

# Determination gets you through

23 September 2016

## Christopher Sullivan discusses alternative ways of resolving dilapidations disputes

---

Most dilapidations claims fortunately never reach the courtroom, but when matters do escalate, the best outcome for both parties is a quick resolution at minimum cost. However, traditional litigation is a slow process and certainly not a cheap one; indeed, it is not unknown for the costs to outweigh the value of the claim.

Litigation might feel like the natural way forward when a dilapidations dispute escalates. Very often, though, the issues at the heart of such disputes are highly technical, making them ideally suited to alternative dispute resolution (ADR).

The Civil Procedure Rules, which regulate all proceedings in the civil courts, actively encourage parties to try to resolve their disputes without recourse to litigation. They must also consider the use of ADR before embarking on major legal proceedings.

Both the [Dilapidations Protocol](#) and the RICS [Dilapidations guidance note](#) likewise encourage the use of ADR. Recent judgments have also seen heavy costs penalties imposed for a failure by parties to give reasonable consideration to using ADR.

*Cheaper, faster and more flexible than traditional litigation, the benefits of expert determination are clear; but your clients may not be aware of the RICS dispute resolution route*

RICS is very much committed to promoting ADR. Indeed, for many years, the [RICS' Dilapidations Dispute Resolution Scheme \(DRS\)](#) has been able to appoint both arbitrators and experts on dilapidations disputes. Due to market demand, it went a step further last year by training and accrediting a panel of experts especially for the scheme. These are building surveyors who have at least 10 years' relevant specialist experience after qualification; all have completed a demanding, RICS-accredited training course and have been successful at a selection interview.

## Independent experts

An independent expert is appointed by the parties to provide a neutral assessment of the claim and intervention is usually set to commence at a fixed time after lease expiry. Following instruction, the expert will first provide a non-binding assessment of the contractual claim and the parties will then have a set period, typically 15 days, to consider this, during which time they may attempt to settle the matter between themselves. Should

an agreement not be reached within this time, the expert will produce a final, binding determination.

The expert's decision can be delivered in as little as 3 months. It will combine the results of their investigation with an assessment of any evidence and representations submitted by the parties, the opinion of other specialists such as mechanics, engineers and cladding consultants appointed by the independent expert, plus, ultimately, the application of their personal expertise.

The process also involves the production of an impartial and binding assessment of the diminution in value of the landlord's reversionary interest, capping the claim in accordance with the provisions of section 18 of the [Landlord and Tenant Act 1927](#) .

## **Determination clause**

The inclusion of an independent expert determination clause in relation to rent review lease procedures has been around for decades, and now there is considerable interest in similar lease provision as regards dilapidations disputes. Recognising this, the RICS working party on dilapidations ADR is developing a standard lease clause that will be soon be available for download from the DRS website.

Such a clause is welcomed, particularly as there are a number of factors that may well prompt an increase in the number of disputed dilapidations claims in the coming years.

- Shorter leases: the average lease term is just over 5 years, and shorter turnarounds mean more claims.
- Upward property cycle: landlords will progressively look to improve their buildings to make them more marketable ? but who pays for this?
- CFCs in air conditioning: the market is demanding new, non-CFC systems, even where the originals still work effectively. Again, who pays?
- Minimum energy efficiency standards: whose liability is the upgrading of inefficient buildings?

## **Advice**

Cheaper, faster and more flexible than traditional litigation, the benefits of expert determination are clear; but your clients may not be aware of the RICS dispute resolution route.

All surveyors involved in dilapidations disputes are strongly encouraged to embrace the scheme, particularly where the dispute appears fractious from the beginning and may seem to be on the way to the courtroom.

**Christopher Sullivan is a partner at [Malcolm Hollis](#) , chair of [RICS Dilapidations ADR working party](#) and a member of the [Dilapidations Forum Steering Group](#)**

## **Further information**

Related competencies include: [Conflict avoidance, management and dispute resolution procedures](#)

This feature was taken from the RICS *Building surveying journal* (July/August 2016)