


Prettys

Dilapidations and ADR

Notes

Jon Miller

Prettys
Number One
Legg Street
Chelmsford
Essex CM1 1JS
Telephone 01245 295295
Facsimile 01245 295299
Mobile 07860 315403
Email jmiller@prettys.co.uk

Profile

Jon Miller left school at 16 and became an apprentice with Matthew Hall Mechanical and Electrical Engineers Limited. At 19, Jon left Matthew Hall to re-enter full time education, obtaining an LLB Hons in 1986 and a Masters Degree in Construction Law and Arbitration in 1996.

Jon qualified as a solicitor in 1989 with Pinsent Masons later joining Fenwick Elliott LLP. Jon joined Prettys in October 2008.

Jon is a Fellow of the Chartered Institute of Arbitrators, an Associate of the Chartered Management Institute, an Academy of Experts and TeCSA Accredited and practicing Mediator, a companion of CiBSE and a RIBA, TeCSA AICA and CIC Adjudicator. Jon lobbied the House of Lords on behalf of the construction industry during the passing of the Housing Grants and Regeneration Act 1996.

Jon sits on the Board of Constructing Excellence in Essex and CiBSE North East Home Counties Branch.

Introduction

1. Most commercial leases contain full repairing covenants, which require the tenant to keep the property in a good state of repair and to hand back the property in the same condition at the end of the lease. Dilapidations are items that need to be repaired to comply with a repairing covenant. This lecture will consider;
 - 1.1. Relevant provisions in Leases obliging tenants to keep premises in repair and in decoration
 - 1.2. Remedies for failing to comply with a repairing covenant
 - 1.3. Tenant's remedy under s.147 Law of Property Act 1925
 - 1.4. Moving out at the end of the term
 - 1.5. Guidance from the Code of Practice on Commercial Leases
 - 1.6. Bringing a claim
 - 1.7. Guidance under the Pre Action Protocol for Dilapidations claims
 - 1.8. Alternative Dispute Resolution to resolve the dispute between landlord and tenant
 - 1.9. Court proceedings
 - 1.10. The role of an expert in court proceedings
 - 1.11. What role's surveyors can undertake at all of these stages.

2. Dilapidations arise when tenants fail to comply with the repair covenants contained in their lease which causes the property to diminish in value which the landlord then claims for by way of damages. The majority of leases of commercial property will be “*FRF*” leases - a Full Repairing and Insuring lease. This is a lease where the costs of all repairs and insurance are borne by the tenant notwithstanding that:
 - 2.1. The landlord will almost invariably pay for the insurance itself; and
 - 2.2. In the case of a multi-let building, the landlord will carry out the repairs to the common parts.

The insurance costs would be recovered by an annual rent and the costs of repairs to common parts would be recovered through a service charge.

This ensures that landlords are protected to ensure they have as good an investment as possible by passing on as many costs as possible to the tenant. Provisions in leases are discussed in more detail below.

Schedule of Dilapidations

3. At the end of a lease, landlords (almost) always serve a ‘schedule of dilapidations’ on the tenant. This is a list of all the outstanding repair, maintenance and decoration items which the landlord’s surveyor has identified which need addressing. The schedule must indicate:
 - 3.1. Which terms of the lease have been breached
 - 3.2. What must, in the opinion of the landlord or its surveyor, be done to put the property into the physical state required by the lease

- 3.3. An estimate of how much the necessary work will cost, or invoices if the work has already been carried out.

An example of a schedule of dilapidations is attached in the accompanying materials.

Types of Dilapidations

4. Dilapidations can be either:
 - 4.1. Ongoing – arise during the term of the lease. These are less common, but can arise if the tenancy is nearing an end or there is a review of the rent payable coming up. The landlord can serve an “interim schedule” on the tenant when there is more than three years remaining of the lease. There must be a clause requiring the tenant to keep the property in repair throughout the life of the tenancy, as opposed to just having to put the property in repair at the end of the tenancy.
 - 4.2. Terminal – arise at the end of the lease and the most common. A terminal schedule may be served on a tenant where there is less than three years remaining on the lease. A terminal schedule may also be served up to **six years** after expiry of the lease. Most are served within a few months of the lease expiring.

Relevant Provisions an a Typical Lease

5. Typically a lease will place obligations on a tenant to repair, decorate and yield up a premises. Further there will normally be a right for the landlord to enter the premises at any time (usually upon reasonable notice) to inspect the premises and identify whether the tenant is in breach of any of their obligations under the lease. Landlord’s inspections are usually carried out to inspect the state of repair of the premises and if the tenant is found to be in breach of their obligations, the landlord can serve a notice under s.146 of the Law of Property Act 1925 warning the tenant that unless he complies with the repairing covenant, the landlord will exercise his right of re-entry.

6. An example of a repair covenant to keep the premises in repair found in a lease appears below:

“The Tenant shall keep the Property clean and tidy and in good repair [and condition].

The Tenant shall not be liable to repair the Property to the extent that any disrepair has been caused by an Insured Risk, unless and to the extent that:

(a) the policy of insurance of the Property has been vitiated or any insurance proceeds withheld in consequence of any act or omission of the Tenant, any undertenant or their respective workers, contractors or agents etc”

7. If a dilapidations claim arises, both parties will first be required to look to the lease to identify their obligations. In theory a tenant under no obligation to repair or decorate will have a good defence. In practice this (almost) never happens.

Repairing/ Renewing

8. Typically tenants are required to covenant to keep premises in a good state of repair. The specific wording of each covenant determines the obligation.
9. A covenant to *keep the property in repair* includes an obligation to put the property into repair if it is in a poor state of (aka “disrepair”) at the start of the lease. This places a positive obligation on the tenant to act and carry out repairs. The tenant cannot argue that he has left the property in the same state as it was at the beginning of the term.
10. In *Proudfoot v Hart* (1890) 25 QBD 42 it was held that an obligation to keep the premises in good ‘tenantable’ repair meant that the tenant should ensure that the property is delivered up in a good state of repair at the end of the tenancy, regardless of whether it was in that state from the onset of the lease. On the facts, the property needed repapering,

repainting and whitewashing to be considered in a satisfactory state of repair in order for the property to be let again, despite the fact that these tasks needed doing at the commencement of the tenancy.

