The purpose of this guidance note is to provide practical guidance to RICS members when instructed in connection with dilapidations matters in England and Wales. This is particularly relevant to practitioners in view of the recent adoption of a formal pre-action protocol under the Civil Procedure Rules (CPR).

The situations in which surveyors can be asked to act or advise, and which are covered by this guidance note, are as follows:

- dilapidations claims at the end of the term
- dilapidations claims during the term
- forfeiture situations
- entry to repair situations
- break clause situations, and
- dilapidations claims by tenants against landlords.
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The sixth edition the RICS Dilapidation guidance note was produced by the *Dilapidations Working Group*. RICS wishes to express its sincere thanks to the working group members:

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Thank you also to everyone who has reviewed previous drafts, in particular Guy Fetherstonhaugh QC and Hugh G M Love, PricewaterhouseCoopers, Scotland, for his contribution to the VAT appendix.
This is a guidance note. Where recommendations are made for specific professional tasks, these are intended to represent ‘best practice’, i.e. recommendations which in the opinion of RICS meet a high standard of professional competence.

Although members are not required to follow the recommendations contained in the note, they should take into account the following points.

When an allegation of professional negligence is made against a surveyor, a court or tribunal may take account of the contents of any relevant guidance notes published by RICS in deciding whether or not the member had acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this note should have at least a partial defence to an allegation of negligence if they have followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

It is for each surveyor to decide on the appropriate procedure to follow in any professional task. However, where members do not comply with the practice recommended in this note, they should do so only for a good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice. Also, if members have not followed this guidance, and their actions are questioned in an RICS disciplinary case, they will be asked to explain the actions they did take and this may be taken into account by the Panel.

In addition, guidance notes are relevant to professional competence in that each member should be up to date and should have knowledge of guidance notes within a reasonable time of their coming into effect.

**Document status defined**

RICS produces a range of standards products. These have been defined in the table below. This document is a guidance note.

<table>
<thead>
<tr>
<th>Type of document</th>
<th>Definition</th>
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<tbody>
<tr>
<td>RICS practice statement</td>
<td>Document that provides members with mandatory requirements under Rule 4 of the Rules of Conduct for members</td>
<td>Mandatory</td>
</tr>
<tr>
<td>RICS code of practice</td>
<td>Standard approved by RICS, and endorsed by another professional body, that provides users with recommendations for accepted good practice as followed by conscientious practitioners</td>
<td>Mandatory or recommended good practice (will be confirmed in the document itself)</td>
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<tr>
<td>RICS guidance note</td>
<td>Document that provides users with recommendations for accepted good practice as followed by competent and conscientious practitioners</td>
<td>Recommended good practice</td>
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<tr>
<td>RICS information paper</td>
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Glossary

**Dilapidations claim:** the overall process associated with an allegation of a breach of lease/tenancy in relation to the condition and/or use of the premises, typically as identified in a schedule of dilapidations, Quantified Demand and/or diminution valuation.

**Diminution valuation:** a valuation prepared in order to calculate a claimant’s loss incurred as a result of alleged breaches. The document is usually prepared by a specialist valuation surveyor.

**Dilapidations Protocol (the Protocol):** pre-action protocol for claims for damages in relation to the physical state of commercial property at the termination of a tenancy.

**Quantified Demand:** a document prepared for the purpose of and complying with section 4 of the Protocol.

**Response:** a document prepared for the purpose of and complying with section 5 of the Protocol.

**Schedule of dilapidations:** a document which identifies relevant lease/tenancy obligations; alleged breaches of those obligations; any remedial works that have been completed or are proposed in order to rectify each alleged breach; and, in certain circumstances, the estimated or actual cost incurred in rectifying those breaches. The document is usually prepared by a building surveyor.

Schedules of dilapidations are commonly referred to in the following manner:

- **Terminal schedule of dilapidations:** a schedule of dilapidations prepared at or shortly after the end of the lease term. This phrase is also commonly used in relation to a schedule prepared in anticipation of the end of the lease term.

- **Interim schedule of dilapidations:** a schedule of dilapidations prepared in contemplation of remedy of any alleged breaches during the contractual term of the lease, and not in anticipation of the lease end.

**Scott schedule:** a schedule of dilapidations with additional columns to allow the parties to set out their respective views.
1 Introduction

1.1 General

1.1.1 The purpose of this guidance note is to provide practical guidance to RICS members when instructed in connection with dilapidations matters in England and Wales.

1.1.2 The guidance note seeks to advise members on the factors they should take into consideration when taking their client’s instructions; reviewing the lease and other relevant documents; inspecting the subject property, and producing and responding to schedules of dilapidations and other documentation for use by the client, the other party to the lease, third parties, the courts and other legal institutions, such as tribunals.

1.1.3 A dilapidations claim is an allegation of breach of contract and as such is actionable in law.

1.1.4 When advising a client on dilapidations matters, a surveyor should seek fully to understand the client’s position, the reasons why the surveyor’s advice is sought and the use to which that advice might be put. The surveyor should try to ascertain the relevant factual and legal background insofar as it will impact on that advice.

1.1.5 Often, after a surveyor has advised his or her client, a document is sent or disclosed to the other party to the lease, to third parties, or to a court or tribunal. That document can be held out as the product of the surveyor applying his or her training, knowledge and expertise to the matter. The surveyor should try to ascertain the relevant factual and legal background insofar as it will impact on that advice.

1.1.6 Surveyors should not allow their professional standards to be compromised in order to advance clients’ cases. Surveyors should not allow a document that contains statements or assertions that they know, or ought to know, are not true or properly sustainable or arguable to be sent bearing their name or the name of their firm. A surveyor should give proper advice even though the client might choose to ignore it.

1.2 Areas covered

The situations in which surveyors can be asked to act or advise, and which are covered by this guidance note, are as follows:

• dilapidations claims at the end of the term
• dilapidations claims during the term
• forfeiture situations
• entry to repair situations
• break clause situations; and
• dilapidations claims by tenants against landlords.

1.3 Naming conventions

1.3.1 While, in general, this text is gender neutral, on occasions where masculine terms only are used (such as in legislation quotes), these should be taken, in the case of surveyors, as meaning ‘she’ and ‘her’ as well, and in the case of the parties, as ‘he’, ‘she’, ‘they’ or ‘it’ (for the case of a corporate body).

1.3.2 The word ‘tribunal’ is used to mean courts, tribunals, arbitrators and independent experts.

1.3.3 The physical subject of the dilapidations claim is referred to as the ‘property’, which therefore should be taken to include part of a property or a demise.

1.3.4 The Civil Procedure Rules apply to the civil courts of England and Wales and are referred to throughout this document as CPR.
2 Role of the surveyor

2.1 General

2.1.1 A surveyor can be offered instructions in a dilapidations case as an expert witness and/or as an adviser or dispute resolver.

2.1.2 Professional objectivity is required in all roles and in the various types of advice given. The surveyor should act in accordance with the RICS Rules of Conduct.

2.1.3 The surveyor should note that, pursuant to the CPR Practice Direction – Pre-Action Conduct (CPR), parties to a dispute:

• are expected to act reasonably in exchanging information and documents to try to avoid litigation
• should set out in writing the detail of their respective positions; and
• should consider whether some form of alternative dispute resolution would be more suitable than litigation.

2.1.4 The surveyor should be aware that, pursuant to the provisions of Part 44.3 of the CPR, the court has discretion as to whether costs are payable by one party to another.

‘In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including:

– the conduct of all the parties
– whether a party has succeeded on part of his case, even if he has not been wholly successful; and
– any payment into court or admissible offer to settle made by a party which is drawn to the court’s attention, and which is not an offer to which costs consequences under Part 36 apply.’

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2.1.5 The rules go on to say that:

‘The conduct of the parties includes:

(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.’

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2.1.6 Surveyors should be mindful that the area of dilapidations involves many legal considerations and should avoid advising or taking steps outside their area of expertise.

2.2 Acting as adviser (but not instructed as an expert witness)

2.2.1 Surveyors appointed as advisers have an obligation to act in accordance with the RICS Rules of Conduct and their own professional responsibility to their clients.

2.2.2 The role of adviser can encompass surveyors using their expertise to identify or comment on breaches of covenant and appropriate remedies, prepare schedules of dilapidations or responses, provide or comment on diminution valuations, provide valuation advice, negotiate with other parties with the aim of achieving a settlement, and provide advice on strategy and tactics in relation to a dilapidations claim or potential dilapidations claim.

2.2.3 Surveyors should undertake their instructions in an objective, honest and professional manner. They should have appropriate experience and
expertise to undertake the instruction. Schedules of dilapidations or responses should not contain allegations of breaches that do not exist, remedies that are inappropriate (for instance, replacement of components when repair would be sufficient to comply with the lease), or costs that are exaggerated or understated. The tenant should be entitled to assume that a dilapidations claim is being put forward with integrity, in good faith and on sound advice. A landlord should be able to assume likewise in respect of the tenant’s response.

2.2.4 Surveyors should guard against exaggeration or understatement, whether in terms of the content of the schedule of dilapidations, the Quantified Demand or the diminution valuation. This is particularly important as any subsequent litigation carries with it the danger of a heavy costs order against the party who exaggerates or understates its position (see also 2.1.4 and 2.1.5).

2.2.5 A surveyor who is appointed solely to prepare or comment on a schedule of dilapidations or a diminution valuation is not an expert witness. The Expert Witness Practice Statement (see 2.3) will, therefore, not apply until the surveyor is considering accepting instructions as an expert witness. Nonetheless, the surveyor should be influenced by the considerations relating to expert witnesses in advising his client, particularly to provide objective advice. It is important for the surveyor to keep in mind that his credibility as an expert witness at a future hearing may be undermined by any failure to follow the guidance in paragraphs 2.2.2 to 2.2.4 above when acting as an adviser.

2.2.6 It is important that surveyors do not formalise settlements without the consent and authority of clients. Indeed, in some situations, it might be appropriate, or a client requirement, that the settlement is formalised via solicitors (see 13 – Settlements).

2.3 Expert witness

2.3.1 A surveyor acts as an expert witness once he accepts a formal instruction from a client to give or prepare evidence for the purpose of proceedings. An expert witness can only give evidence before a tribunal by direction of that tribunal. The appointment of an expert witness can only be made after such direction is given. In practice, however, this is often done in anticipation of such direction at the request of the client/legal adviser and the surveyor should sensibly treat himself as acting as an expert witness from the date of accepting any such instruction, even if no formal direction has been made.

