Dilapidations: Community in Conflict

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Dilapidations: Community in Conflict

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Ten years after the introduction of the Civil Procedure Rules 1998 (CPR), commercial dilapidations surveyors are still struggling to come to terms with the correct application of the more stringent evidential and procedural obligations. During this period, there have been various attempts to improve procedural guidance available for surveyors with two revisions of the Royal Institution of Chartered Surveyors (RICS) Dilapidations Guidance Note, the latest being the 5th edition, published in June 2008. The question of whether this new Dilapidations Guidance Note (the Guidance Note) adequately satisfies the CPR obligations to provide procedural ''best practice'' guidance is now a matter of heated debate within the dilapidations professional community. This article examines the issues.

The dilapidations ''route map''

The Guidance Note was the product of extensive review, consultation and revision by the RICS Working Group on Dilapidations (the Working Group). It was intended to provide a clear path for the coming years, defining how surveyors should be attending to commercial property dilapidation disputes whilst complying with the overriding objectives of the CPR. It is important to establish why there is so much debate and controversy. To answer this question, the contentious issues within the Guidance Note must be explored.

A community divided

Since 2006, opinion has been divided within the dilapidations community on key issues such as:

- whether the surveyor preparing or responding to the schedule at the pre-litigation protocol stage of a dispute acts as an ''advocate'' or an ''expert'';
- the appropriateness of contingency fees for surveyors (i.e., fees based on the value of the settlement achieved); and
- whether schedules should be accompanied by the Property Litigation Association (PLA) proposed ''landlord only'' endorsement; or the alternate CPR Pt 35 pre-litigation ''statements of truth'' for both landlords *and* tenants.

Two camps have formed in respect of the debates between surveyors and lawyers outlined above, referred to as ''traditionalist'' and ''modernist''. There are lawyers and surveyors on both sides; this should not be seen as a dispute of lawyers versus surveyors, or landlords versus tenants. It is far more complex.

Watching the recent debate in the property press, at RICS conferences and on the RICS Dilapidations

Forum website, has been a group of impartial observers, namely the judiciary. It is, of course, judges that deal with the results of the pre-litigation protocols and professional guidelines established by the RICS and their views on the issues currently in debate should not be ignored.

The opening shots—the pre-litigation role of the surveyor

Traditionalists argue that the role of both the landlord and tenant dilapidations surveyor during the pre-litigation protocol stage of a dispute is that of an ''adviser'' or ''negotiator'' but with obligations of impartiality. The logical conclusion of the argument put forward by the traditionalists is that surveyors can sell their services simultaneously as both quasi-experts (who prepare a document potentially for use in litigation in accordance with the CPR) and also as negotiator/advocates.

The traditionalist view on the role of the surveyor is that they expect the surveyor, figuratively speaking, to wear two hats during their instruction: first, as expert during the preparation of the schedule; secondly as partisan advocate/negotiator during the pre-litigation negotiation phase; and then to revert back to the expert role during the litigation phase. Surveyors are, therefore, being encouraged to adopt a unique role of both partisan advocate and impartial expert on the same instruction.

Modernist surveyors and lawyers favour the view that a surveyor appointed to prepare and subsequently comment on the claim in a Scott Schedule format is a pre-litigation expert as envisaged by the CPR from lease end. This obligation is defined in the CPR and would apply to both landlord and tenant surveyors where the pre-litigation expert owes a clear duty of impartiality in respect of contemplated court proceedings. The impartial pre-litigation expert duty must take precedent over any commercial duty owed to a client. He who pays the piper does not call the tune!

The new RICS Guidance Note appears to promote the traditionalist view on the role of surveyors, identifying only the roles of a litigation phase ''expert witness'' and the pre-litigation stage ''adviser'' role. The guidance requires the surveyor to possess ''professional objectivity'' and to act ''in accordance with the RICS Rules of Conduct'' but otherwise it is vague to the extent that traditionalists and modernists can read into it what they wish. Those that had called for clarity in RICS Guidance argue that the legal and procedural role of the surveyor cannot be defined by the RICS in isolation to the procedural rules that govern all civil disputes in England and Wales (i.e. the CPR). On the key issue of whether the surveyor is an advocate, an expert, or both, there can be only one answer, namely the right one. As with all disputes where both sides believe they are correct, maybe it is best to work out in advance what the likely judicial opinion would be . . .!