11. Similarly, the obligation to *keep the property in good condition* can require works to be carried out even if there is no disrepair. In *Welsh v Greenwich LBC* [2000] 49 EG 118 it was established that the reference to '*good condition*' in the repairing obligation marked a separate and unrestricted addition to the concept of 'repair'. On the facts, it was held that damage caused to goods, not the structure, of the building in question was enough to have breached the obligation to keep the building in good condition.
12. *Repair* does not require rebuilding of the whole. In *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716 three houses were built in 1825 and let to the lessee. The term ended in 1919. The successor in title brought an action for breach of the repairing covenant. It was held that by the time the houses were delivered up, the next likely tenants would be short-term rather than long term tenants envisaged when the covenant was created in 1825. The measure of damages adopted in relation to the repair obligation was the cost of repairs necessary to put the premises into the condition in which a reasonable owner would keep them, having regard to their age, locality, continued maintenance and probable tenants ie repairs had to reflect the fact that the houses were almost 100 years old.
13. *Repair* can also include remedying, and removing the cause of, an inherent defect if there is disrepair if such steps are properly needed. If an inherent defect has not yet resulted in disrepair of the property, the landlord cannot require it to be remedied under the repairing covenant. In *Postel Properties v Boots the Chemist* [1996] 41 EG 164 the defendant was a tenant in a shopping centre which needed roof repairs earlier than forecast. The defendant argued that the shopping centre could not recover the cost of repairing the roof because this was a premature repair that was not covered by the service charge of the lease. The court held that it was reasonable for the landlord to carry out the repairs when it did and that the repairs did not amount to giving the landlord something different from

that which existed before and therefore, the costs were recoverable to the extent that they were necessary.

The latent defect had manifested itself – the roof was showing signs of being defective.

14. A covenant by the tenant to “*renew*” the property will extend to a rebuilding of the whole if that is necessary to achieve repair (*Lurcott v Wakely*). However, such a covenant may be perceived as onerous and therefore disadvantageous to the landlord at rent review. In *Norwich Union v British Railways Board* [1987] 2 EGLR 137) the High Court upheld an arbitrator's downward adjustment of 27.5% at rent review due to the more onerous repair obligations placed on the tenant when judged against comparable properties. Essentially a tenant who has to rebuild a property will pay less in rent.
15. The repairing covenant could be drafted to provide that the property is kept in ‘*tenantable repair*’ rather than ‘*full repair*’. There is no comprehensive definition of ‘*tenantable*’ but it is largely considered to be much less onerous than ‘*full repair*’. See *Proudfoot v Hart* (1890) 25 QBD 42 below.
16. The covenant could also be drafted to exclude liability for ‘latent defect’. This refers to pre existing faults that result in later damage. But note how the court viewed a covenant of this nature in *Postel Properties v Boots the Chemist* [1996] 41 EG 164, below.
17. Finally the covenant could include the phrase ‘*wind and water tight*’ which literally means as long as its wind and water tight, it is compliant, regardless of the state of the property. These drafting points will be largely be pursued by the tenant or the tenant’s representatives, as they are ‘tenant friendly’ covenants.
18. The tenant's response to a repairing covenant in a draft lease will depend on the age and nature of the building, the extent of the demise, whether there are any collateral warranties available to the tenant, what is revealed by its survey of the property, the length of the lease and the tenant's own circumstances. In some cases, the tenant may

want to exclude liability for latent defects, both for removing their cause and carrying out repairs arising from them.

19. In the current market, some tenants are trying to flex their financial muscle and refuse to take on onerous obligations – many larger landlords refuse to amend their “standard” leases.

Decoration

20. Many leases will contain a tenant's covenant to redecorate the interior and, where relevant, the exterior, of the property at stated intervals and again in the last year of the term. These intervals may be linked to rent review dates (on the basis that a recently decorated property will be easier to let to the hypothetical tenant and there will be an assumption that the (actual) tenant has complied with its covenants).

21. An example of a decorative covenant:

“The Tenant shall decorate the outside and the inside of the Property as often as is reasonably necessary and also in the last three months before the end of the term.

All decoration shall be carried out in a good and proper manner using good quality materials that are appropriate to the Property and the Permitted Use and shall include all appropriate preparatory work.

All decoration carried out in the last three months of the term shall also be carried out to the satisfaction of the Landlord and using materials, designs and colours approved by the Landlord.

[The Tenant shall replace the floor coverings at the Property within the three months before the end of the term with new ones of good quality and appropriate to the Property and the Permitted Use.]”

22. Note that these redecoration requirements are not dependent on there being any 'disrepair' – in other words, the obligation to redecorate exists, even if the premises are in an excellent 'condition'. This point leads to there being two types of obligations to decorate. The first type of obligation will come within the scope of a repairing covenant. The second type of covenant is simply to redecorate at the time specified in the lease (irrespective of disrepair).
23. In practice, a lease may well contain both types of covenants. The importance of the distinction is that the latter type of covenant (with specified decorating obligations – irrespective of disrepair) is not linked to a repairing obligation, and so is outside the cap on damages imposed by section 18 of the Landlord and Tenant Act 1927 (which says that the amount of damages awarded for a tenant's breach of a repairing covenant cannot exceed the amount by which it reduces the value of Landlord's reversion).

Tenant's Remedy – Decorating Covenants

24. Section 147 of the Law of Property Act can relieve a tenant of performance of a decorating covenant if the landlord's requirement is unreasonable. S.147 provides that a tenant may apply to the court for relief from liability to comply with a decorative covenant if the landlord has served a notice on the tenant requiring him to comply with that covenant. The court shall have regard to all the circumstances of the cases, including the length of the lease and the remaining term under the lease. The court may, if satisfied that the notice is unreasonable, order wholly or partially that the tenant be released from liability to decorate.

S.147 Relief against notice to effect decorative repairs

(1) After a notice is served on a lessee relating to the internal decorative repairs to a house or other building, he may apply to the court for relief, and if, having regard to all the circumstances of the case (including in particular the length of the lessee's term or interest remaining unexpired), the court is satisfied that the notice is unreasonable, it may, by order, wholly or partially relieve the lessee from liability for such repairs.