2.3.2 A surveyor appointed as an expert witness, whether appearing for one party or as a single joint expert, will be bound by the RICS practice statement and guidance note Surveyors acting as expert witnesses (2008). Under that document, and also under the CPR where it applies, the surveyor’s duty to his client is overridden by his duty to the tribunal.

2.3.3 Briefly stated, the obligation of an expert witness to any tribunal is to give objective unbiased evidence. It follows that the evidence given by the expert witness should be the same whether acting for the tenant, the landlord or as a single joint expert.

2.3.4 In the context of court proceedings, surveyors’ obligations are set out in Part 35 of the CPR and its accompanying Practice Direction.

2.3.5 Surveyors appointed as expert witnesses should also act in accordance with the RICS Rules of Conduct insofar as there is no conflict with their duty to the tribunal.

2.4 Dispute resolver

2.4.1 A surveyor may be appointed as a dispute resolver by private agreement between the parties in dispute or by other formal appointing bodies such as the RICS Dispute Resolution Service.

2.4.2 In all cases the surveyor should have regard to the particular requirements of the role; for example, mediator, independent expert, arbitrator, neutral evaluator, etc. Commentary on these roles is beyond the scope of this guidance note.

2.4.3 The dispute resolver should be aware of the RICS Conflicts of interest guidance note (2012).

2.4.4 A surveyor appointed by a single party to provide services set out in sections 2.2 and/or 2.3 is not a dispute resolver.
3.1 General

3.1.1 Instructions relating to dilapidations should be taken in accordance with the RICS Rules of Conduct. Particular regard should be paid to notification of terms and conditions of engagement to be provided in writing to the client. Instructions in dilapidations claims are no different in this respect from any other instruction.

3.1.2 Surveyors should bear in mind that, in addition to their duties to their clients, they have duties to RICS (in maintaining the reputation of the Institution and complying with its rules). Surveyors will usually also have duties to any tribunals to which they give evidence. Surveyors should inform clients of these additional duties.

3.1.3 Surveyors may want to consider with each client whether sub-consultants are required or may be required during the course of the instruction.

3.2 Fees

3.2.1 Fees for undertaking dilapidations instructions are a matter of contractual agreement between surveyors and their clients.

3.2.2 Surveyors have an obligation to set out the basis of their fees in such a way that clients are aware of any financial commitments they are making by instructing the surveyor.

3.2.3 As regards conditional/contingency fees for instructions to act as an expert witness, surveyors should take note of the position and guidance set out in RICS practice statement and guidance note, *Surveyors acting as expert witnesses* (2008).
4 The lease and other enquiries

4.1 Documentation

4.1.1 The surveyor should obtain a copy of the relevant lease and other documentation with all plans and other attachments.

4.1.2 Other documentation which might be necessary or desirable can include:

- scaled plans
- licences or other consents for alterations, with plans and specifications
- any agreement for lease (if intended to survive the grant of the lease)
- assignments and licences to assign
- side letters or other written agreements
- schedules of condition, together with appropriate photographs
- inventories
- schedules of fixtures and fittings
- any notices under the Landlord and Tenant Act 1954; and
- any applications for consent.

4.1.3 Surveyors should satisfy themselves that the documentation obtained is sufficient for them to discharge their instructions. Any questions as to authenticity need to be addressed to the client or the client’s legal adviser. Ambiguities in the documents or in instructions should be clarified as they arise.

4.1.4 Surveyors should read and seek to understand the documentation to at least a sufficient extent to enable them to discharge their instructions. While surveyors do not give legal advice, they should be mindful of the court’s approach to the interpretation of contractual provisions generally, as well as the more specific treatment of lease clauses, which apply in dilapidations claims. Surveyors who are uncertain about any item contained in a document, such as the interpretation of a particular covenant or the extent of the property, should bring the matter to the attention of the client and, if appropriate, the client’s legal advisers.

4.2 Lease clauses

Particular lease clauses to which the surveyor will refer include those described in 4.2.1 to 4.2.6.

4.2.1 Demise

Generally, a tenant’s obligations are limited to the property that has been demised to it. Further, a landlord’s obligation to repair, if there is one, will usually be limited to those areas not required to be repaired by the tenant. The surveyor should understand what is the physical subject matter of the relevant covenants.

4.2.2 Repair

Repairing covenants vary widely. Some covenants say nothing more than that the property is to be kept in good repair. Others, prepared using the ‘torrential’ form of drafting, contain a long list of additional requirements, such as to uphold, maintain, rebuild, renew, amend, etc. In whatever manner the covenant is drafted, its scope should be understood thoroughly.

4.2.3 Decoration

If there is an obligation to decorate, it might be contained in a separate covenant or might be included as part of the repair covenant. It is usual, but by no means universal, for there to be an obligation to decorate at specific intervals or on particular dates during the term, as well as within some period, which is usually specified, shortly before the end of the term.

4.2.4 Alterations and reinstatement

The surveyor should have regard to both the lease and any licences for alterations when considering the question of alterations and reinstatement. Either or both documents might contain provisions relevant to the surveyor’s instructions. An obligation to reinstate lawful alterations will only arise if there is express provision in the lease or licence, which may or may not require prior notice to be served. If there is a requirement for prior notice, that notice must be served in compliance with any associated conditions if the obligation is to be enforceable.
4.2.5 Yielding up
The ‘yield up’ clause might simply require the property to be yielded up in accordance with the lease covenants. It might, however, impose a different set of obligations; for example, complete recarpeting regardless of the condition of the existing carpeting. If the clause is relevant to the surveyor’s instructions, that is to say, the lease is shortly to end or has ended, the clause should be considered carefully.

4.2.6 Statutory obligations
Leases normally include covenants requiring the tenant to comply with and carry out works required by the provisions of any relevant statute or regulation. Many statutory obligations arise only in respect of occupied premises and are not often applicable retrospectively. The surveyor should consider not just the lease covenant but the actual provisions of the relevant statute or regulation, or take legal advice on those provisions, if the surveyor believes they are relevant to his instructions.

4.3 Recovery of fees

4.3.1 Modern leases of commercial property commonly contain an express provision enabling the landlord to recover from the tenant the costs and fees incurred in the preparation and service of a schedule of dilapidations, or a ‘s. 146 notice’. These express provisions may go further, for example by including the fees incurred in negotiating a settlement of the landlord’s claim. In consequence, in considering the recovery of fees, the first point of reference should always be the lease.

4.3.2 Additionally, s.146(3) of the Law of Property Act 1925 contains a statutory costs recovery provision that is specific to waiver or relief from forfeiture.

4.3.3 In default of contractual and/or statutory rights to recover fees, the landlord may be entitled to recover such costs as part of its claim to damages, but should seek appropriate legal advice before attempting to do so. See also 2.1.4.

4.3.4 Surveyors should keep an adequate record of time spent and any other costs incurred to enable possible recovery by the client.

4.4 Schedules of condition
The usual purpose of a schedule of condition, when attached to a lease, is to modify or clarify the repairing obligation. There is no standard approach for dealing with such schedules of condition. All that can be said is that the surveyor should consider carefully the drafting of the schedule of condition and the references to it in the body of the lease. If there is any uncertainty as to its application to the surveyor’s instructions, the client should be informed of the need for legal input.

4.5 Other enquiries
The other investigations that should be made and documents that should be gathered by the surveyor might, depending on the nature of the client’s instructions, include the following:

• current or historic planning consents and the planning environment
• statutory notices relating to the property
• original or current letting or investment sale details
• the landlord’s intentions for the property at, or shortly after, the termination of the tenancy (this might include details of works proposed to the premises); and
• evidence of rental values and yields.
5 Inspection

5.1 Whenever an inspection is to be undertaken before the lease expires, whether the tenant is in occupation or not, the landlord’s surveyor should comply with the terms of the lease when making arrangements for access. (NB: A surveyor who is instructed in connection with a forfeiture situation should check with the client or the client’s legal advisers before making access arrangements, to ensure that no issue of waiver of forfeiture rights will arise from making such arrangements.)

5.2 Surveyors are advised to acquaint themselves with RICS guidance relating to inspecting property.

5.3 It is generally appropriate for an independent inspection to be undertaken on behalf of each party initially, although at least one subsequent joint inspection is normally advisable as part of the negotiation dialogue.

5.4 It is advisable for the surveyor, at the time of the initial inspection, to note the general standard of repair in the locality and whether similar properties are vacant or boarded up. It is also advisable to note any changes to the nature of the area since the lease was granted. The information might be relevant to the assessment of the scope and standard of repair and also to matters relating to the diminution in the value of the landlord’s reversion discussed later (see 8 – Dilapidations claims at the end of the term).

5.5 The inspection should be sufficiently thorough to enable an accurate record of the relevant breaches to be ascertained. The information recorded should also include all necessary data to allow costs to be calculated. All site notes, measurements or other transcriptions should be retained. When relevant, sketches with a north point should be made and photographs taken. It is recommended that these be cross-referenced to the schedule of dilapidations and dated. If a video record is made, the same would apply.

5.6 Further specialist input might be required from, for example, a consultant engineer or quantity surveyor. The surveyor can facilitate the process, liaising with the client and the consultant(s) concerned as necessary. It is recommended that the surveyor advise the client of the importance of ensuring that the consultants’ instructions are consistent with those of the surveyor and that the documentation produced by the consultants is similarly consistent. The surveyor therefore needs to be satisfied with the content of any supportive documentation where incorporated within the surveyor’s own schedule or response.

5.7 It might be appropriate to make a note where further investigation or opening up is required. When this is justified, the agreement of the client and, where appropriate, the tenant should be obtained, together with the extent of making good to the building fabric should it be damaged in the process. It should be noted that if no breaches are discovered then the cost of specialist inspections might not be recoverable as part of the dilapidations claim.
6 The schedule of dilapidations

6.1 General

Schedules of dilapidations are a record of alleged breaches of covenant. A schedule of dilapidations could be required in each of the situations covered by this guidance note and those listed in 1.2. While the format will vary depending on the precise situation, schedules of dilapidations should contain these details:

- the contract, lease or covenant alleged to be breached; and
- the nature of the alleged breach.

