Dilapidations Representations

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In early 2007, the dilapidations community learned of the passing of the Fraud Act 2006 that had come into effect on January 15, 2007. Quite quickly thereafter, some surveyors and solicitors raised concerns that the Act could have implications or consequences for professionals engaged in the provision of services relating to the preparation of dilapidations claims or in responding to such claims.

Some members of the dilapidations community (including some members of the judiciary) have on occasions expressed concerns over a scenario, sometimes encountered, of potentially reckless, unjustified dilapidations claims and/or defence representations being made by some professionals. Could the Fraud Act 2006 be relevant to such conduct? If so, what guidance should surveyors take into consideration when preparing dilapidations claims, defence schedules or other documents to ensure that they do not fall foul of the provisions of the Act?

Representations and the 2006 Act

The obvious starting point for surveyors considering the potential of fraudulent acts in dilapidations claims is the Act itself. In particular, careful attention should be paid to the offence of ''fraud'' or a ''conspiracy to defraud'' by ''false representation'' as defined in s.2 of the Act. Section 2 states:

''Fraud by false representation:

(1) A person is in breach of this section if he—
  (a) dishonestly makes a false representation, and
  (b) intends, by making the representation—
    (i) to make a gain for himself or another, or
    (ii) to cause loss to another or to expose another to a risk of loss.

(2) A representation is false if—
  (a) it is untrue or misleading, and
  (b) the person making it knows that it is, or might be, untrue or misleading.

(3) ''Representation'' means any representation as to fact or law, including a representation as to the state of mind of—
  (a) the person making the representation, or
  (b) any other person.

(4) A representation may be express or implied.

(5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).''

The criminal punishment for an act of fraud (or a conspiracy to defraud even if unsuccessful) is imprisonment for a custodial term not exceeding 12 months or a fine not exceeding the statutory maximum (or both); or on conviction on indictment, to imprisonment for a term not exceeding 10 years

or a fine (or both). The consequences of potentially committing an offence under the 2006 Act are, therefore, severe and should be considered to be a stark warning of the risks associated with questionable and improper conduct.

Duty of good faith

The ability to make representations on any case will be subject to any limitations or obligations imposed by the professional duties of the appointed professional. A key material duty is that of good faith.

Millett J. in *Logicrose Ltd v Southend United Football Club Ltd* [1988] E.G.C.S. 114 confirmed that parties to negotiations ''do not owe each other a duty to act reasonably, but only to act honestly''. These legal duties of honesty and good faith apply in both dilapidations dispute resolution negotiations prior to litigation and, of course, also during subsequent legal proceedings where the formal requirements for statements of truth (and so forth) are imposed. A reminder to surveyors of the importance of the duty of good faith from the very outset of a dispute (at pre-action stage) was given by H.H. Judge Toulmin QC in *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2008] EWHC 2003 (TCC), where he stated that the tenant, in receiving a landlord's schedule and claim, was ''... entitled to assume that the claim was being put forward in good faith based on sound advice''. In this particular case, the tenant successfully contended that the landlord's claim ''was at best reckless ... and at worse less than scrupulous''. It is probably fair to say that the landlord's surveyor and solicitor were subjected to a degree of criticism in the published report of the case.

Whilst one would hope that most competent and reputable professionals are aware of their duties, it should not be overlooked that, in dilapidations, the duty of good faith in conduct and when providing services applies as much to the tenant and their agents as it does to a landlord.

Understanding misrepresentation

In the average dilapidations dispute, both landlord and tenant will employ reputable and competent professionals to fairly represent and safeguard their interests and position. Chartered Surveyors are routinely employed to provide dilapidations expert services and, in doing so, prepare or respond to schedules of dilapidations (claim or response documents). These will usually combine ''witness of fact'' statements in the form of evidence concerning allegations of breaches of tenant's covenants with statements of expert opinion concerning their professional assessment of any reasonable and proportionate works necessary to remedy any alleged tenant's breach.

Because of the duties owed to the courts by any witness of fact and/or expert, any statements issued to the parties by surveyors (even at initial pre-litigation stages) ought to be prepared with due care and skill as the statements will form the supposedly authoritative representations that both sides to the dispute are then entitled to rely upon with good faith as having been objectively and honestly made. Within the context of litigation, these expert services are subject to the requirements of the Civil Procedures Rules Pt 35 including the requirement that expert representations on fact and opinion should be supported by CPR Pt 35 compliant statements of truth from the outset. Problems could, therefore, arise if the representations made by surveyors are not justified and a misrepresentation occurs.

Misrepresentation has been defined as being:

> ''an untrue statement of fact or representation, made by one party to another; either before or at the time of making; with the intention that the person to whom the statement is made shall act upon such misrepresentation, and they do so act.''