(2) This section does not apply:—

(i) where the liability arises under an express covenant or agreement to put the property in a decorative state of repair and the covenant or agreement has never been performed;

- (ii) to any matter necessary or proper—
 - (a) for putting or keeping the property in a sanitary condition, or*
 - (b) for the maintenance or preservation of the structure;**
- (iii) to any statutory liability to keep a house in all respects reasonably fit for human habitation;*
- (iv) to any covenant or stipulation to yield up the house or other building in a specified state of repair at the end of the term.*

- 25. However, if the notice relates to:
 - 25.1. repairs required under an express covenant or agreement to put the property in a decorative state of repair and the covenant or agreement has never been performed;
 - 25.2. or if it relates to any matter necessary or proper to put or keep the property in a sanitary condition;
 - 25.3. or for the maintenance or preservation of the structure;
 - 25.4. or to any statutory liability to keep a house fit for habitation;
 - 25.5. or to any covenant to yield up the house or other building in a specified state of repair at the end of the term;
 - 25.6. the court has no power under the above provision to grant relief to the tenant (subsection 2)
- 26. Such covenants are therefore normally drafted in a more general way: that the tenant is to redecorate as often as is reasonably necessary, in a good and proper manner and appropriate to the particular property and the permitted use.
- 27. A covenant to redecorate in the last three or six months of the term can be viewed differently. Obviously the landlord will have an interest in the state of decorative repair in which the property is returned to it. Section 147 as explained above does **not** apply to

yield-up covenants and so the tenant will **not** be able to seek relief under it at the end of the term. However, s.18 of Landlord and Tenant Act 1927 which limits the amount of damages a landlord can claim (discussed later) does apply to yield up covenants.

Insurance

28. It is worth noting that a tenant is not liable to repair where the damage has been caused by an 'insured risk', unless:
 - 28.1. the tenant has vitiated the insurance policy; or
 - 28.2. the landlord is not obliged to insure in relation to the damage (because it has resulted from an uninsurable risk).
29. Insured risks are defined in the lease and usually include damage caused by flood, storms and earthquakes. If damage is caused to the property because of an insured risk, it is not the tenant's responsibility to repair.

Yielding Up

30. When a lease comes to an end, the landlord wants to get its property back from the tenant in the physical condition that it should be in if the tenant has complied with its covenants, without any cost to the landlord.
31. A term is implied into leases that the tenant will deliver up the demised premises to the landlord at the end of the term (*Henderson v Squire* (1869) LR 4 QB 170). The implied obligation extends to any property that has become part of the premises. The implied term is however limited because it does not prevent a tenant from removing tenant's fixtures before the end of the term, thereby causing damage that needs to be made good. The implied obligation means that the tenant must:

- 31.1. Vacate the demised premises; and
- 31.2. Procure that any of the tenant's subtenants vacate the demised premises;
- 32. In practice, however, it is usual to include an express yielding up covenant in a lease. This has two advantages:
 - 32.1. The express term makes it clear on the face of the lease what is expected of the tenant, rather than relying on implied terms.
 - 32.2. The express term also allows the implied term to be extended.
- 33. Express yield up clauses often provide the landlord with the following additional remedies:
 - 33.1. The right for the landlord to require the tenant to remove fixtures, alterations and to make good the property;
 - 33.2. The right for the landlord to claim money in addition to the cost of putting the property into the proper state of repair, to reflect loss of potential rental income;
 - 33.3. The right for the landlord to dispose of any goods belonging to the tenant that the tenant has left at the property after the end of the term;

The Code of Practice on Commercial Leases

- 34. The code is published by the British Property Federation and contains recommendations for landlords and tenants when they negotiate new leases of business premises and where they deal with each other during the term of the lease, the code consists of 23 recommendations which an industry-wide working party, including landlord and tenant representatives, consider best practice when negotiating a business tenancy.

35. The Code recommends that the tenant's repairing obligations should be 'appropriate to the length of the term and the condition and age of the property at the start of the lease' (Recommendation 7).
36. Once it has been established that the tenant has committed a breach of a repairing or decorative covenant in the lease, the landlord can initiate a claim for that breach against the tenant. There are numerous ways of resolving the dispute, the landlord could bring court proceedings against the tenant or the dispute could be resolved without resorting to court. These alternative ways are described as ADR – alternative dispute resolution and will be considered later on, the pre action protocol for dilapidations offers guidance on the conduct of the parties before a claim is commenced.

The Consequences of Failing to Comply with a Repair Covenant

37. Under the Landlord and Tenant Act 1954 Part II commercial tenants benefit from:
 - 37.1. Security of tenure (ie they cannot just be thrown out at the end of the lease).
 - 37.2. Regulation of business lease termination.

The termination of tenancies is closely linked to claims for terminal dilapidations claimed at the end of the lease term.

38. When the contractual term of the tenancy expires, the tenancy will automatically continue under section 24 of the Act until it is terminated in accordance with the Act. The act also allows business tenants to apply to the court for a new tenancy; the landlord may only oppose the granting of a new tenancy on certain grounds prescribed by the Act. If a commercial tenant fails to keep the property in good repair they may lose their automatic right to continue their tenancy upon the expiration of the lease as the landlord can oppose this continuity based on the tenant's failure to comply with a repair covenant.

The Initial Schedule of Conditions

39. Not surprisingly the state which the property was in when it was originally let can prove to be crucial. This is where surveyors prove to be particularly useful.
40. The landlord will tend to instruct a surveyor to provide a schedule of repair or schedule of conditions which can be agreed by the landlord and tenant's surveyor on the time of the lease. This can include photographs. Even if the schedule of conditions is not agreed, a commercially astute tenant can get a surveyor to prepare a survey of the state of the property immediately before it is let which can prove to be useful evidence when the landlord insists on a repair.