Considerations specific to particular uses of schedules of dilapidations in different scenarios are dealt with in the relevant sections of this guidance note.

6.2 Layout and format

6.2.1 The content of the schedule of dilapidations is usually arranged in sections relating to the type of covenant alleged to have been breached, such as items of repair, decoration, reinstatement and statutory compliance.

6.2.2 In respect of reinstatement, paragraph 3.2 of the Protocol requires the surveyor to specifically identify in the schedule (where appropriate) any notices served by the landlord requiring reinstatement works to be undertaken.

6.2.3 Schedules of dilapidations would normally contain the following columns:

- an itemised numbered reference
- the relevant clause of the lease or other document
- the breach alleged
- the remedy required; and
- the cost of the remedy (when relevant to its purpose).

An example of a schedule of dilapidations format is attached at Appendix A.

6.3 Costing

6.3.1 The schedule of dilapidations should be costed if it is anticipated that the appropriate remedy is damages. There will also be other situations where the parties will require costing of the schedule of dilapidations. In any such case, the schedule of dilapidations should be priced with due reference to reliable and appropriate cost information, which is available from a number of sources, for example:

- current Building Cost Information Service (BCIS) data and other recognised price books (to which the appropriate regional variations should be applied)
- relevant and recent tender price information (on projects of a similar nature and size to that envisaged by the schedule of dilapidations); and
- the result of a consultation with and assistance from a contractor, which could be conducted on the basis of a full specification of works derived from the schedule of dilapidations.

6.3.2 Pricing should be undertaken in sufficient detail to enable an itemised breakdown of the costs to be provided in the event that the recipient of the schedule of dilapidations challenges the quantum.

6.3.3 For larger and more complicated schedules of dilapidations, it could be appropriate for the client to engage a quantity surveyor to undertake the pricing process, the cost of which might be recoverable as part of the cost of preparing the schedule of dilapidations, if preparation costs are themselves recoverable (see 4.3).

6.4 Service

The claimant’s solicitor will usually formally ‘serve’ the schedule of dilapidations, most often where legal and statutory formalities apply. Where formal ‘service’ is not necessary it can be quite acceptable for the landlord’s surveyor to issue the schedule of dilapidations on a client’s behalf. In such instances, surveyors should advise clients to satisfy themselves by consultation with their solicitors.
that the formal route is not required. In each case, confirmation should be obtained from the client of the address to which the schedule of dilapidations should be sent. (See also the requirement for reinstatement notices at 4.2.4.)

6.5 The schedule of dilapidations in discussions

6.5.1 In most instances, the schedule of dilapidations is discussed between the parties with a view to reaching a negotiated settlement. By adding additional columns to the schedule of dilapidations both parties can record their respective positions, thereby developing it into a Scott schedule. An example extract of a Scott schedule is attached at Appendix B.

6.5.2 During the course of dialogue, the tenant’s surveyor can generally state his position on the above basis by use of the columns entitled ‘tenant’s comments’ and ‘tenant’s costs’. Thereafter, the construction of any subsequent Scott schedules will be largely a matter of common sense, reflecting how the surveyors agree the dialogue should be recorded in the interests of narrowing the issues between them.

6.6 The Scott schedule in proceedings

6.6.1 If the dispute is not resolved and proceedings are commenced, the dilapidations claim is most likely to be based upon the schedule of dilapidations prepared by the claimant’s surveyor. The version of the schedule of dilapidations is likely to be the one following discussions with the defendant’s surveyor so that the most up-to-date position is put before the tribunal. This is likely to be in Scott schedule form so that the views of the defendant are also shown to the tribunal.

6.6.2 Surveyors should be aware of the wide scope of the courts’ powers on costs under the CPR. It is possible that the schedule of dilapidations originally served, or the original response, will be compared with that forming the basis of the dilapidations claim or defence and the finally determined liability. If the original schedule of dilapidations is found to be exaggerated, or the original response found to be understated, the offending party will be at risk of a punitive order on costs.
7 The Protocol

7.1 General

7.1.1 A surveyor dealing with a dilapidations claim should be aware of the CPR and at the end of the term should be aware of the Protocol. This applies only to a dilapidations claim at the end of the term.

7.1.2 The CPR in the civil courts of England and Wales encourage the parties to a dispute to exchange full information before proceedings are issued, to enable the parties to avoid litigation where possible and to support the efficient management of proceedings where litigation cannot be avoided. These objectives are addressed by way of pre-action protocols. The Protocol is one such protocol. Surveyors are to use the Protocol and direct their client’s attention to it.

7.2 The lease, other documents and enquiries

7.2.1 The surveyor should obtain and consider the lease and other relevant documents as discussed in section 4. In particular, the yield-up clause of the lease (see 4.2.5) should be considered.

7.2.2 For the reasons outlined in 8.3, the intentions of the landlord with regard to the premises at or shortly after the end of the term should be ascertained. It should be established, for example, whether the building is to be demolished or physically altered in any way and if so, in what manner.

7.2.3 For similar reasons, the property’s potential for redevelopment or refurbishment should be looked into. Enquiries should also be made of the local planning authority.

7.3 Inspection

It is recommended that the guidance in section 5 regarding inspections is followed. If the property is inspected before the end of the lease, it should be re-inspected at the end of the lease (see 7.4.3).

7.4 The schedule of dilapidations

7.4.1 The guidance in section 6 regarding schedules of dilapidations should be followed. The surveyor should consider, in particular, paragraph 6.2.1 as to separation of various breaches of covenant. An example of such a schedule of dilapidations is also included in this guidance note at Appendix A.

7.4.2 As a dilapidations claim after the end of the term is a claim for damages, costings are essential. It is particularly important, and helpful to everyone concerned, if the costings are summarised on a single sheet either at the beginning or the end of the schedule of dilapidations. Cross-references to sections of the schedule of dilapidations, if there is more than one section, are also useful.

7.4.3 Dialogue between the parties is essential, and the schedule of dilapidations should be structured so as to aid such dialogue.

7.4.4 Where a schedule of dilapidations has been served before the end of the term, surveyors should be mindful of the following:

- Which clauses of the lease are alleged to have been breached will depend on the time the schedule of dilapidations is served. Different covenants can apply during the term and at the end of the term. See paragraph 3.4 of the Protocol.

- The property should be re-surveyed at the end of the lease. The condition of the property set out in a schedule of dilapidations served before the end of the term might not be the same as the condition at the end of the term. See also paragraph 3.4 of the Protocol.

7.4.5 When drafting a schedule of dilapidations in anticipation of a dilapidations claim at the end of the term, the surveyor should have regard to the requirements in section 3 of the Protocol.

7.4.6 The requirements of the Protocol might helpfully be supplemented in some cases. For example, if there are adjustments to the cost of repair for the reasons discussed in 8.3.2 to 8.3.7 or for any other reason, then it will be helpful for those
adjustments to be shown on an item-by-item basis. They could be recorded, perhaps by adding further columns to the schedule of dilapidations, such that the whole nature of the dispute can be considered on an item-by-item basis by the parties and, should the matter go so far, at trial.

7.4.7 Though the surveyor who prepares the schedule of dilapidations might exclude items from the version that is served on the tenant, for the reasons discussed in 8.3.2 to 8.3.7, it is recommended that he makes and keeps a note of all breaches of the lease, as that information might be needed for an assessment of the diminution in the value of the landlord's reversion. That information may also be relevant to the question of costs.

7.4.8 Where relevant, the following consequential losses incurred might be added to the schedule of dilapidations:

- professional fees in connection with preparation of the schedule of dilapidations
- legal fees in connection with the service of the schedule of dilapidations
- administration of the work envisaged by the schedule of dilapidations; and
- VAT (see Appendix C).

However, the ability to claim these losses could be subject to specific lease requirements. (See also 7.6.4.)

7.4.9 Paragraph 4.6 of the Protocol requires that the legal basis for claimed consequential losses be set out.

7.5 Surveyor's endorsement

7.5.1 The schedule of dilapidations should be endorsed by the surveyor preparing it. The endorsement can be given either by the surveyor in his own name or by the surveyor signing in his own name stating he does so ‘for and on behalf of’ XX firm or company, if appropriate.

7.5.2 The requirement for the surveyor's written endorsement is found in paragraph 3.6 of the Protocol, which specifies that the endorsement should confirm that in the opinion of the surveyor:

- all the works set out in the schedule are reasonably required to remedy the breaches identified in [the schedule]
- 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.

7.5.3 Before giving the endorsement, the surveyor should consider the guidance set out in 1.1.5 and 1.1.6.

7.5.4 Where a schedule of dilapidations is prepared after the lease end date, the surveyor should ask the landlord to confirm what its intentions were for the property in writing before making the endorsement (see 4.5 and 7.2.2), and ensure that a written record of the reply is made and kept on file.

7.5.5 Where a schedule of dilapidations is prepared before the lease end date, the landlord's intentions, or anticipated intentions, on the lease end date may not be known. If, after enquiry, as described in paragraph 7.5.4, the landlord's intentions are not known, the surveyor will, of course, be unable to endorse the schedule of dilapidations to the full extent set out in paragraph 7.5.2.

Under these circumstances, the endorsement should confirm that, in the opinion of the surveyor, all the works set out in the schedule are reasonably required to remedy the breaches identified in the schedule and that the costs quoted, if any, for such works are reasonable.

Subsequent schedules of dilapidations, Scott schedules or Quantified Demands prepared after the end of the lease should be endorsed to the full extent set out in 7.5.2.

7.5.6 In giving an endorsement, the surveyor should make reference to any relevant information provided by the landlord or advice given by consultants such as valuers and quantity surveyors.

7.5.7 Before giving the endorsement, if there is a concern as to the landlord’s entitlement under the lease to pursue an item, whether in the body of the schedule of dilapidations or a consequential loss item, the surveyor should bring the matter to his client’s attention and, if necessary, recommend that advice is sought from the client’s solicitors.

7.6 Quantified Demand

7.6.1 The Quantified Demand is dealt with in section 4 of the Protocol. It is intended to be a document that enables the tenant to understand
the landlord’s position as fully as possible. The Quantified Demand is not intended to have the same status as a Statement of Case, which would be prepared by the landlord’s lawyer and served on or shortly after the issuing of proceedings. However, the Quantified Demand is more than simply a summary of the costs of the works and/or losses identified by the landlord.