Fortunately, H.H. Judge Hazel Marshall Q.C., a Senior Chancery Judge, was the keynote speaker at the 2008 RICS Dilapidations Forum Annual Conference. During a fascinating speech, she provided clear insight into the way in which at least some of the judiciary may view this debate. All views expressed were, of course, personal and non-binding, but are at the very least highly indicative of how the issue might be decided if it ever came before the courts.

H.H. Judge Marshall Q.C. examined the question of whether surveyors acting at pre-litigation stages of a dilapidations dispute are ''experts'' as defined in the CPR. In her view, the answer was:

> ''Undoubtedly Yes! Surveyors should be 'experts' right from the start . . . whilst [surveyors] may be appointed to give advice; it is the advice of an expert. Other advice should be coming from a different source. . . . [surveyors should] regard themselves as being an expert from the very beginning [of a dispute].''

Such an opinion would tend to suggest that the RICS need to re-visit the terminology and obligations as set out in the latest Guidance Note.

Entrenched positions—surveyor incentivised fees

Perhaps the most emotive issue arising out of the question of whether a surveyor is an advocate or expert is how they earn their fees. Whilst this is crucial for surveyors in terms of income, it is far more important for landlord and tenant clients if the evidence prepared by surveyors on their behalf is compromised by professional practices that fall below the standards required by the judiciary with reference to the CPR.

Nothing seems to excite some surveyors more than questions being raised over the appropriateness of any pre-litigation contingency fees and it is not hard to see why. Many surveying practices still routinely charge their landlord and tenant clients

fees based on a percentage of the final dilapidations settlement. Surveyors working on various types of contingency fee when producing evidence during the pre-litigation protocol stage of a dispute argue that such performance-related fees do not pose a problem and that it is how their clients wish to remunerate them.

Landlord and tenant clients may well desire to skew evidence in their favour, to gain a more preferential settlement than their true liability or damage suffered, but as H.H. Judge Hazel Marshall Q.C. pointed out to the RICS Dilapidation Forum Conference in September 2008, ''[the] client isn't interested in the purity of the law of dilapidations''.

The view held by an increasing number is that performance-related fees during all pre-litigation stages are inappropriate, open to challenge and in some circumstances exploitative of clients where the fee charged may bear no resemblance to the effort or resource engaged. Whether clients are aware of it or not, such an incentivised approach to the Scott Schedule stages of a dilapidations dispute is potentially highly risky to their case. Many senior dilapidations surveyors have quite rightly preached about the primacy of the first landlord schedule served at lease end and the first tenant response thereafter in this post-CPR era. It is the most contemporaneous evidence of all for a dilapidations dispute, one that may come to court many years after the end of a lease. To suggest that this evidence can ever be prepared on a contingency basis is untenable.

Modernist surveyors support the adoption of straightforward time charge or fixed fees as appropriate for dilapidations claims and point to the CPR and judgments such as *Toth v Jarman* [2006] EWCA Civ 1028, in which judicial guidance was given stating that a ''... conflict of interest could be of any kind, including a financial interest, a personal connection, or an obligation ...''.

The argument against contingency fees recognises that, where surveyors accept appointments on incentivised terms, their personal interest is arguably no longer focused on achieving a fair and equitable dilapidations settlement based on the true measure of any loss; but is instead based on what remuneration they may gain. Even the perception of partiality is risky for surveyors, particularly when there is such a simple alternative. To the modernists, a performance-related fee represents a financial interest in the value of the settlement, which is a disclosable conflict of interest and should be avoided.

The playing field for dilapidations needs to be levelled. It is patently unfair on landlord and tenant clients who instruct their surveyors on a CPR expert basis on a time charge, when they have to exchange reports and opinions with a surveyor on the other side who has a vested interest in the outcome—a basis that encourages a distorted, time consuming and less than fair approach. The perpetuation of incentivised contingency fees for surveyors stifles the prospects of achieving the CPR overriding objectives and the parties that suffer as a consequence are the clients. The RICS Guidance Note avoided the issue and merely stated that such pre-litigation fees are ''a matter of contractual agreement between surveyors and their client''.