Remedies

41. A Landlord can include in his dilapidations claims items such as:
 - 41.1. Repairs – the cost of repairing the demised property to its original condition at the commencement of the lease;
 - 41.2. Decorations – most leases contain a clause requiring the property to be decorated internally every five years and externally every three years;
 - 41.3. Reinstatement – many leases contain clauses requiring the tenant to reinstate the property to its original layout;
 - 41.4. Professional fees – these may include legal and expert fees for negotiating the dilapidations claim;
 - 41.5. Loss of Rent – if claimed this will be at the market rate for the period to remedy the dilapidations;

41.6. Loss of Service charge where applicable; and

41.7. VAT – on the cost of the works where not recoverable by the landlord.

Damages

Landlord and Tenant Act 1927 - Section 18

42. S.18 provides that damages recoverable for a breach of a repair covenant in a lease shall not exceed the amount (if any) by which the value in the reversion is diminished owing to that breach. If there is no drop in value of the reversion, there can be no claim for damages. It further provides that no damages shall be recovered, whatever state of disrepair the premises are in, if the premises are to be pulled down at the termination of the lease or shortly after, or if such structural alterations are to be made that would render any repairs valueless covered by the covenant.

S.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.”

Leasehold Property Repairs Act 1938

43. The Act applies where the lease was granted for a term of seven years or more and has at least three years left to run. Where this is the case, the act sets out a special procedure, which the landlord must follow before he is able to sue for damages in relation to dilapidations. Under the act the landlord must serve a notice under section 146 of the LPA 1925, containing a statement informing the tenant of his right to serve a counter notice within 28 days claiming the benefit of the act. If the tenant serves a counter notice the landlord may not continue with proceedings against the tenant without permission of the court. The court has discretion in deciding whether to grant permission, leave is not usually granted unless the landlord can show:
- 43.1. that the value of the reversion has been substantially diminished;
 - 43.2. that the immediate remedying of the breach is required for preventing sustained diminution or for complying with any act, bye law or for protecting the interest of other occupiers;
 - 43.3. that there are special circumstances which render it just and equitable that leave be given.

Forfeiture

Law of Property Act 1925 Section 146

- 43.4. S.146 provides that where a right of re-entry of forfeiture is considered as a remedy for breach of any covenant or condition under the lease, it must not be exercised until the landlord has served a notice on the tenant. The notice should detail the nature of the breach, if applicable the remedy it requires the tenant to undertake and the amount of compensation for the breach the landlord is claiming.

S.146 Restrictions on and relief against forfeiture of leases and underleases

A right of re-entry or forfeiture under any proviso 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—

specifying the particular breach complained of; and

if the breach is capable of remedy, requiring the lessee to remedy the breach; &

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.

Bringing a Claim

44. A landlord's claim can be inflated and could include items that are not in disrepair and so the tenant will want to defend all or part of the claim. The tenant will initially approach the landlord to discuss the claim and it is important that the tenant's surveyor ascertains the landlord's intentions for the building at the end of the term. If the landlord intends to change the use of or even demolish the premises, and alterations or disrepair may be irrelevant due to s.18 (1) of the Landlord and Tenant act 1927, discussed below, and therefore will not need to be repaired.
45. The tenant's surveyor should ask the landlord on what basis the cost of the claim is made. The landlord may have obtained a formal valuation or submitted invoices showing actual expenditure if he has already had the work carried out.

Pre Action Protocol

46. There has been a change in the Court's attitude over the last 15 years whereby the Courts encourage the parties to try to settle the disputes between themselves rather than simply issuing a summons or a writ. Recent reviews of the justice system have expressed concern at the legal or other costs which were incurred by litigants and how little was being recovered. Essentially a new code came about whereby the Court Rules were completely redrafted – this is known as the “*Civil Procedure Rules*” (aka “CPR”). One of

the consequences of the Courts encouraging the parties to settle and talk is the growth of the Alternative Dispute Resolution (“ADR”). Another consequence is the use of Pre-Action Protocols. This encourages the parties to exchange information, hold meetings, consider whether ADR can be used long before they actually issue proceedings in Court.

47. The Property Litigation Association sets out best practice Pre Action Procedure (“Protocol”) to be followed for claims for damages for dilapidation against the tenant at the end of the tenancy.
48. The Protocol does not seek to define terms relating to dilapidations claims however, it does provide the following guidance:
 - 48.1. *“Dilapidations might be said to be a claim for all breaches of covenant or obligation relating to the physical state of a demised property at the termination of the tenancy and usually includes items of repair, redecoration and reinstatement.”*
 - 48.2. *“Repair might be said to be a reference to a state of disrepair in a property where there is a legal liability to remedy or undertake, work to rectify it.”*
 - 48.3. *“Reinstatement might be said to be a reference to returning a property to its former state prior to carrying out works of alteration, where there is a legal liability to remedy or undertake, that work.”*
 - 48.4. *“Redecoration might be said to be a reference to a state of general finish or appearance of the property as required by the lease where there is a legal liability to remedy or undertake, that work.”*

The reason behind the Protocol not defining such terms is because the work required will depend on the individual contractual terms of the lease and any other relevant supporting documentation.

49. The objectives of the Protocol are threefold:
- 49.1. *“to encourage the exchange of early and full information about the prospective legal claim”*
 - 49.2. *“to enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings”*
 - 49.3. *“to support the efficient management of proceedings where litigation cannot be avoided”*
50. The Protocol requires the landlord to serve a schedule in the form provided by the Protocol, on the tenant setting out the following:
- 50.1. the breaches of the tenant’s covenants and obligations which have not been remedied on termination of the tenancy;
 - 50.2. state what is necessary to put the property into a physical state required by the terms of the lease in the opinion of the landlord or its surveyor;
 - 50.3. the landlord’s costings either based on estimates, or invoices for work done.
51. The Protocol requires the schedule to be served on the tenant within a reasonable time. Under the Protocol a reasonable time is considered to be 56 days from the termination of the tenancy.
52. At paragraph 4 of the Protocol it sets out the details and procedure, which must be followed when making a claim for dilapidations. The following details should generally be included in the claim:
- 52.1. the landlord’s full name and address