7.6.2 The Quantified Demand is to be sent within the same timescale for sending the tenant the schedule of dilapidations (within 56 days of the determination of the lease). In practice, it will often be sent with the schedule or referred to (e.g. with the schedule annexed).

7.6.3 The Protocol does not prescribe who should prepare the Quantified Demand in any given case. In practice, it will usually be prepared by the surveyor who prepares the schedule of dilapidations and who gives the surveyor’s endorsement (see 7.4 and 7.5). The surveyor may require input from the landlord and/or the landlord’s other advisers (for example, the landlord’s lawyer, valuer or cost consultant). It is important that the surveyor understands the limits of his professional expertise and professional indemnity insurance when preparing the Quantified Demand.

7.6.4 The Protocol does not prescribe a specific format for the Quantified Demand but does set out guidance in section 4. The surveyor preparing the Quantified Demand should have regard to this guidance and to the following:

- The full amount of what the landlord is seeking in damages is to be set out clearly in the Quantified Demand.
- The principles of damages (see 8.2 and 8.3) should be read and understood by the surveyor before preparing the Quantified Demand.
- The Quantified Demand and the schedule of dilapidations should not include items of work that are likely to be superseded by work which the landlord intends to undertake to the property (see paragraph 4.5 of the Protocol). The Quantified Demand should include the total of the costings listed in the schedule of dilapidations (see 7.4.2 and 6.3).
- Any consequential losses claimed as damages and added to the schedule of dilapidations (see 7.4.8) are to be quantified. Additionally, and where relevant, the following may be incurred and might be included, quantified and sought as damages in the Quantified Demand, albeit the ability to claim these losses could be subject to specific lease requirements:
  - holding costs expected to be incurred before re-letting or sale, as the case may be
  - loss of rent until the end of any works and during any additional marketing period required as a consequence;
  - rates liability
  - insurance, security, energy and cleaning costs not already reflected in the schedule of dilapidations
  - loss due to lack of service charge recoupment
  - finance costs (including interest); and
  - other fees of the surveyors (including fees relating to assessment of rent and diminution in value).
- Each item in the Quantified Demand is to be fully quantified and substantiated with, where possible, an explanation of the basis for their inclusion (e.g. a reference to the schedule of dilapidations or a provision within the lease).
- Where the quantum of any part of the content is unknown as at the time of serving the Quantified Demand, it is a matter of judgment for the person preparing the document how to deal with this. One option may be to serve the Quantified Demand with this part of the quantum marked ‘to be advised’ with a note to say that this aspect will be quantified as soon as possible. However, this approach should be limited to where it is really necessary and where the relevant part cannot yet be properly quantified.
- Evidence supporting each item should be produced where relevant.

7.6.5 By way of assistance to surveyors, a suggested specimen format for a Quantified Demand is set out at Appendix D of this guidance note. This specimen is not intended to be ‘a one size fits all’ document and should be read and used in conjunction with section 4 of the Protocol and the above paragraphs. While it may be appropriate in simple cases, it may not be appropriate for other
cases. It is for the surveyor preparing a Quantified Demand to consider what is appropriate in any specific case. This specimen is not a substitute for reading and complying with the requirements of section 4 of the Protocol, which should be done in each case.

7.7 Service

There is generally a formal requirement in the lease for service of notices, e.g. to be served pursuant to s. 196 Law of Property Act 1925. In consequence, the landlord’s schedule of dilapidations and Quantified Demand might typically be served on the tenant by the landlord’s solicitors. In the absence of any such requirement, the landlord needs simply to convey the dilapidations schedule and Quantified Demand to the tenant by an effective route (see paragraph 6.4).

7.8 The response

7.8.1 The response is dealt with at section 5 of the Protocol. The Protocol contains recommended timing for the tenant’s response to the Quantified Demand (56 days), and the subsequent progress of negotiations.

7.8.2 The response should be endorsed by the surveyor preparing it. The endorsement can be given either by the surveyor in his own name or by the surveyor signing in his own name stating he does so ‘for and on behalf of’ XX firm or company, if appropriate.

7.8.3 The requirement for the surveyor’s written endorsement is found in paragraphs 5.4 and 5.5 of the Protocol, which specify that the endorsement should confirm that in the opinion of the surveyor:

- 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;
- any costs quoted in the response are reasonably payable for such works; and
- account has been taken of what the tenant or tenant’s surveyor reasonably believes to be the landlord’s intentions for the property.’

7.8.4 The Protocol states that if the surveyor considers that any items in the schedule of dilapidations or Quantified Demand are likely to be superseded then this should be stated in the response, and particulars should be given as to why this view is taken and the relevant items identified.

7.8.5 In preparing a response and giving the endorsement to the response, the tenant’s surveyor should consider the factors and take many of the steps the landlord’s surveyor should have considered and taken as discussed at 7.1–7.5 above. The standard of behaviour required of a surveyor is the same whether he acts for a landlord or tenant.

7.9 The Scott schedule

7.9.1 The landlord’s schedule of dilapidations and the tenant’s response are usually brought together for ease of reference in a Scott schedule.

7.9.2 The suggested structure of a Scott schedule is set out in Appendix B and discussed in 6.5 and 6.6. The Scott schedule is indispensable as an aid to dialogue between parties in dilapidations claims at the end of the term.

7.10 Dialogue/stocktake

7.10.1 Both the courts and RICS encourage dialogue between parties to a dispute. In order to achieve this, it is desirable that surveyors of like disciplines should meet during the course of the dispute, in order to clarify the nature of the dispute and, if possible, to settle aspects of it.

7.10.2 Because of the high costs involved, it should be the parties’ objective, as well as the courts’, that the matter be settled instead of tried, if at all possible.

7.10.3 As stressed at section 10 of the Protocol, where the dispute has not been resolved by dialogue, the surveyors should undertake, prior to the issue of proceedings, a further review of their respective positions and ideally attend a meeting to see if either proceedings can be avoided, or at least the issues narrowed between them.

7.11 Physical work versus damages

7.11.1 There might be advantages to both landlord and tenant in works being carried out by the tenant prior to the end of the term. From the landlord’s perspective, it could be able to market the premises more speedily. Equally, a tenant who
chooses to do the work during the term:

- will have control of the actual works and the timetable for those works
- will probably avoid the majority of consequential losses set out at paragraph 7.6.4 above; and
- might be able to recover VAT where the landlord cannot (see Appendix C).

7.11.2 After the lease has expired, the landlord has control and will be able to dictate the quality and scope of the works, as far as the expired lease allows, and the timetable. The landlord can then seek to recover his or her loss as damages.

7.12 Court proceedings

Most dilapidations claims at the end of the term do not result in proceedings being issued. Normally, the matter can be settled between the parties without that step being taken. Should matters go so far, however, once proceedings are issued, the surveyor will need to take his lead from the client’s solicitors.
8 Dilapidations claims at the end of the term

8.1 General

8.1.1 Probably the most common dilapidations situation is where:

- a lease has ended or is close to ending; and
- the property has been, or it is anticipated that it will be, left in a condition below covenanted condition.

8.1.2 If the lease has already ended, the only remedy a landlord has is a dilapidations claim for damages.

8.1.3 If the surveyor is instructed before the lease has ended, there can be alternative remedies available to the landlord. These alternatives are discussed in section 9 of this guidance note (Dilapidations claims during the term). Further, there might be time for the tenant to comply with the terms of the lease. The surveyor should consider these alternative possibilities, bearing in mind that damages will become the only remedy once the lease expires.

8.2 Principles of damages

8.2.1 The fundamental purpose of damages is to compensate an injured party for its loss; it is not to punish. That is the position, regardless of the nature of the breach(es). Accordingly, a landlord cannot recover more than his or her loss. How that loss is assessed is discussed below.

8.2.2 The common law position is that, where there has been a breach of the repair covenant, the normal measure of damages is the cost of the necessary repair works plus consequential loss. This is subject to an assessment of the landlord’s loss (see section 8.3).

8.2.3 Section 18(1) of the Landlord and Tenant Act 1927 (which only applies to repair covenants) has two parts or ‘limbs’. The ‘first limb’, which applies to both dilapidations claims at the end of the term and dilapidations claims during the term, provides that the damages recovered for breach of a repair covenant cannot exceed the diminution in the value of the landlord’s reversion. The ‘second limb’, which applies only to dilapidations claims at the end of the term, provides that no damages are recoverable if the property is to be demolished or structural alterations undertaken that would render valueless the repairs the tenant should have undertaken.

8.2.4 Where there have been breaches of covenants other than the repair covenant (e.g. reinstatement covenants), s. 18(1) does not apply and damages are assessed at common law again, with the fundamental purpose of assessing the landlord’s loss (see 8.3 below). Depending on the circumstances of the case, this is done generally by reference to:

- the cost of works
- the diminution in the value of the landlord’s reversion; or
- a combination of the two.

8.3 Assessment of loss

8.3.1 It is usual for the landlord’s loss at the termination date of the lease to be assessed by reference to the cost of works as set out in the schedule of dilapidations. Whether the unadjusted cost of works properly reflects that loss will depend on a number of factors, including:

- the landlord’s intentions for the property
- whether the landlord has carried out, or intends to carry out, the works
- whether the property has potential for redevelopment or refurbishment
- the market for the property; and
- what arrangements might be made with a new tenant.

The cost of works set out in the original schedule of dilapidations may only be a starting point from which adjustments need to be made. Those adjustments are known by various names, including ‘dilutive effects’ and ‘supersession’.

8.3.2 Where the landlord has carried out, or intends to carry out, all the works that the tenant failed to complete, the cost of works set out in the
The original schedule of dilapidations could represent the landlord’s loss and no adjustment might be required.

8.3.3 If, however, the landlord has not done and does not intend to do some or any of the works, the cost of works set out in the original schedule of dilapidations might not be a fair reflection of the landlord’s loss. The reason for the landlord not doing the works and his or her intentions for the property might need to be examined. The landlord’s intention might be to do works that would have rendered valueless some or all of the items that the tenant failed to carry out and so those items would need to be removed from the schedule of dilapidations before it forms part of the Quantified Demand. In an extreme case, if the landlord intends to demolish the property, few or no items will remain.

