

Summary and legal basis

In almost all commercial tenancies there will be obligations concerning the form and condition of the premises. This section considers how to identify the extent to which there are such obligations, who has to meet them and the action that can be taken if they are not met. A failure to comply with such obligations will give rise to a claim for what is commonly known as dilapidations.

For any sizeable dilapidations claim both the landlord and the tenant will appoint professional representatives, usually building surveyors, because of the degree of construction knowledge required. For the dilapidations process to be successful the appointed surveyor must also have a reasonable understanding of the often complex legal principles in this area of law. It is not uncommon for solicitors to be involved in dilapidations claims, perhaps in the formal service of the claim itself, or in the interpretation of the lease covenants. Surveyors must be aware that it is not in their remit to interpret leases - only to understand a lawyer's interpretation of a lease.

The purpose of this section is to give practical assistance to surveyors in making (and receiving) claims and progressing negotiations effectively in order to achieve a resolution in a timely manner. The section focuses on the roles and responsibilities throughout the dilapidations process.

Both the [Civil Procedure Rules 1998](#) (CPR) and the [Pre-action Protocol for claims for damages in relation to the physical state of commercial property at the termination of a tenancy \(the Dilapidations Protocol\)](#) have introduced a stronger framework for the effective resolution of disputes without the need for expensive and time-consuming litigation. The Dilapidations Protocol is fully incorporated into the RICS [Dilapidations](#) guidance note, 7th edition (the guidance note). All dilapidations practitioners should ensure that they are fully conversant with all of these documents. Some material which appears in the guidance note is not replicated here and it is therefore **essential** supplementary reading.

It is hoped that as surveyors develop a better understanding of the principles and processes of dilapidations claims the number of cases reaching the courts will be reduced.

The legal basis

Dilapidations claims are based upon the law of contract, supplemented by case law and statute. A lease essentially creates a contractual relationship between two parties and a schedule of dilapidations is an allegation of breach of contract, which could result in litigation. As a record of evidence that can be put before the court, the clarity and accuracy of a schedule of dilapidations is extremely important. In addition, the requirements and regulations of the [Civil Procedure Rules](#) (CPR), and the associated protocols and guidance, apply to dilapidations claims and practitioners should ensure that they are aware of the requirements of the CPR on their role and actions.

This section concentrates on lettings of commercial property within the court jurisdiction of England and Wales. Although many aspects of the procedures and processes described here may be relevant to claims in Scotland, dilapidations claims in Scotland have a number of significant differences. See Fleming, McKinlay and McMillan's Dilapidations in Scotland for guidance.

Most dilapidations claims concern tenants' obligations, and this section will focus principally on claims made by landlords against tenants. However, it will also address the less common scenario of a claim against a landlord. Although the commentary mainly focuses on 'terminal' dilapidations claims, the principles identified are, to some extent, applicable to non-terminal situations.

Taking instructions

Take steps to identify and manage any conflicts of interest that might impede impartiality. It goes without saying that surveyors should not act simultaneously for 2 or more parties with competing interests such as the landlord and tenant of the same property.

Additionally, **from 1 January 2018**, RICS members must conform with the mandatory requirements set out in the RICS global professional statement: [Conflicts of interest \(1st edition\)](#) .

In dilapidations cases many clients already have a reasonably clear idea what they want to achieve and how they would like to achieve it, particularly if they have a large property holding. Other clients will have little or no experience and will need to be guided. In both cases, however, before taking on the instruction, the surveyor will need to establish the nature of the lease and other documentation, and the client's future plans for the property in question.

The surveyor should consider whether subconsultants and specialist advice will be required and advise the client appropriately. Naturally, any subconsultants must be appropriately experienced (and insured) to carry out the work required. The guidance note states that the surveyor must ensure that such instructions and documentation subsequently produced is consistent with that of the surveyor, particularly where it is to be incorporated into the surveyor's report (such as a schedule of dilapidations, quantified demand, response, Scott schedule or diminution valuation). Section 3.1.11 of the guidance note also suggests that the surveyor's terms and conditions make it clear that they cannot be held responsible for any information/advice provided by third parties. See [Quantified demand](#) where the issue of third-party information is discussed in relation to the endorsement of the quantified demand/schedule of dilapidations.

It is the case that most dilapidations claims never involve lawyers (save, perhaps, to serve schedules of dilapidations) and are resolved between surveyors acting for the landlord and tenant. But at the outset of an instruction, one cannot know whether that claim will be resolved or become the subject of litigation. The RICS [Dilapidations](#) guidance note encourages surveyors to undertake instructions in an 'objective, polite, constructive and professional manner' (section 2.2.4 of the guidance note). This is particularly important because it might come about that communications and documents will be scrutinised by others (including a judge) sometime later. This could be so, even if advice is given to the instructing client, as the concept of legal professional privilege (i.e. confidentiality of advice) will not apply, a point confirmed by the Supreme Court in [R \(on the application of Prudential plc\) v Special Commissioner of Income Tax](#) [2013] UKSC 1. Surveyors must also ensure that their schedules are not exaggerated and responses not understated (section 2.2.6 of the RICS [Dilapidations](#) guidance note, 7th edition) or the offending party may be 'at risk of a punitive order on costs'.

Fees

There is no set fee scale for dilapidations work: they are a matter of contractual agreement between surveyors and their clients and surveyors should ensure that the client is aware of the basis on which fees are calculated. Fees made on a conditional/contingency basis are entirely acceptable, although such an arrangement would have to come to an end in the

event the surveyor is subsequently instructed as an expert witness.