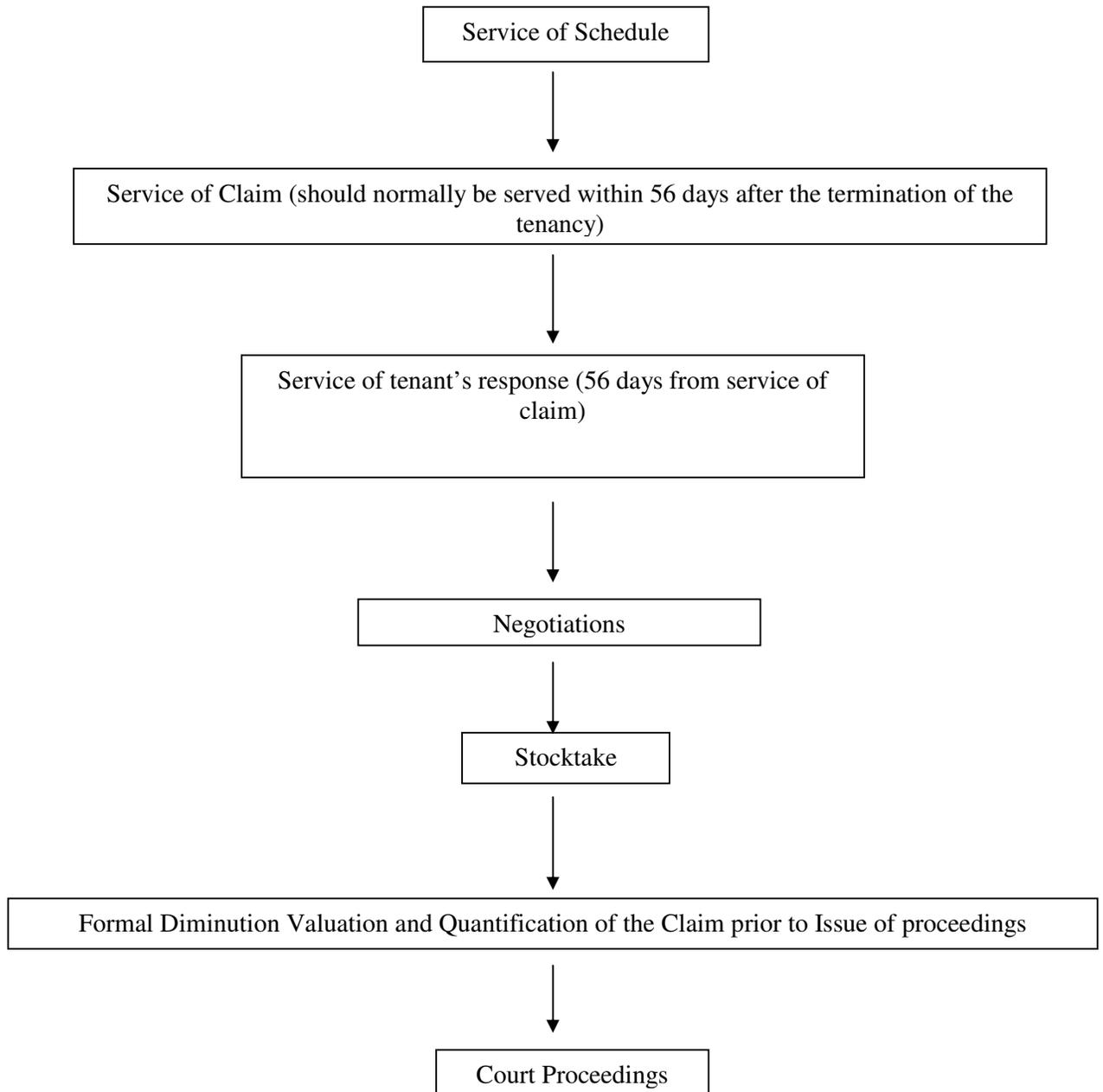
- 52.2. the tenant's full name and address
- 52.3. a clear summary of the facts on which the claim is based
- 52.4. the schedule referred to earlier
- 52.5. a clear summary of the monetary sums the landlord is claiming as damages in respect of the breaches
- 52.6. any documents relied upon or required by the Protocol
- 52.7. confirmation that the landlord or its professional advisers will attend a without prejudice meeting in accordance with section 7 of the Protocol with the view to negotiate and settle the claim
53. The tenant must respond to the claim within a reasonable time. Again 56 days is taken by the Protocol as a reasonable time to respond.
54. The tenant's response should take account of what works in the opinion of the tenant's surveyor are reasonably required for the tenant to comply with its covenants and obligations under the lease.
55. The Protocol encourages the parties to consider whether some form of alternative dispute resolution is suitable.
56. At paragraph 9 of the Protocol it suggests that where pre action settlement discussions in accordance with the Protocol have failed the parties may wish to under take a "stocktake" of the issues in dispute, and evidence the court is likely to need to decide those issues, before proceedings are commenced.

57. The Protocol provides guidance relating to when a Formal Diminution Valuation and Quantification of the Claim is required prior to issuing proceedings. It provides that any technical evidence given by experts must comply with Part 35 of the Civil Procedure Rules. This is where it is particularly relevant for your profession. A more detailed examination of the expert's role in a dilapidations claim will be considered later.

58. A Formal Diminution Valuation is a valuation showing the diminution in value to the landlord's reversion due to the fact that the tenant has breached a repair covenant. The landlord must quantify its loss by providing to the tenant a detailed breakdown of the issues and losses based on this valuation. The landlord can also illustrate his loss by proving actual expenditure he has incurred in order to rectify the damage.

59. If the landlord carries out the work it considers necessary to remedy the breach, a Formal Diminution Valuation is likely to be unnecessary as the claim can be based on the actual expenditure.

60. The Protocol provides a ‘flowchart’ of the steps that should be followed leading up to the last resort of issuing proceedings:



NB the provisions of this Protocol should be adopted in respect of each of the stages detailed in this flowchart.

61. If the parties cannot reach an agreement after complying with the Protocol, then the final step will be for the dispute to be referred to court.

ALTERNATIVE DISPUTE RESOLUTION

62. Paragraph 8 of the Protocol requires parties to consider whether some form of ADR would be more suitable than litigation.

Discussion and Negotiation

63. The parties in dispute attempt to amicably resolve their differences between themselves without enlisting the aid of any third party

64. It seems contrite that a Court based Protocol encourages the parties to discuss their differences when presumably they will have done so long before instructing lawyers. However, I find that the parties to a dispute often make the same mistakes when negotiating:

- 64.1. Often they have little or no realistic expectations of what they can get. In England, “positional negotiating” dominates. Essentially a party will ask for (say) double the amount which it was prepared to settle at, on the basis that the offer would inevitably be reduced by 50% in negotiation.