8.3.4 Where the property has potential for redevelopment or refurbishment, depending on the circumstances, items of work rendered valueless by this potential may need to be removed to arrive at a fair figure for the landlord’s loss.

8.3.5 Where there are several different ways of properly undertaking an item of work but the landlord undertakes or intends to undertake a method that is not the cheapest, there is a risk that the landlord will not be able to recover the full cost.

8.3.6 Where remedial work cannot be undertaken without some degree of betterment or improvement, the full cost will normally be recoverable by the landlord. However, where there are alternative methods, some of which involve betterment or improvement and some of which do not, it is likely that recovery will be limited to the cost of the methods that do not involve betterment.

8.3.7 In appropriate circumstances, the landlord’s loss may be assessed by reference to the diminution value of the reversion. This is usually calculated by:

- ascertaining the market value of the property in the state in which it should have been left by the tenant pursuant to the covenants of the lease; and
- deducting from that the market value of the property in the actual condition in which it was left.
9 Dilapidations claims during the term

9.1 General

9.1.1 The Protocol does not apply to dilapidations claims during the term. However, the CPR Practice Direction – Pre-Action-Conduct can apply.

9.1.2 The remedies available to a landlord pursuing a dilapidations claim during the term can include:

• damages
• forfeiture
• entry to carry out the work, followed by a claim for costs; and
• specific performance.

The remedies of damages, forfeiture and entry to carry out the work are considered in 9.2 to 9.4. The remedy of specific performance is beyond the scope of this guidance note. Legal advice should be taken in every case.

9.2 Damages

9.2.1 The Leasehold Property (Repairs) Act 1938 (the 1938 Act) will apply to a landlord’s dilapidations claim for damages during the term if the lease was granted for a term of seven years or more and three or more years of the term remain unexpired.

9.2.2 If the 1938 Act applies, the landlord must first serve a notice under section 146 of the Law of Property Act 1925 and then, if the tenant serves a counternotice within 28 days of service of the notice, must obtain the permission of the court before commencing proceedings.

9.2.3 As noted in 8.2.1 above, the purpose of damages is to compensate an injured party for its loss; it is not to punish.

9.2.4 With dilapidations claims for damages during the term, the common law position is that, whether there have been breaches of the repair covenant or other breaches of covenant, damages are usually assessed by reference to the diminution in the value of the landlord’s reversion.

9.2.5 Where the breach is of the repair covenant, the ‘first limb’ of section 18(1) of the Landlord and Tenant Act 1927 will also apply (see 8.2.5). However, given that the cap imposed by that section of the Act is the same as the normal measure of damages, it is likely to have little effect on the level of damages recovered.

9.3 Forfeiture

9.3.1 The remedy of forfeiture, if successfully pursued, results in the lease coming to an end. This is a complex area. Consequently, it is strongly recommended that legal advice should be obtained.

9.3.2 A landlord cannot forfeit a lease for a tenant’s non-compliance with its covenants unless:

• the lease contains a forfeiture clause
• the landlord has served a valid notice pursuant to section 146 of the Law of Property Act 1925 on the tenant
• a reasonable period of time has expired since service of the section 146 notice; and
• the tenant has not complied with the section 146 notice during that time.

9.3.3 If the lease was granted for a term of seven years or more, of which three years or more remain unexpired, the Leasehold Property (Repairs) Act 1938 will again apply. Under the 1938 Act, if the tenant serves a counternotice within the 28 days of service of the section 146 notice, the landlord cannot forfeit the lease without the permission of the court. Additional restrictions apply to the forfeiture of residential long leases.

9.3.4 The right to forfeit can be lost or waived by a landlord if it or its agents, after becoming aware of the relevant breach, take any step that unequivocally recognises the continuing existence of the lease, such as demanding or accepting rent. The issue of waiver might not be relevant to a continuing breach (such as of a repair covenant) but might be of importance where there has been a once-and-for-all breach, such as making alterations without the requisite consent.
9.4 Entry to undertake remedial works

9.4.1 Many leases contain a right for the landlord to enter the property without the consent of the tenant to undertake works the tenant should have carried out, that is, where the tenant is in default of their obligations. These are sometimes known as ‘Jervis v Harris’ clauses after a prominent legal case. These clauses are usually very specific about the circumstances under which landlords can operate the rights they contain, such as notice periods for landlord’s inspections, and what works are to be undertaken should breaches of covenant be found. Extreme caution is required when using these clauses. Incorrect application by a landlord can lead to counterclaims from the tenant for trespass and breach of quiet enjoyment. Consequently, it is strongly recommended that legal advice is obtained regarding their use.

9.4.2 Usually, the landlord is entitled to enter the property, subject to specific notice requirements, and to take a record or schedule of the breaches of covenant and then to serve notice of those breaches on the tenant. It is essential that only the breaches allowed for by the clause are scheduled and no others. If the clause only refers to breaches of repairing covenant, only items of repair can be included in the schedule. Incorporation of inappropriate breaches could invalidate later steps under the clause.

9.4.3 Once notice has been served on the tenant, there is usually a specific time period for the tenant to undertake the works. Again, this time period can vary, as can the obligation to complete or commence the works.

9.4.4 If, at the end of the designated time period, the tenant has not undertaken the works set out in the landlord’s notice, the landlord is entitled to enter the property and undertake the works themselves. The works are only those set out in the landlord’s notice in accordance with the terms of the lease.

9.4.5 Normally, the landlord’s costs are recoverable as a debt, not as damages, and the provisions of the Leashold Property (Repairs) Act 1938 and section 18(1) of the Landlord and Tenant Act 1927 will not apply. However, the clause may provide for the costs to be recoverable as ‘liquidated damages’ or have some similar wording, in which case it is possible that these statutory provisions will apply.

9.5 Instructions

On being instructed by a party in connection with a dilapidations claim during the term, the surveyor should also ascertain the remedy or remedies being contemplated or pursued by the landlord and the role the surveyor is to play in pursuing/defending against that remedy/those remedies (see 3 – Taking instructions).

9.6 The lease, other documents and enquiries

9.6.1 Refer also to section 9.4 (The lease and other enquiries). Where the landlord is pursuing forfeiture as a remedy, particular note should be made of the forfeiture clause and the circumstances in which forfeiture is permitted.

9.6.2 Where the landlord is pursuing a remedy under a Jervis v Harris clause, the terms of the clause should be considered carefully for the reasons set out in 9.4.

9.6.3 Any issues of interpretation should be referred to the client’s solicitors.

9.7 Inspection

9.7.1 Surveyors instructed by landlords pursuing forfeiture are reminded in particular of the warning given in 5.1 about waiver of forfeiture rights.

9.7.2 If the landlord is pursuing a remedy under a Jervis v Harris clause, the surveyor should follow precisely the procedural steps and timings set out in the lease concerning inspections.

9.8 Schedule of dilapidations

9.8.1 Where the schedule of dilapidations is to be attached to a section 146 notice, where damages and/or forfeiture are being pursued, it should set out the breach. The remedial work can also be set out although, under section 146, it is not strictly necessary to do so.

9.8.2 Where the schedule of dilapidations is produced pursuant to a Jervis v Harris clause, it is similarly likely to be a requirement that breaches be specified rather than the remedy. Regardless of the manner in which the clause is drafted, though, its requirements should be closely followed.
9.8.3 Only if damages are being pursued is it likely to be appropriate for the schedule of dilapidations to be costed and, even then, the costs of works might bear little resemblance to the loss that the landlord has suffered, particularly if the lease has some time to run.

9.9 Service

It is very likely that, where forfeiture or an entry to repair remedy is being pursued and/or the 1938 Act applies, formal notice provisions will apply. Service should therefore be undertaken by the client’s solicitors.

9.10 Response

In preparing a response, the tenant’s surveyor should consider the factors, and take many of the steps that the landlord’s surveyor should have considered, and taken, as discussed in 9.5–9.9 above.

9.11 Undertaking the work

The tenant might consider undertaking the work to minimise the dilapidations claim against it or to avoid losing the lease altogether. The surveyor should review the discussion at 7.11, which sets out some of the relevant considerations, and should advise his client on the possible advantages and disadvantages of undertaking the work.

9.12 Subsequent steps

The subsequent course of the dispute depends on the remedy being pursued by the landlord. If the landlord is pursuing a dilapidations claim for damages during the term, the parties’ surveyors might be able to negotiate a settlement without the further need for the involvement of solicitors, other than, possibly, to document any settlement reached. By contrast, if forfeiture or the use of a Jervis v Harris clause is being pursued, the tenant’s reaction to the threatened use of the remedy could require legal advice, as could the manner in which the remedy is to be implemented.

9.13 Court proceedings

Most dilapidations claims do not result in proceedings being issued. Normally, the matter can be settled between the parties without that step being taken. Should matters go so far, however, once proceedings are issued the surveyor will need to take his or her lead from the client’s solicitors.
10 Break clauses

10.1 General

10.1.1 Many leases contain clauses giving either landlord or tenant the right to determine the lease before the end of the contractual term. These are also known as options to determine or, more commonly, break clauses.

10.1.2 It is strongly recommended that legal advice be obtained when dealing with a break clause.

10.1.3 Any conditions relating to the exercise of a break should be complied with for the break clause to operate. It is for the party operating the break clause to ensure it has complied with the relevant conditions.

10.1.4 Conditions often found in leases include the following:

- **Service of a notice** by a stated date before the break. Time is of the essence when complying with any requirement under a break clause. Failure to serve the notice properly, or in time, will usually result in the break being lost. Calculating the date by which any notice must be served can be difficult. Some clauses specify a precise date by which the notice must be served; others give a minimum period of notice before the break date such as ‘not less than six months’. It is therefore essential that careful consideration should be given to service of any necessary notice and this should invariably be undertaken by the tenant’s solicitor.

- **Payment of a premium.** This condition could vary in application and could specify either a fixed amount or the method of calculating the amount, such as ‘six months’ rent’.

- **Providing vacant possession.** This condition would apply to a tenant operated break. What is required by this condition will depend on the precise wording of the clause and facts of the case. Typically, though, it will require a total cessation of use and occupation of the property by the tenant, that the property is clear of all people and that the tenant’s chattels have been removed. Careful consideration should be given to precisely what has to be done (and specifically what items have to be removed), in any case. Legal advice should be sought in cases of uncertainty.

