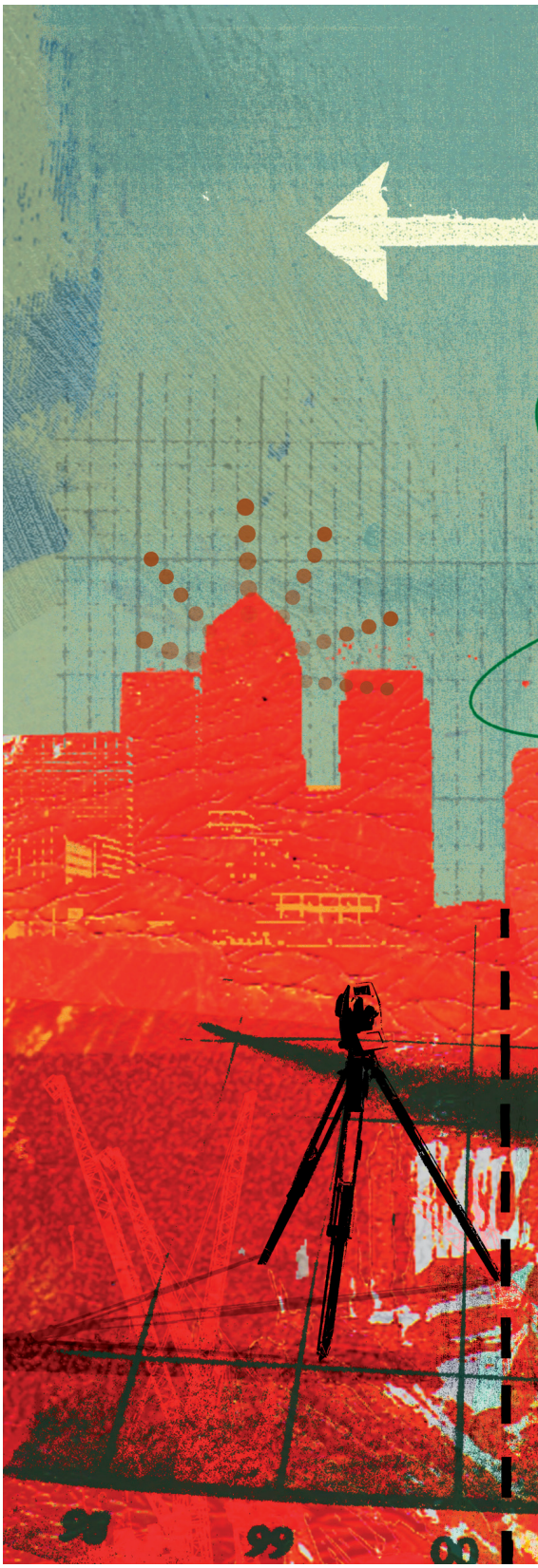
Bring it into sharper focus

Dilapidations best practice is the subject of a draft RICS guidance note. The intention behind it is good, say *Patrick Stell* and *Keith Firn*, but revisions need to be made



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In July, the draft of the proposed *RICS Guidance Note on Dilapidations* (5th ed) was posted on the RICS dilapidations forum website; comment was invited from the forum's members. The guidance note will define dilapidations best practice for the next four to five years, and this consultation period presents the best opportunity for surveyors to assist in that process.

The draft has prompted a widespread response, both positive and negative, from surveyors. Much of the criticism has a common theme that centres on the nature, role and obligations of surveyors when acting on commercial dilapidations claims.

Role of the surveyor

Paragraph 1.5 of the draft provides a sensible definition of the role of a surveyor in a dilapidations claim. It arguably defines that role as being one of "independent expert" in all but name. Unfortunately, later sections give rise to ambiguity, by positioning surveyors in the uncomfortable middle ground between "experts" and "negotiators". These very different roles (one supposedly impartial and the other partisan) can easily become unworkable and contradictory, are open to abuse and may even prejudice the claim if it is litigated.

The draft explains that a surveyor acting as an "adviser" should be objective and impartial when producing a document that needs to be suitable for litigation. It also states that the surveyor should be "influenced by the considerations relating to expert witnesses". Quite what this requires in practice is not clear, and such fence-sitting serves only to obscure the – in fact – uncomplicated role of the surveyor.

It is arguable that, by virtue of his being appointed, a dilapidations surveyor is an expert from the outset because he has been appointed for his specific skill and experience – in short for his expertise.

Those who argue against formalising the role of dilapidations surveyors as experts in all dilapidations claims suggest that relatively junior surveyors would not have the requisite expertise. The counter argument is that the title of expert is not a title achieved only by high-ranking senior surveyors but one that a relatively junior surveyor, experienced on a particular value of claim, could hold. For example, a competent, recently qualified MRICS who had cut his teeth on contract administration and dilapidations up to, say, £100,000 could easily have more relevant technical and pricing knowledge at this level than a more senior colleague who focused entirely on much larger contracts.

The guidance note could explain that there are, perhaps, a few exceptions to the rule that surveyors involved in dilapidations must always be appointed as independent experts. A dilapidations surveyor could be an adviser where there is no legal "cause of action", that is, where the default position is not litigation. Examples of such situations include certain instances of lease assignments, lease surrender negotiations and conditional lease break negotiations.

The issue of jointly appointed surveyors for end-of-lease dilapidations claims has been debated since the inception of the Civil Procedure Rules (CPR) in 1998. This could have been at the heart of the Dilapidations

Protocol but is, unfortunately, not addressed in the draft. If the draft had adopted this CPR-compliant approach, the RICS would need to rewrite the protocol as well as the guidance note. A fascinating but unlikely prospect.