- 64.2. Without advice from a surveyor as to what dilapidations are really worth, a Landlord can pursue a case on the basis that he will receive far more than can be expected. Often cases settle “at the doors of the court” and having spent a considerable amount on legal and surveying fees, a protagonist finds that on the eve of a trial commencing in court that he is likely to recover far less than he originally anticipated.

Good advisers, lawyers and surveyors alike, should provide a “reality check”.

- 64.3. One of the most common mistakes is that one of the representatives at the negotiation table lacks authority. There is little point in dealing with someone who does not have the requisite authority and who is worried about what his boss may think if he accepts a deal on the table. In all negotiations it is imperative to get the decision maker there.
- 64.4. The need to get the decision maker present is also important when bearing in mind that many people have second thoughts. When being trained how to negotiate, I was always told that, once an agreement is reached, it should be set out in writing and signed immediately. The agreement does not have to be drafted by a lawyer and I have seen agreements handwritten on pieces of paper signed in the early hours of the morning.

This is because if the parties agree in principle but wait for the agreement to be set out in writing later, they often have second thoughts. Once an agreement is reached it should be put on paper and signed to make sure it is legally binding¹.

Early Neutral Evaluation

65. The parties can agree for an independent third party to act as a judge in the dispute. The third party will normally be an expert in the relevant field who will impartially assess the merits of both parties’ arguments and suggest which argument is strongest. Surveyors often act as an independent third party or as an advocate for one of the parties.

The independent third party may even sit with a representative of each of the parties to assist him when making a recommendation, however this is quite rare.

66. The advantage to such an early neutral evaluation gives a quick snapshot of the likely outcome of the dispute saving time and costs.

67. The disadvantages are:

67.1. Both parties have to agree in writing to the early neutral evaluation. Frequently the parties are entrenched they cannot agree on anything, and without this a neutral evaluation cannot take place.

67.2. Often the independent third party gives an assessment and this is not binding. The whole process in these circumstances, should one party to refuse to accept the assessment, can be a complete waste of time and money.

Mediation

68. The parties can agree to instruct a mediator who is specially trained in resolving disputes and try to assist in a negotiated settlement. This is by far the most common form of ADR and the preferred route of ADR for most courts. The process is normally as follows:

68.1. A court will often send parties away to try to mediate the dispute, unless they have attempted to do so previously.

For years there was as a debate as to whether the Courts could actually do this. If a mediation basically involved an independent mediator helping the parties to negotiate, how could a Judge force the parties to negotiate properly? A reluctant party could use mediation to delay matters? A party could be belligerent in the mediation and as everything said in the mediation is confidential and not placed back before the Judge, the Judge would never hear about it.

Most of these objections were eventually overlooked – the Court imposed costs sanctions on parties who refused to mediate – see below.

¹ In most circumstances a settlement which is verbal is just as binding as a settlement in writing - however a verbal agreement can be very difficult to work out the verbal agreement when an agreement has actually been reached, and if so what were its terms.

68.2. The parties normally enter into a mediation agreement with each other and the mediator. The mediation agreement normally deals with:

68.2.1. the mediator's fees (both parties are responsible for all of the fees – aka “*joint and several liability*”);

68.2.2. the process leading up to the mediation meeting (this normally consists of the parties setting out their cases in writing and submissions. This could even include an expert's report from a surveyor);

68.2.3. the location for the mediation meeting (which often lasts around 1 day);

68.2.4. confirmation that everything that is sent by the parties is privileged and cannot be used against them, and further that the mediator cannot be called as a witness should the parties fail to settle their dispute;

68.2.5. confirmation of who has authority to settle on behalf of each of the parties.

69. The mediation normally takes place at a neutral venue, often at the mediator's office.

70. On the day of the mediation meeting:

70.1. The meeting begins with each party making a short statement or presentation setting out their case. The common failing here is that the parties and their experts often address their presentations to the mediator. Instead it is the person with authority on the other side who needs to be influenced.

70.2. The mediator will then “caucus” with each party separately. This is a radical departure from the court process. One of the fundamental principles of English law is that the courts must exercise “natural justice”. “Natural justice” includes each party being made

fully aware of the case against them and having the opportunity to answer the case that is being made. In contrast a mediator cannot repeat what is said to him in caucus unless the party making the statement agrees.

There is no such principle of “natural justice” in mediation. The mediator meets with the parties separately. He will test the parties’ cases and mediators are trained to “look forward rather than back” to try to get the parties not to rely upon their rights, but to get them to understand what would happen if they proceeded with the dispute down the litigation route. The mediator will ask questions such as “How much will be spent legal fees?” “How much time will be spent on the dispute?” “Why should you spend time on the dispute rather than marketing to develop the business etc?”

70.3. The mediator will then shuttle between the parties, keep them separate, draw them together as appropriate in order to try to achieve a settlement.

71. Mediators, unless third parties agree, do not give a decision. They try to encourage and influence the parties to achieve a settlement.

It may sound surprising but most mediators are trained to obtain a settlement, they are normally told to ignore whether or not they think the settlement is “fair” or “unreasonable” etc – the emphasis at mediation training is to get a settlement.

72. Surveyors frequently act as mediators, act as an expert explaining what has gone wrong, and can even act as an advocate in mediation.

73. Mediation has a high success rate; over 80-90% of disputes that are referred to mediation result in a settlement at the mediation itself, or shortly thereafter. However there are some disadvantages:

73.1. There is no compulsion for a party to see a mediation through to an end. A party can walk out of a mediation at any time but a good mediator will use the fear of a mediation

collapsing to keep the parties in the room, and even to elicit higher offers from another party.

- 73.2. Many mediations are seen as a waste of time because the mediator does not make a decision – often mediators do not even make a recommendation.
- 73.3. Some mediators have a tendency to split the difference.
- 73.4. Much depends on the personality of the mediator and how well he or she is trained. The mediator has to act quickly in gaining the parties' trust. It takes a lot to meet the parties face to face on the first day of the meeting and within an hour or so convince them that everything that is said to you in caucus is confidential and will not be repeated to the other side.