Any misrepresentations made during the course of dealings and negotiations between two parties (or their appointed agents) may result in civil action for damages for deceit under the law of tort; or under the Misrepresentation Act 1967. The course of action adopted by an aggrieved party might also include the rescission of the contract, but will ultimately depend on the type of the misrepresentation (i.e. whether it was innocent, negligent or fraudulent in nature).

- Innocent misrepresentations: in the simplest of terms, innocent misrepresentations are made where the maker of the statement has reasonable grounds for believing in its truth and did so believe.
- Negligent misrepresentations: a negligent misrepresentation is a statement of purported fact made by a party who had no reasonable grounds to believe (but they

did believe) that the facts represented were true. Importantly, a negligent misrepresentation will not be classed as being fraudulent so long as the party who made the misrepresentation had an honest belief in the truth of the statement at the time of making. It should also be remembered that when a negligent misrepresentation claim is made, the Misrepresentation Act 1967 places the onus on the maker of the statement to disprove negligence.

- Fraudulent misrepresentations: the category of fraudulent misrepresentation is the one that has, perhaps, prompted the debate and concern within the dilapidations community. The starting point for understanding this type of misrepresentation is the definition set down in *Derry v Peek* (1889) 14 App Cas 337, when it was held that: ''a fraudulent misrepresentation is a false statement made knowingly or deliberately or without belief in truth—or recklessly without caring whether it was true or not''. The common-law test for fraudulent misrepresentation has since developed over the years but was further clarified in the case of *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All E.R. 573, where it was held that, for a misrepresentation to be considered to be a fraudulent misrepresentation: ''... it must be made with the intention that it should be acted on and it is, in fact, acted upon. Male fides are not a prerequisite for a fraudulent misrepresentation to be proven ... Recklessness is only evidence of fraud—not proof, unless it amounts to a flagrant disregard for the truth and so is also dishonest.''

In order for fraud to be established there must, therefore, be an assessment of dishonest intentions. But how is that assessment made and on what basis? When investigating and tackling fraud, specialist units of the police, such as the Economic Crime Department of the City of London Police, have regard to the two-stage test set down in *R v Ghosh* [1982] Q.B. 1053. The test can be summarised as being:

1. whether the behaviour of the party committing the misrepresentation or act would be regarded as dishonest by the standards of reasonable and honest people (i.e. the general public); and
2. whether the particular individual or body committing the misrepresentation or act was aware that his/their conduct would be regarded as dishonest by reasonable and honest people.

If both limbs can be satisfied, then there is a good ground to suggest that the offending action or misrepresentation was dishonest and most probably fraudulent. Furthermore, an assessment of dishonesty under the two-stage *Ghosh* test will also take into consideration the extent of personal experience and influence of any individual or body making the misrepresentation. For example, in *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch), Briggs J. held that, in a case where fraudulent material misrepresentations had been deliberately made by an ''experienced player'', then:

> ''... there is a powerful inference that the fraudsman achieved or endeavoured to achieve his objective, at least to the limited extent required by the law, if his fraudulent improper influence was actively in the mind of the recipient when the contract or negotiated agreement was considered or came to be made.''

The foregoing overview of fraudulent misrepresentation is, at best, a simplistic summary of what is an extensive and convoluted legal subject but, hopefully, encapsulates and conveys some key issues.

Fraud in dilapidations

Of particular importance and concern to some surveyors and solicitors currently providing dilapidations services are the consequences of both making or receiving potentially fraudulent misrepresentations whilst providing professional services. Potentially fraudulent misrepresentations, when made or encountered in dilapidations cases, tend to compromise the ability of the parties and their appointed professionals to proportionately resolve what ought to have been a relatively simple contractual damages claim.

Fraudulent misrepresentations in dilapidations are not just unprofessional and disreputable but may even result in the committing of a criminal act of fraud or a conspiracy to defraud under s.2 of the Fraud Act 2006 if the fraudulent misrepresentation concerns a matter of fact (such as the truthfulness or accuracy of a statement identifying the existence of a tenant's breach) and where a reasonable assessment of the intention of the misrepresentation was that it intended to make an unfair financial gain for one party and/or to cause an unfair loss for the other.

Given the severity of the punishment for fraud or conspiracy to defraud and the potential damage to the collective reputation of the dilapidations professional community that would follow a successful prosecution, there has been some concern expressed by members of the community suggesting that the more questionable instances of dilapidations misrepresentations are not aired publicly in harsh terms and should be viewed instead in less contentious terms as just extreme examples of surveyor or agent (say) ''professional exuberance''.

However, and by way of contrast, acknowledged experts in the community suggest that fraudulent misrepresentation (and possibly fraud) does exist among dilapidations professionals and that it urgently needs to be both recognised and tackled more effectively. For example, in the pages of *Property Week* (May 16, 2008, p.74), Mr Edward Shaw, Director of Building Consultancy at Savills Commercial Ltd, was reported as having come across what, he believed, ''was a clumsy attempt at dilapidations fraud'' involving a landlord's dilapidations claim for circa £1 million that apparently demonstrably exceeded the possible legal liability of the tenant and that eventually settled at less than £200k.