- **Compliance with lease obligations.** This condition (which would apply to a tenant operated break) can vary, so careful reading is required. For example, if full compliance is required there can be no subsisting breaches on the option date. If compliance is qualified in any way, or compliance only with specific covenants is required, while the scope/standard might not be so onerous, it is nevertheless recommended that the highest standards are applied when undertaking works.

10.1.5 If one or more of the conditions attached to a break are not satisfied, the lease will continue past the break date, unless the parties agree otherwise.

10.1.6 For the surveyor advising on the physical condition of the property, providing vacant possession and compliance with lease obligations are the more relevant considerations. These should be considered in conjunction with the solicitors advising on the legal matters. It is recommended that advice be sought if there is any uncertainty over the obligations or conditions.

10.2 Instruction, lease, enquiries and inspection

10.2.1 It is strongly recommended that a surveyor, on being instructed in connection with a break clause, immediately obtains and reads the lease to make themself aware of any relevant time limits and conditions. Many negligence actions have arisen from professional advisers failing to spot such time limits or conditions through not reviewing the lease at an early stage. Extreme care should be taken to ensure that the interplay between the legal position, the landlord’s objectives and the physical state of the building is handled correctly; legal advice should be sought on every occasion.
10.2.2 The objectives of the client with regard to the break and the property should be ascertained, as should the objectives of the other party, insofar as the client is aware of them.

10.2.3 The further steps that are taken by the surveyor will very much depend on the objectives of the client and the client’s preferred strategy for dealing with the break. It may or may not be in the client’s best interest for the surveyor to inspect the property, to make enquiries of his counterpart at an early stage, or to produce a schedule. No steps of this nature should be taken without legal advice.

10.3 Schedule of dilapidations

If the surveyor is instructed by a landlord to produce a schedule of dilapidations in connection with a break clause, the surveyor should consider the guidance given in section 6 of this document (The schedule of dilapidations). Whether the break is conditional upon the works being completed or not, if the landlord is simply seeking to make the tenant aware of the works he or she considers need to be completed before the break takes effect, it is likely that the schedule will not need to be costed. If, however, the landlord is seeking to agree a financial settlement with the tenant, then it should probably be costed and include any relevant consequential losses. Much of the guidance in section 8 (Dilapidations claims at the end of the term) could also be of relevance. If, however, the surveyor is instructed by the tenant and if the break is conditional upon the works being completed prior to the termination date, they should be wary of entering into negotiations regarding a financial settlement with the landlord and should concentrate upon compliance with the break.

10.4 Service

Any timing and other stipulations for the service of a break notice stated in the lease are of the essence of the contract and should generally be dealt with by the lawyer acting for the relevant party. Once the formal notice of the break has been served, the surveyor acting for the landlord may be instructed to prepare a schedule of dilapidations (see 10.3 and 6.2). As to service of the schedule, see 6.4. The surveyor should also carefully consider with the client’s solicitor how to serve any schedule of dilapidations on the tenant.

10.5 Response

The response by a tenant to the receipt, or non-receipt, of a schedule of dilapidations will depend on the tenant’s objectives and preferred strategy for dealing with the break. The guidance stated at 10.1–10.4 should also be considered by the surveyor instructed by a tenant.

10.6 Dialogue and court proceedings

The nature and extent of any dialogue will depend on the parties’ objectives and strategies. The surveyor is reminded that the courts and RICS encourage parties to be open and reasonable in the manner in which they conduct themselves in disputes and that, where parties fail to be open or they conduct themselves in an unreasonable manner and matters proceed to court, they could suffer cost sanctions.
11 Dilapidations claims against landlords

11.1 General

11.1.1 A lease can contain a landlord’s covenant to repair the property and/or other parts of the building (e.g. the common parts), or such an obligation might be implied by statute or common law.

11.1.2 Generally, a tenant cannot enforce a landlord’s covenant/obligation to repair within the property unless the tenant has first given the landlord notice of the breach. In respect of repairs outside the property (e.g. within the common parts of the building), generally no notice is required.

11.1.3 Any notice required should be in writing. The landlord does not need to be given exact details of the disrepair, or of the remedial works required, so long as the contents are sufficient to put the landlord on notice that works are required.

11.1.4 In addition to carrying out works of repair for which he or she is liable, the landlord will generally be obliged to make good any consequential damage to the property caused by such works of repair.

11.2 Remedies

11.2.1 General

11.2.1.1 The remedies available to a tenant for breach by the landlord of their repairing obligation include:

- damages
- self-help; and
- set-off.

11.2.1.2 There could be other remedies available (e.g. specific performance) but these are beyond the scope of this guidance note.

11.2.2 Damages

11.2.2.1 While an award of damages is one of a number of possible remedies available during the term, it is the only remedy available at the end of the term.

11.2.2.2 Section 18(1) of the Landlord and Tenant Act 1927 does not apply to a tenant’s dilapidations claim for damages.

11.2.2.3 The amount of damages to which a tenant is entitled is that, which so far as money can, will put the tenant in the position in which he would have been had there been no breach by the landlord.

11.2.2.4 Where there has been a breach of the landlord’s repair covenant, the tenant may choose to:

- remain in the property
- temporarily vacate; or
- sell their interest in the property or sublet.

11.2.2.5 The appropriate heads of damages (i.e. the items referred to at 11.2.2.6) will vary depending on which of these actions the tenant takes.

11.2.2.6 A tenant who remains in the property might claim for:

- inconvenience and discomfort, which might be assessed by reference to the rental value of the premises
- ill health
- damage to personal belongings
- damage to the property; and/or
- loss of profits.

11.2.2.7 A tenant who vacates might claim for

- cost of alternative accommodation
- cost of moving
- redecoration and cleaning costs; and/or
- loss of profits.

11.2.2.8 A tenant who sells or sublets might claim for any reduction in price/rent achieved due to the breach.

11.2.3 Self-help

Where the breach relates to part of the property, the tenant can carry out the required works themself and seek to recover the cost from the landlord. Where it relates to disrepairs outside the property, for example, within the common parts of the building, in the absence of an express right, the tenant should be cautious about undertaking the work themself. There could be no implied right of entry, and the tenant could be committing a trespass.
11.2.4 Set-off

11.2.4.1 Set-off is deduction from rent and other sums payable to the landlord under the lease. The tenant might wish to recover the damages they have suffered by way of set-off, along with any sum the tenant has reasonably spent remedying the breach through self-help.

11.2.4.2 The right of set-off can, however, be expressly excluded by the terms of the lease.

11.3 Instructions, documentation and inspection

11.3.1 On being instructed by a party to a dilapidations claim by a tenant against a landlord, the surveyor should make many of the same enquiries and take most of the steps that would have been made and taken in a dilapidations claim by a landlord against a tenant, as set out in sections 3 to 5 of this guidance note.

11.3.2 The Protocol does not apply to dilapidations claims by tenants against landlords. However, the CPR Practice Direction – Pre-Action-Conduct can apply (see 2.1.3).

11.3.3 The scope of the landlord’s repairing covenant could be contained in the service charge provisions, and/or alongside the landlord’s other covenants, or be implied. The covenant/implied obligation should be fully understood, as should any provisions restricting the remedy or remedies available to the tenant.

11.3.4 The surveyor should ascertain what action the tenant has taken following the breach, in terms of remaining in occupation, vacating, selling its interest or subletting.

11.3.5 The surveyor should seek to understand the remedy or remedies being sought or pursued by the tenant.

11.4 Schedule of dilapidations

11.4.1 If the landlord’s breach is a simple one (e.g. failure to maintain the communal air-conditioning plant in a multi-let office block), a schedule of dilapidations might not be required.

If, however, there are numerous items of breach, then the tenant’s dilapidations claim will be better set out in a schedule of dilapidations form.

11.4.2 The schedule of dilapidations used for a dilapidations claim by a tenant against a landlord is likely to be similar to that required for a dilapidations claim by a landlord against a tenant. Whether such a schedule of dilapidations should be costed will depend on the remedy or remedies being sought. One prepared where the tenant is proposing self-help probably does not need, initially, to be costed. One prepared in connection with a damages or set-off claim might need to be, depending on the heads of damage.

11.5 Service

The tenant’s dilapidations claim will usually be served on the landlord by the tenant’s solicitors but there is generally no formal requirement in the lease for service in that manner.

11.6 Response

In preparing a response, the landlord’s surveyor should consider the factors and take many of the steps the tenant’s surveyor should have considered and taken, as discussed at 11.3 and 11.4.

11.7 Undertaking the work

The landlord ought to consider undertaking the work to minimise the dilapidations claim against them. The surveyor should review the discussion at 11.2, which sets out some of the relevant considerations, and should advise his client on the possible advantages and disadvantages of this route.

11.8 Subsequent steps

The subsequent course of the dispute depends on the remedy being pursued by the tenant. If the tenant is pursuing a damages and/or set-off claim, it may be that the parties’ surveyors can negotiate a settlement without the further need for the involvement of solicitors other than, possibly, to document any settlement reached. In contrast, if self-help is being pursued, the landlord’s reaction to the threatened use of the remedy could require legal advice, as could the manner in which the remedy is to be implemented.
11.9 Court proceedings

Most dilapidations claims by tenants against landlords do not result in proceedings being issued. Normally, the matter can be settled between the parties without that step being taken. Should matters go so far, however, once proceedings are issued, the surveyor will need to take his lead from the client’s solicitors.
12 Alternative dispute resolution

12.1 The majority of dilapidations claims are resolved between the parties. However, where disputes cannot be resolved by agreement, it could be necessary to have recourse to litigation.

12.2 Pursuant to the CPR, the court, not the parties, will actively manage the case listed for hearing. In so doing, the court will usually encourage the parties to use an alternative dispute resolution (ADR) procedure that might offer distinct advantages over litigation, such as speed, privacy, informality and cost.

12.3 ADR is described in the glossary to the CPR as the ‘collective description of methods of resolving disputes otherwise than through the normal trial process’. The most widely used is mediation. Independent expert determination, arbitration and early neutral evaluation are also forms of ADR.