ADR generally

- 74. Advantages to all types of ADR include:
 - 74.1. ADR is private. The submissions are confidential and do not appear on the Court file (which the public have access to). What is said is confidential – journalists can as a right attend trials in the High Court and the County Court.
 - 74.2. Any settlement will also be confidential.
 - 74.3. A mediator can encourage the parties to come up with novel solutions. Often as part of the settlement money can change hands but there can also be promises of future work. This is the so called “*win/win*” solution, although in my experience most mediations result in one party paying money to the other.

- 74.4. If successful ADR is far cheaper and far quicker than litigation – research figures vary wildly but most suggest that ADR is successful in around 90% of cases. However a settlement may not actually be achieved at the mediation itself
75. There are some disadvantages but the main one is that for an ADR to take place successfully **both** parties must co-operate to some degree. There is an assumption that both parties to a dispute want the dispute to be resolved whereas in reality one of the parties is not looking for a resolution but to delay payment.

Mediation in particular gives great scope for delay. Parties wishing to seek a resolution often have to at least threaten to write to the Judge to explain that the other party has refused to mediate, agree a mediator, etc etc. This causes some difficulty as most of what is said at the mediation process is privileged and confidential.

What if ADR is not used?

76. The Protocol provides that both the landlord and the tenant may be required by the court to provide evidence that ADR was considered. The Protocol provides:
77. *“The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the Protocol is not followed then the Court must have regard to such conduct when considering costs”.*
78. There are many mediation providers, some of which have a vested interest in promoting mediation. But there is however one overall reason why mediation should be used to settle a dispute – the courts have made it clear that if parties refuse to mediate, then even if they eventually win the court case, they will not recover all of their costs.
79. The Courts penalise even successful parties who have unreasonably refused to mediate.

Court Proceedings

80. If court proceedings are commenced, the timetable of the proceedings will be governed by the CPR which sets out specific time limits for progression of the matter.
81. Like the Protocol the CPR places a great deal of emphasis on consideration alternative dispute resolution as a means to resolving the claim.
82. On route to trial the CPR provides both side with various interim applications they can make, for example summary judgement, security for costs, strike out, etc.

The main stages in a court case from onset to trial are set out below.

Claim Form

83. The Claim Form (which used to be known as a “writ” or “summons”) should be completed and issued in court before the expiry of the Limitation period for bringing a claim.
84. The claim form must be served within four months from the date of issue by the Court.
85. CPR Part 7 and Part 16 govern the details that should be contained within the claim form. In summary the claim form should contain:
 - 85.1. Concise statement of the nature of the claim
 - 85.2. State the remedy that is sought – e.g. damages, specific performance etc
 - 85.3. If interest is claimed the authority providing for interest to be claimed should be included

Defence

86. Part 15 of the CPR governs responding to a claim.
87. If the defendant wishes to defend the claim the Defendant must within 14 days of service with the claim form acknowledge service of the claim form.
88. If the defendant fails to acknowledge service the Claimant can apply to the court for judgement in default.
89. The defendant has the opportunity to make a counterclaim in its defence, if it considers this appropriate.
90. The defence must state which allegations in the particulars of claim:
 - 90.1. He denies;
 - 90.2. He is unable to deny or admit and puts the Claimant to proof; and
 - 90.3. He admits
91. Where the defendant denies an allegation, he must state within the defence his reasons for denying it.

Reply

92. Once the Claimant has been served with the defence, the Claimant has the opportunity to respond to the Defence. This is not obligatory.
93. The Claimant should serve his reply at the same time as submitting his allocation questionnaire.

94. The allocation questionnaire requires both parties to answer a series of questions which help the court to manage with and deal with the administration of the case. It allows the court to estimate how long a trial would need to be based on witnesses, including expert witnesses each party is calling.

CMC

95. The Case Management Conference is where the parties before a judge agree a timetable for progression of the case.
96. Parties are encouraged to agree directions before the CMC.
97. Directions will usually cover the following:
 - 97.1. Disclosure.
 - 97.2. Exchange of witness statements.
 - 97.3. Expert evidence – appointment of expert, exchange of reports, questions to experts etc.
 - 97.4. Fixing of a date for trial.

Allocation

98. Claims are allocated to one of three different tracks:
 - 98.1. The Smalls Claim Track(CPR Part 27) – cases with a value not more than £5,000 costs are not recovered.

- 98.2. The Fast Track (CPR Part 28) – claims between £5,000 and £25,000 where the trial will be no longer than one day – costs are fixed.
- 98.3. The Multi Track (CPR Part 29) – case which are worth more than £25,000 and where the trial is expected to last more than one day with evidence from more than one expert witness – costs “*follow the event*”.

Disclosure

99. Disclosure is the process of listing documents that each party presently or formerly had within their control which either assist or damages the case of any party to the proceedings.
100. Each party must carry out a reasonable search for documents that may either assist or damage any parties’ case.
101. Parties do not have to disclose any privileged documents – for example:
- 101.1. Client and solicitor advise (legal advice privilege).
- 101.2. Communications between client and lawyer in contemplation of litigation (litigation privilege).
- 101.3. Without prejudice communications – often used to encourage settlement.

Witness statements

102. CPR Part 32 governs the contents of witness statements.
103. A witness statement is a written statement signed by a person, which contains evidence, which that person would be allowed to give orally in court at trial.

104. Witness statements are used to prove facts in dispute between the parties.
105. The CMC direction will set out a timetable for exchange of witness statements in the run up to trial.
106. Experts reports – The exchange of expert reports in accordance with Part 35 occurs before the trial to allow each party to re-assess the merits of their own and their opponent's case based on how different the expert's reports are.

Trial

107. The court will require a pre trial checklist to be filed shortly before the trial, the deadline for filling will be set in the directions given at the CMC.
108. The pre trial checklist allows the court to assess whether the directions have been complied with and assess whether the case is ready for trial.
109. After the filling of a pre trial checklist the court can make further directions, which it considers necessary.
110. Prior to the trial taking place the Claimant must compile a trial bundle containing all the documentation that will be needed through out the trial. Where possible the contents of the trial bundle shall be agreed between the parties. The trial bundle should be filed no more than 7 days and no less than 3 days before the trial is due to start.
111. The general structure of a trial is:
 - 111.1. Opening speeches.
 - 111.2. Claimant's case – both witness and expert evidence.

