Mutual interests

Dilapidations disputes may become less frequent and less contentious following the introduction of a new practice direction on pre-action conduct, say *Patrick Stell* and *Keith Firn*. Illustration by *Clare Nicholas*

The resolution of dilapidations issues is governed by the Civil Procedure Rules 1998 (CPR), which provide a framework for resolving all civil law disputes. Since their introduction 10 years ago, the CPR continue to evolve in ways that have a positive effect on dilapidations disputes; the most recent significant changes were made in April.

Together with the RICS *Guidance note on dilapidations* and the Property Litigation Association's (PLA) draft dilapidations protocol, and a greater focus by commercial landlords and tenants on their respective lease covenants, the changes can further improve the service offered by lawyers and RICS surveyors.

Changes to the CPR practice direction on pre-action protocols

For the 12 months up to April 2009, the Ministry of Justice (MoJ) undertook a detailed consultation on the potential for a "one size fits all" general pre-action protocol for use in all disputes.

The courts considered that such a protocol might create a binding procedural framework for every civil dispute (including dilapidations) where no formally adopted protocol existed. After considerable feedback from many interested parties, in April the MoJ published the 49th update to the CPR, which introduced the new practice direction on pre-action conduct (PDPAC) (see at www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_pre-action_conduct.htm). This aims to reduce litigation by promoting the fullest possible exchange of information on the claim and the funding arrangements of those involved and promoting alternative dispute resolution (ADR).

The changes introduced by the PDPAC will be of particular interest to commercial landlords and tenants in the context of lease end dilapidations because the rules govern the conduct of parties from the outset of a dispute. In the case of dilapidations claims, this will be the point at which an allegation of breach of contract is made, namely when the breach is ascertained and detailed in the schedule of dilapidations served by the landlord (or its lawyer) at or near lease end. The CPR contain nothing to suggest that the effect of the PDPAC should be delayed while surveyors "negotiate" the alleged breaches in the Scott schedule. Quite the opposite, since the PDPAC applies as soon as the landlord alleges a breach and the tenant contests all or part of the schedule. The RICS guidance and the PLA protocol both confirm this position by advising that the CPR apply from the start of a dispute.

Key changes of particular relevance to dilapidations surveyors are set out in section III of the PDPAC. These include:

If supported by updated RICS guidance notes, the changes will have significant potential for reducing the frequency and extent of unduly acrimonious disputes

- Clause 7: A more clearly defined obligation on both parties to exchange information before commencing ADR.
- Clause 8: An explicit requirement that the parties must make appropriate attempts to settle a dispute, including the use of ADR.
- Clause 9: A requirement for both parties immediately and proactively to disclose information concerning the funding arrangements of advisers that can be classed as being on a "conditional fee" basis (where, for example, the fee is based on the outcome of a damages claim).
- Annex A: This provides guidelines on the dispute resolution to be followed by the courts where no other formal procedure or adopted pre-action protocol applies; this includes commercial dilapidations disputes.
- Annex C: This sets out detailed requirements for the use of "experts" at the pre-litigation stage of a dispute, *before* expert witnesses are appointed. The evidence of a chartered surveyor who has inspected the property at lease end and whose schedule is served on the tenant in support of a claim for damages on expiry will be referable to the court should the proceedings go ahead, whether or not the schedule is relied on as evidence. Particular attention is drawn to CPR 35, which governs the obligations on those producing evidence that might be used in litigation.

Effect on RICS guidance

Dilapidations surveyors have worked on a percentage fee basis that dates back to the old RICS fee scale. The RICS working group on dilapidations stated that surveyors were still entitled to agree incentive-based contingency fee terms to prepare and defend dilapidations claims during the pre-litigation stages of a dispute up to commencement of proceedings. However, in the light of an express duty to inform the opposing parties of the existence of any conditional fee agreements, this historic position will need to be revised.

Surveyors must now recognise that the PDPAC definition of conditional fee agreements includes surveyors' incentivised (contingency) fee terms irrespective of whether they are appointed to prepare or defend schedules or they consider themselves to be acting as experts, advocates, advisers or negotiators at the pre-litigation stage. It is worth noting that the PDPAC does not outlaw contingency fees for surveyors, although such terms may still be highly inappropriate in the context of the remnants of the law against champerty. Thus, parties and their surveyors should be aware of the potentially serious consequences for their claim or defence if the Scott schedule claim or

response documents are prepared by surveyors engaged on such terms.