12.4 Unlike arbitration, where the award issued by the arbitrator is based on the evidence adduced by the parties or obtained by enquiry, an independent expert determination is, as the name suggests, a determination by an expert in the field. The expert will base that decision on his own knowledge and experience, and is not obliged to receive, or even consider, any evidence adduced by the parties, unless the lease so requires or the parties agree.

12.5 The independent expert’s decision, known as a determination, is final and binding, and there is no right of appeal. However, the independent expert can be held liable in damages for any provable loss sustained by a party through the expert’s negligence.

12.6 There are several factors that make mediation different from most other forms of dispute resolution:

- No decision can be imposed upon the parties by the mediator; nor will the mediator express any personal view on the dispute unless the parties so request.
- During mediation the parties are able to freely discuss the strengths and weaknesses of their case and those of the other side with the mediator, without prejudicing their position should a settlement not be reached.
- The mediator will encourage and help the parties to generate and consider their options, and develop these into viable courses of action.

12.7 Further information on ADR can be obtained through the RICS Dispute Resolution Service, which also maintains a register of accredited mediators and a panel of independent experts who are experienced in the field of dilapidations.
13 Settlements

13.1 Most dilapidations claims do not end up in court. They are normally settled by negotiation. Those negotiations will often be undertaken by the surveyor who acted as adviser and prepared or responded to the original schedule of dilapidations or diminution valuation. In reaching a settlement, the surveyor should consider the dilapidations claim as a whole, including time and costs in pursuing the claim. He should bear in mind that the total costs to both parties in relation to a dilapidations claim taken through to trial will often exceed the value of the claim itself. It is therefore important that the surveyor provides objective advice on the merits of a proposed settlement.

13.2 If a dilapidations claim is determined by a court, an arbitrator, or an independent expert, the successful party will have a court order, award or determination, which can be enforced by a court. If court proceedings are settled out of court, the terms of the settlement will usually be recorded at the court, by way of a court order, and hence the proceedings are disposed of. Again, the successful party has a court order, which can be enforced.

13.3 If a dilapidations claim is settled between the parties, and most are, either by agreement or by use of a mediator, without court proceedings being issued, the parties will need to record the terms of the agreement precisely in order that, if necessary, the agreement can be enforced by commencement of court proceedings for breach of the agreement.

13.4 A settlement agreement should:

- be in writing, identifying:
  - the parties (i.e. the landlord and the tenant)
  - the relevant lease
  - the schedule of dilapidations and Quantified Demand to which the settlement applies
- be open, i.e. not marked ‘without prejudice’
- be stated to be in full and final settlement of the dilapidations claim
- deal with each and every part of the dilapidations claim, including, where appropriate, any interest and costs
- state the date by which:
  - if appropriate, any payment pursuant to the agreement is to be paid; and/or
  - if appropriate, works are to be conducted, inspected and signed off (including, if appropriate, a procedure for agreement and signing off of any ‘snagging items’)
- be dated; and
- be signed by each party, or signed for and on behalf of each party by a duly appointed surveyor, lawyer or agent authorised to bind the party for whom they sign.
### Appendix A  Example format of a schedule of dilapidations

<table>
<thead>
<tr>
<th>Item no.</th>
<th>Clause no.</th>
<th>Breach complained of</th>
<th>Remedial works required</th>
<th>Cost</th>
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### Summary

- Cost of works (inclusive of contractor’s preliminaries, overheads and profit)
- Administration of work envisaged by schedule of dilapidations
- Professional fees for preparation of schedule of dilapidations
- Legal fees for service of schedule of dilapidations
- Sub-total
- VAT 20% (at rate prevailing on date of alleged loss)
- TOTAL
## Appendix B: Example extract of a Scott schedule

<table>
<thead>
<tr>
<th>Item no.</th>
<th>Clause no.</th>
<th>Breach complained of</th>
<th>Remedial works required</th>
<th>Tenant's comments</th>
<th>Landlord's comments</th>
<th>Landlord's costs</th>
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### Appendix B: Example extract of a Scott schedule

This Appendix B provides an example extract of a Scott schedule, which is a document used in real estate transactions to list and describe the necessary repairs or improvements to a property. The schedule is typically used when a property is being sold or leased, and it helps to ensure that both the landlord and the tenant are aware of the property condition and the required work.

The Scott schedule includes columns for the following information:
- **Item no.** identifies each individual item or repair required.
- **Clause no.** refers to the specific section of the lease or agreement that pertains to the item.
- **Breach complained of** describes the nature of the breach or violation.
- **Remedial works required** outlines the specific repairs or improvements needed.
- **Tenant's comments** allows the tenant to provide feedback or suggestions.
- **Landlord's comments** provides the landlord's response or additional information.
- **Landlord's costs** and **Tenant's costs** indicate the financial responsibilities of each party.
- **Remedial costs** might be used to specify the costs for the remedial works.
- **Tenant's costs** and **Landlord's costs** might include additional financial details
- **Compliance with statute** indicates whether the repairs or improvements comply with any applicable laws or regulations.

The table format is designed to clearly and systematically list and organize the required repairs or improvements, ensuring that both parties are aware of their responsibilities and the necessary work to be done.
Appendix C: Value Added Tax

C.1 The question of whether a landlord can properly claim VAT as part of its damages claim often arises.

C.2 A sum equivalent to the VAT a landlord has incurred on costs (or is likely to incur) is recoverable as damages where the landlord does, or intends to do, work the tenant failed to do, and incurs, or will incur, VAT on the cost of those works but is unable to reclaim that VAT as input tax from HMRC.

C.3 Generally, the services required by a landlord from contractors and professional advisers to deal with dilapidations will be standard rated ‘supplies’. So those contractors and advisers will (unless they are very small businesses) have to add VAT to the charge for their services. A VAT charge will, therefore, be incurred by the landlord.

C.4 Whether that VAT incurred can then be recovered by the landlord from HM Revenue & Customs (HMRC) as input VAT depends on its own tax position and the nature of the property. The precise details of the circumstances in which a landlord will be able to recover VAT incurred on its costs is beyond the scope of this note. However, what can be said is that, if the landlord is unable to recover (in part or whole) the VAT incurred, then an amount equivalent to the irrecoverable VAT incurred can properly be added to the damages claim. Conversely, if a landlord can fully recover the VAT incurred as input tax from HMRC then it will not have suffered a loss as a consequence of VAT incurred. In this latter situation, the landlord cannot properly reclaim an equivalent amount as damages from the tenant.

C.5 It is for the landlord to demonstrate that it cannot recover the VAT incurred for whatever reason.

C.6 A further question that often arises is whether a tenant can require the landlord to provide a VAT invoice in respect of the dilapidations payment it makes to the landlord.

C.7 HMRC has given clear guidance (see Notice 742 Land and Property, paragraph 10.10) that a bona fide dilapidations claim represents a claim for damages by the landlord against the tenant and that the payment involved is not the consideration for any ‘supply’ for VAT purposes and so is outside the scope of VAT. Thus, a VAT invoice for dilapidations must not be raised by the landlord. As a consequence, the tenant, even if VAT registered, cannot recover from HMRC any ‘embedded’ VAT element of the damages payment to the landlord equal to the landlord’s irrecoverable VAT.

C.8 In view of this, if the landlord cannot recover VAT incurred, there could be a financial advantage to a VAT registered tenant in undertaking dilapidations works before the end of the term. The tenant might then be able to recover the VAT that their contractors and professional advisers charge, as overhead VAT incurred on the tenants business. By doing the works themselves, the tenant would avoid liability for any proportion of damages equivalent to the landlord’s irrecoverable VAT.
Appendix D: Example of a Quantified Demand

QUANTIFIED DEMAND FOR [ ] PROPERTY

The landlord:

Recoverability of VAT:

The tenant:

Premises:

Lease:

Summary of facts:

Schedule of dilapidations:

Summary of monetary sums:  
As per schedule of dilapidations £
Loss of rent £
Loss of service charge £
Void rates £
Loss of insurance rent £
Other sums as appropriate £
VAT (if appropriate) £
TOTAL £

Supporting documents:  
For example:
– Schedule of dilapidations
– Copy lease, licences for alterations, etc.
– Copy invoices or contractors’ estimates
– Copy reinstatement notices (if appropriate)
– Copy section 18/loss valuation (if appropriate)

Further explanation:  
(if appropriate)

Meetings:  
The landlord confirms that they and/or their professional advisers will attend a meeting/meetings as proposed under section 7 of the Protocol

Response:  
The tenant and/or their professional advisers should respond to this Quantified Demand within a reasonable time being no more than 56 days from the date of this Quantified Demand

Signed:  
........................................................................................................
For/on behalf of [the Landlord]

Date:  
........................................................................................................

Only to be used in conjunction with reading the Pre-action Protocol on Terminal Dilapidations (and particularly section 4) and paragraphs 7.6.1 to 7.6.5 of the guidance note and obtaining separate legal advice where appropriate.
Appendix E: Extracts from legislation

The following extracts from legislation are reproduced in this appendix:

- **Law of Property Act 1925**: section 146
- **Landlord and Tenant Act 1927**: section 18
- **Leasehold Property (Repairs) Act 1938**: sections 1–8
- **Landlord and Tenant Act 1954**: section 51.

The extracts are as amended by subsequent legislation as noted on the UK Statute Law database. Amendments are in square brackets.

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An online database of revised UK primary legislation can be found at [www.statutelaw.gov.uk](http://www.statutelaw.gov.uk), the UK Statute Law Database (SLD). The database is the official revised edition of UK primary legislation online. It contains primary legislation that was in force at 1 February 1991 and primary and secondary legislation that has been produced since that date. Note that there may be amendments which have not yet been applied. See the status statement at the top of each piece of legislation.

UK legislation passed after 1988 is published in its original form by the Office of Public Sector Information at [www.opsi.gov.uk](http://www.opsi.gov.uk) and UK legislation prior to 1988 may be purchased through the Stationery Office Limited on [www.tso.co.uk](http://www.tso.co.uk).

**Law of Property Act 1925**

Part V: Leases and tenancies

146 Restrictions on and relief against forfeiture of leases and underleases

(1) A right of re-entry or forfeiture under any provision or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice:

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(c) in any case, requiring the lessee to make compensation in money for the breach; and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

(2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor’s action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.

(3) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved, under the provisions of this Act.

