might normally be the case or, in extreme cases, the judge might order that the claimant pay some or all of the opponent’s costs.

There are a number of Pre-action protocols that form part of the CPR. They concern, among other things, claims for damages for personal injury, claims for damages for clinical negligence and for defamation claims. While there is a pre-action protocol for claims for possession by social landlords of residential rented property for arrears of rent, there are none that specifically concern commercial property.

That said, the section of the CPR that concerns pre-action protocols sets out guidance of the conduct of a dispute prior to the issue of court proceedings that ought to be had regard to in any case, particularly where there is not a case specific pre-action protocol in place.

However, there has existed since 2002 a protocol known as the Pre-action protocol for dilapidations (the Protocol). Initially a document drafted by the Property Litigation Association ([www.pla.org.uk](http://www.pla.org.uk)), its purpose was to introduce some CPR-like guidance to the resolution of claims by commercial property landlords for damages suffered by the tenant failing (by the end of the

lease) to have complied with those terms of the lease and related documents that concern the state, form and condition of the property.

In 2003, after significant involvement by the RICS Dilapidations working party, it was incorporated in the RICS Dilapidations Guidance Note. The Note described the procedures set out in the Protocol as representing good practice.

The Protocol as originally drafted was operated by many surveyors and lawyers. The anecdotal evidence is that it worked to make landlords and their advisers take more care when compiling and pursuing a claim for damages. However, there was some general concern that elements of the Protocol could benefit from amendment or clarification. Some of that concern flowed from an “application” to the Department of Constitutional Affairs that the Protocol be adopted as part of the CPR, in the way that the existing protocols have.

That resulted in an updated Protocol being launched in September 2006.

The revised version can be seen on the Property Litigation Association website ([www.pla.org.uk](http://www.pla.org.uk)).

It has been the subject of quite high degree of comment; perhaps more than one would have expected. It is regularly discussed, for example, in the e-mail discussion available to members of the RICS Dilapidations Forum.

Perhaps two aspects of the updated Protocol (full title – Protocol for Claims for Damages in relation to the Physical State of Commercial Property at the end of the Lease) have caused most debate: the circumstances of when the landlord or tenant should prepare and serve a valuation of its loss under section 18 Landlord and Tenant Act 1927 and the requirement that the schedule of dilapidations and the associated claim should be endorsed by the surveyor preparing it with a note that the claim represents a fair assessment of the loss to the landlord.

In relation to the first issue, the degree of sometimes quite strong adverse reaction has been quite surprising. Some building surveyors (who in the main are responsible for drafting the schedules and claim) have expressed strongly worded concern that they cannot, professionally, give the endorsement because to do so requires them to support elements of a claim that might involve some aspect of valuation which they are not in a position to do. Some have expressed the view that their professional indemnity insurers would take a dim view of them signing off the claim in such a way. But, with respect to the surveyors who have expressed those views, I suggest that they have missed the point. In preparing the documents that are then served on the tenant, they are initiating a claim that may well result in litigation. There is clear statutory intervention in such claims (viz section 18 Landlord and Tenant Act 1927) and there are limits on the claims that can be made in many cases. In many cases the landlord is never going to be able to successfully claim everything that it might want – it is only entitled to recover its loss, assessed in the way the law permits. The schedule and the claim do not represent, as it were, the opening shot in some negotiation applying the traditional approach in such cases (i.e. to start high) being appropriate. Therefore, the surveyor should only ever be putting forward documents in the form of a schedule and claim that explain and support a claim for what the landlord has lost and to do otherwise might suggest (a) that the surveyor is not acquitting himself properly of the task he has been engaged to meet and (b) the surveyor is “misrepresenting” the landlord’s claim.

I believe that there should be no difficulty in the surveyor who holds himself out competent to assist a landlord in making a claim for loss in these cases (more commonly known as being a claim for dilapidations).

The second area of “debate” has also been somewhat surprising. The Protocol sets, in a manner intended to more clear than perhaps was the case in its first version, the approach that might be adopted in any particular case in relation to the service of a diminution valuation.

From some of the comments made, it would appear than some people expressing views on the updated Protocol have not appreciated that a diminution valuation will not be required in every case. Ultimately the position will depend on the circumstances of each case. Of course, the decision on this issue should be made very carefully, particularly if the outcome is not to serve one. (For the Protocol’s guidance on the subject, direct reference to it should be made at [www.pla.org.uk](http://www.pla.org.uk).)

In addition to the two issues that have been the subject of most debate, there has also been some debate about the Protocol’s status. There have been expressions of concern that, it not having been adopted into the CPR, in some way diminishes its weight. However, there is a form of the Protocol in the existing version of the RICS Dilapidations Guidance Note (which itself is to be updated before long), the updated version has been approved by the RICS Dilapidations working group and most practitioners are applying (or at least having regard to) its principles to the extent that it could be said to amount to an indication of industry good practice. Therefore, it seems to me that there should be no reason why one would not have regard to it when dealing with a claim intended to be covered by it.

Notwithstanding the representations that have been made in respect of the adjustments to the Protocol and although only four months have passed since the launch of the updated version, it does seem that yet greater care is being taken in the formulation of landlord’s dilapidations claims and that, perhaps, there has been a permanent change to what was perceived to have been the culture of making inflated claims in an attempt to get as much as possible for the landlord even though they could not be justified. That must be good for all, including landlords who do not then waste time, money and energy on pursuing claims that will often only be cut down or not followed through at all.

**Jason Hunter**

[hunterj@russell-cooke.co.uk](mailto:hunterj@russell-cooke.co.uk)

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