

# PRACTICE & LAW



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# Attend to the details

**Dilapidations** In part 2 of the series, *Keith Firn* and *Patrick Stell* stress the need for surveyors to undertake comprehensive due diligence

The RICS *Dilapidations Guidance Note* (4th ed) suggests that it is best practice for surveyors acting on dilapidations claims to “obtain a copy of the relevant lease in complete form with all plans and other attachments... (and) deeds of variation”. Similar requirements are also contained in the recently released consultation draft of the next edition of the guidance. Both state that:

The surveyor needs to satisfy himself that the documentation obtained is sufficient for him to discharge his instructions. Any questions as to authenticity may need to be addressed to the client or his legal adviser. Ambiguities in the documents or in instructions should be clarified as they arise.

What is not clear in the current guidance is exactly what measures a competent surveyor should take to “satisfy himself”. What “due diligence” should a surveyor undertake at the outset of a dilapidations instruction?

## Overriding professional duty

All members of the RICS are governed by and are expected to comply with the RICS by-laws and regulations. Regulation 4 of the RICS *Rules of Conduct for Firms* (2007) and the RICS *Rules of Conduct for Members* (2007) require that professional work is carried out “with due skill, care and diligence”. The RICS *Professional Ethics Guidance Note* (2002) states that it is ethical for members to “ensure that clients’ interests are properly cared for”.

Any surveyor who overlooks the requirement to carry out basic due diligence damages the reputation of the RICS and undermines public confidence in the

dilapidations resolution process. Such an approach may also have professional indemnity consequences for the surveyor should things go wrong.

## Basic due diligence

Clause 4.1.2 of the dilapidations guidance provides a reasonably comprehensive list of documents that the surveyor could request and obtain at the outset of a claim. These documents, where available, will define the extent of the claim or may prompt further client enquiries and must therefore be critically appraised upon receipt.

Each document should be reviewed to ensure that it is complete. For example: has the surveyor’s copy of the lease been signed by both parties; is it a draft; is it dated; and does it carry the registration duty paid stamps? If these initial questions are not addressed to the surveyor’s satisfaction, further enquiries should be made.

The surveyor should then establish whether he has sufficient information to obtain a clear understanding of the lease; for instance, has he received coloured and

legible copies of plans, photographs or other images or documents referred to in the lease?

The surveyor must seek to establish the landlord’s true intentions with regard to the property; these will determine whether the measure of damages will be based upon the cost of the works or another measure, such as diminution in the reversionary value. A landlord’s intentions may change to reflect circumstances, and the surveyor needs to ensure that the landlord is aware of the implications of making false claims and misleading statements of intent. The landlord should be open about its intentions from the outset and should promptly inform its surveyor if these are to change.

The overriding principle in all initial investigations is that the surveyor must take the time to understand the basis for the claim and to review and critically appraise any documentation and statements.

## Privity of contract checks

The central principle of *restitutio in integrum* (restoration to original condition) is applicable only where the parties have entered into a valid contract. In the case of dilapidations claims, there must be a valid lease (the contract) between the landlord claimant and the tenant defendant.

A dilapidations claim is simply a claim for breach of contract, so the diligent surveyor should undertake additional “desktop” due diligence enquiries. One of the most important is the privity of contract check to confirm the existence of a contractual relationship between the parties that purport to be the landlord and tenant. ►

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## CASE STUDY: WHEN THINGS GO WRONG

In most cases, diligence, privity and solvency issues will be problem-free, but surveyors should always err on the side of caution. Below is an example of a case in which a dilapidations surveyor failed to carry out appropriate due diligence on a lease-end dilapidations claim.

The landlord owned premises in east London that had been let to company A in 1988 for a term of 11 years. In 1989, company A formally assigned the lease to company B. The defendants were the directors, shareholders, and guarantors of company B. However, the landlord was apparently unaware that company B had vacated the property in 1993 and had been dissolved at Companies House in June 1996. It also later transpired that the original tenant, company A, had also been dissolved in July 1992.

From 1993, the defendants occupied the property as directors of a new trading company, company C, which made quarterly “rent” payments. During 2000, the landlord’s surveyor visited the property in order to prepare a schedule of dilapidations. He failed to notice that company B no longer existed and, under his guidance and encouragement, the landlord served the schedule on company B in early 2001. The initial claim totalled around £111,000 plus various consequential losses.