Taking issue with the draft

● Incentivised fees

The risk of perceived partiality resulting from incentive fee agreements for those valuers or building surveyors involved in preparing and negotiating dilapidations claims should be addressed at the outset of an instruction.

Paragraph 3.2.2 of the draft makes a bold and clear statement that incentive-based fees are incompatible with the role of the expert witness. The draft could go further, by stating that because a dilapidations claim is a legal damages claim (therefore, by definition, governed by the CPR), all schedules should be prepared "in contemplation of litigation", namely by experts.

Do lawyers really want their potential expert witnesses to have to change their fee agreements just prior to litigation, at the risk of distorting the perception of independence of all documentation produced up to that date?

● Appointment of sub-consultants

The draft is too brief on this crucial subject. For example, mechanical and electrical issues often equate to 25-50% of a claim. Few building surveyors and lawyers are qualified or sufficiently competent to address all specialist issues arising at the end of a lease of a commercial building, and third-party consultant input is often required.

The draft should state the proper terms of appointment of any sub-consultant used by a surveyor in a dilapidations claim and he should work on the same impartial expert basis.

● Role of the valuer

Do all roads in dilapidations really lead to valuation evidence? Experience suggests that they probably do not. The draft puts the valuation cart before the cost-of-works horse and over-emphasises the valuation approach to the neglect of the common law principles of loss. Both aspects are vitally important in dilapidations claims and both deserve to be dealt with clearly in one distinct section in the draft alongside a clearer explanation of the relationship between the two.

● Finalisation of binding agreements

Important advice for surveyors with regard to finalising legally binding agreements is tucked away in section 2.2.4 of the draft.

Entering into a binding agreement without consent is a common trap for surveyors; it could result in an unhappy client and possibly a professional indemnity insurance (PII) claim. It therefore warrants a separate section pointing out the risks. Surveyors should be urged to obtain client authority in writing prior to making an offer to settle a claim. The default position should always be to involve a lawyer in any written agreement.

● Surveyor's due diligence

The draft is clear and useful on certain due diligence issues. However, it could have provided a more dilapidations-focused checklist to address other areas, such as: conflicts of interest; money laundering; tax avoidance; and the Fraud Act 2006.

The surveyor should be encouraged to check and confirm who the client is, and that the person/firm instructing him has an interest in the lease and the authority to instruct. The landlord's intention at lease end has a significant bearing on the landlord's surveyor's claim and should be ascertained in writing at the outset.

The guidance note is intended to set the standard and to offer advice in respect of PII claims. It might also be useful, therefore, to encourage the surveyor to advise his client in writing concerning exactly what documentation he is relying upon; namely what has been supplied and what documentation may be outstanding.

● Protocol

The draft deals with the CPR and the Property Litigation Association (PLA) protocol with indecent haste. It could have referred surveyors to the already binding default Pre-action Protocol, set out in the CPR Practice Direction (section 4.1-4.10) that covers all civil disputes (including dilapidations) and governs pre-litigation behaviour in cases not covered by a specific protocol. This is well suited to dilapidations if combined with a clear RICS guidance note, particularly because the draft Dilapidations Protocol has not been adopted by the courts.

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The Civil Justice Council is reviewing all adopted protocols and all draft protocols to determine whether one default protocol can deal with all civil claims, including dilapidations. Should the RICS again hang its hat on a Dilapidations Protocol that has been around in draft for five to six years?

● Landlord surveyor's assessment of its client's loss

The draft blurs the roles between the PLA Protocol and the RICS guidance note. It attempts to clarify the ambiguity and subsequent concern that arose out of section 4.8.3 of the PLA Protocol.

The clarification provided by the draft does not take account of the fact that many claims are exaggerated not by the surveyor but by the landlord, which may say that it will take one course of action while intending another.

A surveyor's assessment of the landlord's loss (as required by the draft Dilapidations Protocol) combines many factors, including: the cost of the works; valuation evidence; the legal interpretation of the lease; and the landlord's actual intention. However, the only party that can sign off these issues with complete confidence is the landlord. It is not reasonable for a surveyor to be required to sign a statement warranting a client's past or future intention, and the RICS should not be encouraging such a liability.

The landlord should personally sign the statement of truth on the dilapidations schedule, thereby removing the unnecessary responsibility on the part of the valuation or building surveyor. This would also indicate the honesty of a landlord's stated intentions, an issue that is crucial to the quantum of any dilapidations claim.

Moreover, such a step would also address the issue of schedules being prepared without a consultation with the landlord regarding the actual works intended. This would also be addressed.

● Role of lawyers

The first step in any dilapidations claim is for a lawyer to review and serve the schedule. Unfortunately, the draft suggests that lawyers are not always needed to serve documents. This might be true in some cases, but lawyers' fees for the service of the landlord's schedule on the tenant are often minimal and recoverable under the lease. Furthermore, using a lawyer will ensure that the document is served at the correct address at the correct time. It also means that the lawyer is involved at the initial stage of a damages claim. Surveyors should be encouraged, as best practice, to use a lawyer for this purpose.

Once a settlement has been achieved, a lawyer should be instructed. This involvement will ensure that all liabilities have been addressed in a way that concludes the relevant liabilities as intended by the parties. Even a small claim can become complex and expensive if the legal agreement is ambiguous. The surveyor should always recommend a lawyer's involvement at this stage.

Deserved applause

The RICS working group should be applauded for releasing the draft for consultation. It is clear that a substantial amount of work has gone into the document and, hopefully, further revisions will be made prior to publication to address the widespread concerns.

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