Annex C of the PDPAC draws particular attention to CPR 35. This governs the obligations imposed on anyone producing evidence that might subsequently be used in proceedings. The interpretation of the CPR favoured by the courts indicates that surveyors' statements and schedules issued at pre-litigation stages are representations of an expert that must be considered as having been made in good faith and capable of being taken as genuine and honest evidence by the recipient. As best practice, a surveyor's pre-litigation expert statement and schedule should routinely be accompanied by a CPR 35-compliant statement of truth, unless the surveyor is expressly retained solely in the capacity of an advocate and he is advocating a third party's expert opinion.

Moreover, if a surveyor is appointed in a capacity that may (or will) preclude the future use of his schedule as admissible evidence in a damages claim – since it would not be compatible with the standard expected of an objective expert document – it is vital that the landlord or tenant client is informed of the consequences for any claim/defence *before* an appointment is accepted and that the appointment is made only with the client's informed consent.

The effect of these procedural changes means that the RICS guidance note will need to be revised. As the law evolves, so too will the guidance.

Effect on protocol

Even though the PLA protocol has not been adopted, it has enjoyed a high profile since its inception in October 2000. It continues to be recognised as indicative of good practice, particularly in larger and more complex claims. In the light of the PDPAC, the protocol will require revisions, such as:

- Making it shorter and clearer so that the time taken to consider and apply the rules on smaller claims is proportional to value.
- Reducing the rigidity imposed by timetables that are no longer compatible with the mandatory timescales defined in clause 7.2 of the PDPAC.
- Rebalancing the statements of truth required so that standard CPR 35 statements are required to be signed by both parties and their respective pre-litigation appointed surveyor, if applicable. The PLA had proposed a more equal approach, with tenant endorsements in addition to those already required of the landlord. This was vetoed by the RICS dilapidations working group; a decision that will now need to be revisited.

Since the protocol remains secondary to the PDPAC, priority should be given to complying with the PDPAC in all dilapidations disputes, unless both parties to a dispute agree otherwise.

Both parties must immediately and proactively disclose information concerning the funding arrangements of advisers on a "conditional fees" basis

Dispute-avoidance opportunities

The focus should not be entirely on procedural law. It can be easy to overlook opportunities for commercial landlords and tenants to gain a mutual benefit by adopting other pragmatic dispute-avoidance measures when negotiating lease terms prior to the start of the contractual relationship and during the lease term. These can include:

- Landlord inventories that sufficiently identify the extent of the demise. These should include an up-to-date lease plan, the layout and configuration at the start of the lease and key fixtures, fittings and finishes. This will help to define, for example, lease end reinstatement obligations, rent review net internal areas and yield-up fixtures and should therefore assist both parties at lease expiry accurately and effectively to identify and resolve dilapidations claims.
- Adjudication clauses in leases should cover dilapidations disputes that might arise at lease end. This could be similar to the concept of third surveyor in the Party Wall etc Act 1996, and could apply to disputes that are not resolved within a defined period after lease end.
- ADR clauses should require the parties to refer to ADR on a defined date after lease end. The use of ADR, particularly the involvement of an impartial lawyer with dilapidations experience, can significantly reduce the scope for dispute. This concept is fully embraced in both the PLA protocol and the RICS guidance and should be encouraged.
- Leases should require the landlord to serve reinstatement notices at or by a specific date in advance of determination of the lease. This would afford the tenant an opportunity to undertake the works, but it could also allow the landlord to enter the property to undertake reinstatement as a self-help measure should the tenant fail to complete the reinstatement by a defined date shortly before the lease determines. This would benefit landlords and tenants.
- The lease should contain a contractual requirement (in the spirit of the overriding objective of the CPR and paras 3 to 6 of Annex C) for the landlord, prior to commissioning a schedule of dilapidations, to serve notice on the tenant of its intention to carry out a dilapidations survey.

The notice could propose a list of, say, three independent dilapidation experts, one of whom would be jointly appointed to draw up a schedule of breaches. This would enhance the sharing and exchange of evidence between parties and help to ensure that the expert was objective and not seeking to create a gain or a loss for either side.

Welcome changes

The consequences of the recent changes to the CPR for landlord and tenant clients are predominantly positive. By following the PDPAC and adopting other dispute avoidance measures, commercial landlords and tenants should experience less contentious dilapidations claims and more efficient dispute resolution at lease end.

If supported by updated RICS guidance notes, the changes will have a significant potential for reducing the frequency and extent of unduly acrimonious dilapidations disputes. This in turn should result in more proportionate actions, with savings in costs that, in today's economic climate, will be welcome.

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