At the same time, the landlord began lease renewal negotiations with the defendants.

However, relations between the parties deteriorated and the negotiations failed. The dilapidated property was vacated on 23 June 2002 and the landlord sought to recommence its dilapidations claim. In January 2003, it commenced court proceedings against company B and the guarantors; it sought to argue that the material date for the dilapidations damages assessment was 23 June 2002. The tenant’s solicitor estimated that, were the landlord to succeed in its claim, the liability would exceed £150,000. During the early stages of litigation, the facts concerning the dissolution of company B were brought to the court’s attention. The landlord’s only prospect for recovering damages lay with a claim against the guarantors of company B. The question became one of resolving when the lease and the guarantor’s liability determined (and what the material date was for assessing the dilapidations damages). The landlord argued that it should be 23 June 2002 because, in its view, the guarantors had been holding over in continued occupation of the premises up to that date.

Following 12 months of High Court litigation, a preliminary judgment on the material date for the assessment of dilapidations was determined. The court held that the guarantors had not entered into a lease for the remainder of the term following the dissolution of company B.

Since company B had ceased to exist in 1996 and the guarantors were not the tenants under the 1988 lease, it was impossible for either the tenant or the guarantors to have been holding over beyond the end of the lease. The court decided that the material date for the claim was 24 March 1999 and the claim that the guarantors had been holding over beyond this date was rejected. Following its preliminary decision, the court ordered expert surveyor reports on the dilapidations and diminution in value. However, although there had undoubtedly been a degree of dilapidation at the material date, there was no contemporaneous evidence of the state of the premises in 1999 that would have enabled the experts reliably to assess the breaches of covenant that may have existed at the material date. The landlord’s claim became unsustainable and further issues came to light that called into question the veracity of the landlord’s statement of truth accompanying its claim. The parties settled out of court for a fraction of the claim and the landlord suffered its own litigation costs, which greatly exceeded the settlement. The landlord’s surveyor had to explain why he had not obtained the inexpensive and publicly available information at the outset of his appointment, and why the landlord had been encouraged to take on an ill-judged and costly action.

For example, the landlord’s legal interest in a property can be ascertained by making an internet search of the Land Registry register. The cost in terms of money (typically £3-6) and time (10 minutes) is minimal in respect of most cases and such searches should be routinely undertaken at the outset; they may well prove invaluable. If the surveyor discovers title and lease interest discrepancies, he may even need to reaffirm instructions with his client.

Another invaluable check is to establish who has been paying the rent and upon what basis. It is often found that a party other than the tenant recorded on the lease has been paying the rent. This can raise questions concerning who is in occupation and whether there is a tenancy at will. These issues may affect the dilapidations liability faced by the surveyor’s client. Any discrepancy may affect the claim and should be referred to the client’s solicitor.

### Tenant solvency checks

The tenant’s status should be checked in order to ascertain any legal or financial issue that could jeopardise the claim. For example, rent arrears, or a history of

poor rent or service charge payments, may indicate the tenant’s poor covenant strength arising from financial difficulties previously unknown to the surveyor.

If the landlord or the tenant is a UK limited company, it will be registered at Companies House. The online search facility of Companies House (<http://wck2.companieshouse.gov.uk>) will reveal

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useful information on the status of corporate parties. It is also possible to purchase copies of recent company reports directly from the website for a small fee and with minimal effort.

Experience shows that such searches frequently have a material bearing on the prospects of a claim. If a surveyor can establish, from information gleaned from Companies House, that the tenant limited

company is in financial difficulties, he can quickly advise the landlord to make further enquiries through its solicitor before wasting money on survey fees, thereby earning the gratitude of his client.

### Pay attention

The straightforward due diligence enquiries outlined above will help to prevent surveyors and their clients from wasting time and making potentially costly mistakes on claims that have either limited or no prospects. Opportunities can be lost if these enquiries are not made in a timely manner and are not clearly documented.

It is not sufficient for surveyors initiating a dilapidations claim on behalf of a landlord merely to issue standard client enquiry letters requesting information; they must pay adequate attention to all the information received.

Careful due diligence is an essential but often overlooked part of dilapidations dispute resolution. Surveyors (and solicitors) ignore it at their peril.

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