This is a debate that has run for some time and there have been various discussions as to the reasons why these situations might arise. Much time, ink and effort could also be taken up debating whether individual cases are, in fact, cases of fraud. But given the common law and statutory definitions of fraud, surely any surveyor who initially represents that a claim is worth substantially more than ultimately they recommend their client should settle for ought to question whether they were, in reality, misrepresenting the position when they first presented the claim. If they were, would it be justifiable to class this overstatement as mere professional ''exuberance''?

Perhaps as a consequence of the difficulties associated with proving fraudulent intent, there do not appear to be many reported instances of professional bodies investigating questionable dilapidations representations by professionals when reported by the courts in published judgments. One might, therefore, speculate over what the true degree of fraudulent misrepresentation and/or fraud in the dilapidations community may be but, in doing so, it must be remembered that being reckless as to the truth, or not caring whether a representation is true, is sufficient to constitute a fraudulent representation.

All in the game?

But as some would observe, does the issue of representations and ''exuberance'' in dilapidations really matter? If a surveyor represents that a claim is for seven figures and then the claim is settled for a five figure sum, who has lost? As some perceive it, the landlord still has some cash and the tenant feels they have achieved a good result. Who is the victim? No one is likely to take further action—they will all simply move on.

For example, it is not unknown for those involved in dilapidations to refer anecdotally to cases they have encountered (or heard of) where a landlord and their advisers have steadfastly represented that there was no intention to redevelop a site that was the subject of a dilapidations claim only for the bulldozers to have moved in very shortly after the dilapidations settlement was concluded (on what appeared to be a misrepresentation of materially relevant future intentions). But what many do not realise is that even if the representations made on future landlord intentions were possibly 100 per cent true and accurate at the point of making and the intentions only changed at a later date, then this too can still constitute a misrepresentation as the courts can consider such representations as being ''continuing representations'' that the parties have a duty to correct when they subsequently determine to act in a manner that renders the original representations untrue. It is also not unheard of for the courts to then overturn past ''full and final'' settlements where misrepresentation has occurred so the parties can then recommence the whole claim/settlement negotiations afresh.

Conclusion

As experienced professionals engaged on dilapidations cases on a daily basis, it would be fair to say that our personal experiences over the years suggest that a sizeable proportion of claims and defences received contain representations that in many cases seem beyond the reasonable range of objective and competent professional opinion and, therefore, one might subsequently struggle to classify them as being of the ''innocent misrepresentation'' variety. Regrettably though, in our experience, there remains a curious and relatively significant proportion of dilapidations claims or defences where the nature of the apparent misrepresentations encountered seem to be unduly suspect and, in keeping with the apt phrase reported in the *Business Environment Bow*

Lane Ltd case, above, remain ''at best reckless . . . and at worse less than scrupulous''.

By engaging with others within the community, we have learned that our experiences seem to be mirrored by many other fellow professionals and so it is not unreasonable to expect that, one day, there will be a case where the sums involved are such as to justify an irritated landlord or tenant party taking action to recover excessive sums paid or losses unrecovered as a consequence of a misrepresentation by a trusted professional.

Perhaps, the key aspect that practitioners in the dilapidations community need to keep in mind at all times is that, in preparing a schedule of dilapidations (or responding to one), a surveyor is essentially setting out their client's position in relation to a breach of contract claim. In the same way that they must be cognisant with, and have regard to the relevant case law and principles applicable to such claims, they ought really to understand the potential consequences should they misrepresent their client's position.

There have been some calls from within the dilapidations surveying community for better education and guidance to be given on the key issues such as representations, misrepresentation and fraud, particularly given the duties of care owed by professionals and the severe consequences arising from professional transgressions and less than scrupulous exuberance. To some extent, this has started to be addressed by seminars and discussions within the context of the RICS dilapidations forum. Whilst this may be considered to be a positive and helpful step within the relatively small forum community there are a significant number of surveyors engaged in dilapidations work who are not privy to these discussions. Consideration might be given, therefore, to a more formal promulgation and discussion of these issues. Indeed this might be something for consideration by the RICS when the time comes for the Dilapidations Guidance Note to be updated.

Ultimately, the real point for individual consideration by all professionals on a case-by-case basis is to ask themselves: ''notwithstanding the result that my client would like to achieve, am I prepared to stand before a judge of the Technology and Construction Court and justify my statements on oath?'' Individuals who prepare statements which will be used as statements of fact either to pursue or defend claims owe it to themselves to undertake a reality check at the time they put pen to paper. If there is any doubt as to answering in the affirmative then, given the potential penalties referred to above, is it worth the exuberance in an attempt to enhance a client's negotiating position?

The law is stated as at December 1, 2009.