(4) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, or for non-payment of rent, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor’s action (if any) or in any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property...
comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case may think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.

(5) For the purposes of this section:
(a) “Lease” includes an original or derivative under-lease; also an agreement for a lease where the lessee has become entitled to have his lease granted; also a grant at a fee farm rent, or securing a rent by condition;
(b) “Lessee” includes an original or derivative under-lessee, and the persons deriving title under a lessee; also a grantee under any such grant as aforesaid and the persons deriving title under him;
(c) “Lessor” includes an original or derivative under-lessor, and the persons deriving title under a lessor; also a person making such grant as aforesaid and the persons deriving title under him;
(d) “Under-lease” includes an agreement for an under-lease where the under-lessee has become entitled to have his under-lease granted;
(e) “Under-lessee” includes any person deriving title under an under-lessee.

(6) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(7) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(8) This section does not extend:
(i) To a covenant or condition against assigning, underletting, parting with the possession, or disposing of the land leased where the breach occurred before the commencement of this Act; or
(ii) In the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof.

(9) This section does not apply to a condition for forfeiture on the bankruptcy of the lessee or on taking in execution of the lessee’s interest if contained in a lease of:
(a) Agricultural or pastoral land;
(b) Mines or minerals;
(c) A house used or intended to be used as a public-house or beershop;
(d) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures;
(e) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.

(10) Where a condition of forfeiture on the bankruptcy of the lessee or on taking in execution of the lessee’s interest is contained in any lease, other than a lease of any of the classes mentioned in the last sub-section, then:
(a) if the lessee’s interest is sold within one year from the bankruptcy or taking in execution, this section applies to the forfeiture condition aforesaid;
(b) if the lessee’s interest is not sold before the expiration of that year, this section only applies to the forfeiture condition aforesaid during the first year from the date of the bankruptcy or taking in execution.

(11) This section does not, save as otherwise mentioned, affect the law relating to re-entry.
or forfeiture or relief in case of non-payment of rent.

(12) This section has effect notwithstanding any stipulation to the contrary. (13) [The county court has jurisdiction under this section.]

Landlord and Tenant Act 1927
Part II: General amendments of the law of landlord and tenant
18 Provisions as to covenants to repair
(1) Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid; and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.

(2) A right of re-entry or forfeiture for a breach of any such covenant or agreement as aforesaid shall not be enforceable, by action or otherwise, unless the lessor proves that the fact that such a notice as is required by section one hundred and forty-six of the Law of Property Act, 1925, had been served on the lessee was known either:
(a) to the lessee; or
(b) to an under-lessee holding under an under-lease which reserved a nominal reversion only to the lessee; or
(c) to the person who last paid the rent due under the lease either on his own behalf or as agent for the lessee or under-lessee;
and that a time reasonably sufficient to enable the repairs to be executed had elapsed since the time when the fact of the service of the notice came to the knowledge of any such person.

Where a notice has been sent by registered post addressed to a person at his last known place of abode in the United Kingdom, then, for the purposes of this subsection, that person shall be deemed, unless the contrary is proved, to have had knowledge of the fact that the notice had been served as from the time at which the letter would have been delivered in the ordinary course of post.

This subsection shall be construed as one with section one hundred and forty-six of the Law of Property Act, 1925.

(3) This section applies whether the lease was created before or after the commencement of this Act.

Leasehold Property (Repairs) Act 1938
1 Restriction on enforcement of repairing covenants in long leases of small houses
(1) Where a lessor serves on a lessee under subsection (1) of section one hundred and forty-six of the Law of Property Act, 1925, a notice that relates to a breach of a covenant or agreement to keep or put in repair during the currency of the lease [all or any of the property comprised in the lease], and at the date of the service of the notice [three] years or more of the term of the lease remain unexpired, the lessee may within twenty-eight days from that date serve on the lessor a counter-notice to the effect that he claims the benefit of this Act.

(2) A right to damages for a breach of such a covenant as aforesaid shall not be enforceable by action commenced at any time at which [three] years or more of the term of the lease remain unexpired unless the lessor has served on the lessee not less than one month before the commencement of the action such a notice as is specified in subsection (1) of section one hundred and forty-six of the Law of Property Act, 1925, and where a notice is served under this subsection, the lessee may, within twenty-eight days from the date of the service thereof, serve on the lessor a counter-notice to the effect that he claims the benefit of this Act.
(3) Where a counter-notice is served by a lessee under this section, then, notwithstanding anything in any enactment or rule of law, no proceedings, by action or otherwise, shall be taken by the lessor for the enforcement of any right of re-entry or forfeiture under any proviso or stipulation in the lease for breach of the covenant or agreement in question, or for damages for breach thereof, otherwise than with the leave of the court.

(4) A notice served under subsection (1) of section one hundred and forty-six of the Law of Property Act, 1925, in the circumstances specified in subsection (1) of this section, and a notice served under subsection (2) of this section shall not be valid unless it contains a statement, in characters not less conspicuous than those used in any other part of the notice, to the effect that the lessee is entitled under this Act to serve on the lessor a counter-notice claiming the benefit of this Act, and a statement in the like characters specifying the time within which, and the manner in which, under this Act a counter-notice may be served and specifying the name and address for service of the lessor.

(5) Leave for the purposes of this section shall not be given unless the lessor proves:

(a) that the immediate remediying of the breach in question is requisite for preventing substantial diminution in the value of his reversion, or that the value thereof has been substantially diminished by the breach;

(b) that the immediate remediying of the breach is required for giving effect in relation to the [premises] to the purposes of any enactment, or of any byelaw or other provision having effect under an enactment, [or for giving effect to any order of a court or requirement of any authority under any enactment or any such byelaw or other provision as aforesaid];

(c) in a case in which the lessee is not in occupation of the whole of the [premises as respects which the covenant or agreement is proposed to be enforced], that the immediate remediying of the breach is required in the interests of the occupier of [those premises] or of part thereof;

(d) that the breach can be immediately remedied at an expense that is relatively small in comparison with the much greater expense that would probably be occasioned by postponement of the necessary work; or

(e) special circumstances which in the opinion of the court, render it just and equitable that leave should be given.

(6) The court may, in granting or in refusing leave for the purposes of this section, impose such terms and conditions on the lessor or on the lessee as it may think fit.

2 Restriction on right to recover expenses of survey, etc.

A lessor on whom a counter-notice is served under the preceding section shall not be entitled to the benefit of subsection (3) of section one hundred and forty-six of the Law of Property Act, 1925, (which relates to costs and expenses incurred by a lessor in reference to breaches of covenant), so far as regards any costs or expenses incurred in reference to the breach in question, unless he makes an application for leave for the purposes of the preceding section, and on such an application the court shall have power to direct whether and to what extent the lessor is to be entitled to the benefit thereof.

3 Saving for obligation to repair on taking possession

This Act shall not apply to a breach of a covenant or agreement in so far as it imposes on the lessee an obligation to put [premises] in repair that is to be performed upon the lessee taking possession of the premises or within a reasonable time thereafter.

4 [Repealed]

5 Application to past breaches

This Act applies to leases created, and to breaches occurring, before or after the commencement of this Act.

6 Court having jurisdiction under this Act

(1) In this Act the expression “the court” means the county court, except in a case in which any proceedings by action for which leave may be given would have to be taken in a
court other than the county court, and means in the said excepted case that other court.

(2) [Repealed]

7 Application of certain provisions of 15 and 16 Geo. 5 c. 20

(1) In this Act the expressions “lessor”, “lessee” and “lease” have the meanings assigned to them respectively by sections one hundred and forty-six and one hundred and fifty-four of the Law of Property Act, 1925, except that they do not include any reference to such a grant as is mentioned in the said section one hundred and forty-six, or to the person making, or to the grantee under such a grant, or to persons deriving title under such a person; and “lease” means a lease for a term of [seven years or more, not being a lease of an agricultural holding within the meaning of the Agricultural Holdings Act 1986] [which is a lease in relation to which that Act applies and not being a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995].

(2) The provisions of section one hundred and ninety-six of the said Act (which relate to the service of notices) shall extend to notices and counter-notices required or authorised by this Act.

8 Short title and extent

(1) This Act may be cited as the Leasehold Property (Repairs) Act, 1938. (2) This Act shall not extend to Scotland or to Northern Ireland.

Landlord and Tenant Act 1954

Part IV: Miscellaneous and supplementary

51 Extension of Leasehold Property (Repairs) Act 1938

(1) The Leasehold Property (Repairs) Act 1938 (which restricts the enforcement of repairing covenants in long leases of small houses) shall extend to every tenancy (whether of a house or of other property, and without regard to rateable value) where the following conditions are fulfilled, that is to say:

(a) that the tenancy was granted for a term of years certain of not less than seven years;

(b) that three years or more of the term remain unexpired at the date of the service of the notice of dilapidations or, as the case may be, at the date of commencement of the action for damages; and

(c) [that the tenancy is neither a tenancy of an agricultural holding in relation to which the Agricultural Holdings Act 1986 applies nor a farm business tenancy].

(2) …

(3) The said Act of 1938 shall apply where there is an interest belonging to Her Majesty in right of the Crown or to a Government department, or held on behalf of Her Majesty for the purposes of a Government department, in like manner as if that interest were an interest not so belonging or held.

(4) Subsection (2) of section twenty-three of the Landlord and Tenant Act 1927 (which authorises a tenant to serve documents on the person to whom he has been paying rent) shall apply in relation to any counter-notice to be served under the said Act of 1938.

(5) This section shall apply to tenancies granted, and to breaches occurring, before or after the commencement of this Act, except that it shall not apply where the notice of dilapidations was served, or the action for damages begun, before the commencement of this Act.

(6) In this section the expression “notice of dilapidations” means a notice under subsection (1) of section one hundred and forty-six of the Law of Property Act 1925.
The purpose of this guidance note is to provide practical guidance to RICS members when instructed in connection with dilapidations matters in England and Wales. This is particularly relevant to practitioners in view of the recent adoption of a formal pre-action protocol under the Civil Procedure Rules (CPR).

The situations in which surveyors can be asked to act or advise, and which are covered by this guidance note, are as follows:

- dilapidations claims at the end of the term
- dilapidations claims during the term
- forfeiture situations
- entry to repair situations
- break clause situations, and
- dilapidations claims by tenants against landlords.