111.3. Cross examination of the Claimant's evidence by the Defendant.

111.4. Defendant's case – both witness and expert evidence.

111.5. Cross examination of the Defendant's evidence by the Claimant.

111.6. Closing speeches.

Cost implications of commencing proceedings

112. The costs of court proceedings can often outweigh the amount in dispute by the time the trial has concluded. These costs include legal, court and experts fees, and parties are encouraged to continue negotiating with a view to settling the dispute throughout the proceedings. Generally if you win a case, you can expect to recover some of your costs back from the losing party, but never 100%. The costs implications of commencing and defending proceedings are substantial and should be considered carefully.

Part 36 Offers

113. A defendant can make an offer to settle the dispute to the claimant, and as long as it complies with the formalities of Part 36, it can provide costs protection. The offer must be in writing and state it is pursuant to part 36 of the CPR. It must also be open to accept for a period of at least 21 days, this is called the 'relevant period'. If the claimant goes on to win at trial, but is awarded damages less than the offer the defendant made under part 36, the claimant must pay the defendant's costs from the day after the last day of the relevant period up to the date of judgment to punish the claimant for not accepting the better offer at the time it was made.

114. Similarly, a claimant can make an offer to the defendant stating what they would be willing to accept to settle the dispute. If the defendant does not accept this offer, and the

claimant then goes on to be awarded at least its own offer, the defendant will be heavily punished in costs. The defendant will have to pay the claimants costs on an 'indemnity basis' from the day after the last day of the relevant period up to the date of judgment. The claimant receives an 'enhanced' interest rate also.

115. It is these substantial costs consequences that make any offer to settle from either party a serious consideration.

Role of an Expert in Court Proceedings

116. Experts are often instructed to prepare reports on a specialist field and to sometimes appear in court as expert witnesses to answer questions from either party and to help the judge understand any technical information.
117. It was been identified that you may, in your professional lifetime be called upon to conduct a valuation in relation to a property where a landlord considers he has a dilapidations claim.
118. According to the Civil Procedural Rules:

“It is the duty of an expert to help the Court on the matters within his expertise...

This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid”².

119. As to what this means in practice:

² CPR 35.3

“Experts should provide opinions which are independent, regardless of the pressures of litigation. In this context, a useful test of “independence” is that the expert would express the same opinion if given the same instructions by an opposing party”³.

120. In *Great Eastern Hotel Company Limited v John Laing Construction* a Programming/Planning Expert was criticised by the Judge. The Judge described some of his evidence as “*fanciful*” and “*naïve*”. The Judge felt the Expert had an “*uncritical acceptance of the favourable accounts put forward by Laing*”.

The Judge concluded that “*sadly ... [Laing’s Expert] had no concept of his duty to the Court as an independent expert.*”

Expert or Advocate?

121. Being an Expert Witness does not mean doing the best for your client. You should establish from the very beginning whether you are to be an “*Expert*”, or an “*Advocate*” - they are two different roles, and it is dangerous to switch between the two.
122. As an “*Advocate*”, a surveyor may push very strongly your client’s position. Sometimes, when a matter then proceeds to Court, an Advocate (incorrectly) acts as the Client’s Expert. However, the Expert has a different duty. Because the Expert has an overriding obligation to the Court the Expert must (for example) state those matters which go against his opinion.
123. If you have acted as an Advocate and have argued your case vigorously for your client, you may find that you cannot say the same things when you then begin to act as an Expert. The problem is, your views given as an Advocate will be put to you when you are cross examined as an Expert.

³ Civil Justice Counsel Protocol for the Instruction of Experts to give evidence in civil claims, paragraph 4.3 -Emphasis added.

124. In *Clonard Developments v Humberts* the Judge in the High Court stated, in an action surveyors for negligent valuation, that two experts were “*unhampered by impartiality ... each adopted the role of advocate*”. (The Court of Appeal refused to overturn this conclusion)⁴.
125. I believe that the “*Expert Witness*” approach is always the right one when giving evidence to a client. I have seen numerous cases where a surveyor has acted as an “*Expert*” and given a very positive view of the client’s chances of success. Only when it comes to drafting a report to put before a Judge does the “*Expert*” then starts to become pessimistic and worried.
126. I believe an Expert should approach every commission on the basis that he has to give independent advice which may eventually appear before a Judge; this avoids any complications. I believe it is also in the Client’s interest – the Client wants to hear bad news as early as possible so he can plan his case (or not start it in the first place). Having to extract a client from a case where an Expert has “*changed*” his views can not only be costly but very embarrassing for the Expert.

The Report

Form and Content of the Expert’s Report

127. Expert evidence must be given in a written report, unless the Court directs otherwise⁵. As to the content of the Expert’s Report it must:
- 127.1. “*Give details of the expert’s qualifications;*
- 127.2. *Give details of any literature or other material which the expert has relied on in making the report;*

⁴ 1999 EGCS 7 Court of Appeal

⁵ CPR 35.5(i)

127.3. *Contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;*

127.4. *Make clear which of the facts stated in the report are within the expert's own knowledge;*

127.5. *Say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;*

127.6. *Where there is a range of opinion on the matters dealt with in the report*

127.6.1. Summarise the range of opinion; and

127.6.2. Given reasons for his own opinion.

127.7. *Contain a summary of the conclusions reached.*

127.8. *If the expert is not able to give his opinion without qualification, state the qualification; and*

127.9. *Contain a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty.*

128. *An expert's report must be verified by a statement of truth as well as containing the statements required in paragraph 2.2(8) and (9) above.*

129. *The form of the statement of truth is as follows:*

"I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and those which are not. Those that are within my own

knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinion on the matters to which they refer.”

130. Crucially an expert report must be addressed to the Court and it is the Expert’s personal opinion – a report should use the word “*I*” not “*we*”.
131. The Academy of Experts provides a Model Form of an Expert’s report is attached.
132. A single joint expert may be used in some cases, instead of each party instructing their own. Any relevant party may submit instructions to the expert, and those instructions must be copied to all parties.
133. The Civil Justice council has also produced a protocol for the instruction of experts to give evidence in civil claims. It also appears in the materials.

Jon Miller

11.3.10