Those who wish to maintain a contingency fee approach for their services should head the advice of H.H. Judge Hazel Marshall Q.C.:

> ''... if I [as a judge] learned that an expert was or had been on an incentive fee—which was perfectly legitimate cross examination—it would certainly cause me to examine his evidence more critically. ... As a judge I may well form a view on the effect on credibility of surveyors acting with incentive fees. ... Human nature being what it is, incentive fees could have an effect on the opinions expressed, consciously or subconsciously. ... Incentivised fees are not entirely conducive to good [efficient, fair and cost-effective] litigation.''

This was a further endorsement of the modernist view that RICS Dilapidations Guidance should be revised for the best interests of CPR compliant surveyors.

Under siege—endorsements or ''statements of truth''?

Another contentious issue that derives its origins from whether a dilapidations surveyor at the CPR protocol stage is a CPR pre-litigation expert (or not) is the hotly debated issue over the making of statements of truth when preparing claim or defence documents.

Whilst the dilapidations community may not agree on all issues, there have been positive and virtually unanimously agreed developments. Most noticeably, almost all surveyors now support efforts to curb exaggerated landlord's claims with the principle that

the initial landlord's claim should be accompanied by suitable signed declarations.

This sensible measure introduced by the PLA helps remind a landlord and their advisers that the claims and allegations they make are serious matters and should not be viewed as the start of negotiations where the person seeking damages aims deliberately high. This was a key issue for Lord Woolf when the CPR was introduced and is useful for surveyors who now need to bear in mind that reckless or knowingly false claims may constitute a criminal offence under the Fraud Act 2006. However, despite the consensus, in principle there remains dispute over the precise form of the endorsements and whether only the landlord should make such a statement or whether the landlord and tenant surveyor must both have the same obligation.

Traditionalists seem satisfied with the recently revised landlord's surveyor ''endorsements'' proposed by the PLA in their Dilapidations Protocol (version 3, May 2008) and do not see the need for a tenant's surveyor to make similar reciprocal endorsements of the tenant's defence position from the outset of the defence.

The other section of the community takes the view that it is not just landlord's claims that can be exaggerated because tenants' defences are also often deliberately misstated. Modernists believe that both the landlord claim and tenant defence should be ''endorsed'' by all those making them; with suitable written declarations, and importantly accompanied by CPR compliant statements of truth. The landlord or tenant client could even sign the statement of truth personally if the situation required, for example where the landlord's intention is a key factor in determining supercession or the quantum of loss.

Interestingly, it has emerged that the PLA had originally sought the inclusion of a reciprocal tenant endorsement, but that this was subsequently omitted at the request of the RICS because they considered that ''there wasn't a problem [with exaggerated tenant defences]'' and also that it had been omitted to avoid adding ''another layer of bureaucracy''. This suggestion was not well received by H.H. Judge Hazel Marshall at the recent RICS Dilapidations Forum conference where she observed:

> ''. . . Statements of truth have significantly reduced [the levels of] litigation.''

In response to the question of whether a tenant's surveyor preparing a defence should sign a statement of truth at the pre-litigation phase, her response was:

> ''Why jolly well not! Tenant's surveyors should sign statements of truth.''

The judge's view was unequivocal and, in her opinion, tenant surveyors should sign statements of truth from the first issue of any response they prepare in the Scott Schedule process during the pre-litigation protocol stages of a dilapidations claim.

Peace in our time?

Dilapidations, as an area of civil dispute post CPR 1998, must become more about seeking consensus between competent CPR expert surveyors at the pre-litigation stage rather than the surveyor acting as a partisan ''hired gun'' on a mission that is paid by results.

Regardless of the debates within the dilapidations community, the official guidance offered by the RICS cannot afford to ignore the debate any longer. Regardless of whether the majority of the community ultimately prefer the traditionalist or modernists approach, the RICS and the dilapidations community should seek to bring itself into line with the CPR and the approach of the courts and judiciary. It is clear that the open debate needs to be continued and where appropriate the RICS Guidance Notes revised. Maybe then peace and unity will return to dilapidations.

The authors' book, *Dilapidations and Service Charge Disputes—A Practical Guide* is being published by Estates Gazette Books in November 2008.

The law is stated as at October 13, 2008.