Can Commercial Property Dilapidations Surveyors Ever Be "Economical with the Truth"?

By

Keith I. Firn, Patrick Stell and Michael R. Watson

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Can Commercial Property Dilapidations Surveyors Ever Be "Economical with the Truth"?

Keith I. Firn, BSc(Hons), MRICS, MFPWS
Chartered Building Surveyor, Director, Datum Building Consultancy

Patrick Stell, MSc, MRICS
Chartered Building Surveyor, Solicitor (non-practising), Director, GKS Building Consultants

Michael R. Watson, TD LLB
Partner, Property Litigation and Risk Management, Shulmans, Solicitors

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Background

In June 2003, the Royal Institution of Chartered Surveyors (RICS) published the fourth edition of their Dilapidations Guidance Note in which it was identified that a surveyor preparing the initial dilapidations schedule at pre-litigation stages was an "*expert*" (albeit not yet an expert witness) who "should produce a schedule or valuation he considers he will later be able to present to the court in accordance with his obligations", further stating that "surveyors should … conduct themselves within the spirit of the [Property Litigation Association] Protocol [for Terminal Dilapidations Claims for Damages (Ver.1, July 2002)]."

In June 2008, the fifth edition of the Dilapidations Guidance Note reversed the suggestion that the services provided by a surveyor pre-litigation were those of an "expert" and, instead, concluded that the schedule of dilapidations was prepared by a surveyor acting simply as an "adviser". Since 2008, there has been debate between dilapidations specialists regarding the definition of the role of the surveyor in a dilapidations claim at the pre-litigation Protocol phase. At the height of the debate, two Technology and Construction Court Judges spoke at the RICS conferences in 2008 and 2009 to contradict the formal position of the RICS stating that surveyors at lease-end were providing "expert" services from the outset of a claim and should behave accordingly (see, *Landlord & Tenant Review*, Vol.12, Issue 6, pp.199–202).

In response to the debate, the RICS Knowledge Board published an *Independent Legal Review of the Dilapidations Guidance Note* (fifth edn) in 2010.

Can a surveyor be "economical with the truth"?

While the Independent Legal Review reached a number of non-contentious and relatively unsurprising conclusions, other elements raised eyebrows amongst dilapidations professionals. For example, the Review provided a pre-litigation dilapidations claim scenario as follows:

> "27. Where a surveyor is acting as adviser for a landlord client in (for example) a terminal dilapidations dispute, it will not be unusual for a conversation of the following sort to take place:
> With decent patch repairs costing in the region of £12,000, the roof could last for another five to ten years.
> A complete roof renewal would cost £65,000, but I could not justify that if this matter ends up in court …."

Within the Independent Legal Review it is then implied (or suggested) that, during the pre-litigation stages of a dilapidations claim, a RICS Regulated Chartered Surveyor:

- *"… is allowed to be economical with the truth."*
- *"…is not obliged to set out the whole and complete truth…"*;
- *"… is under no obligation to …"* limit his schedule of dilapidations remedial works being claimed to only those works and costs that he believes would be *"acceptable"* to undertake and incur in order to remedy the breach being complained of."
- may *disregard* his *"… own professional view … that the cost is unwarranted"*.

To some within the dilapidations community, the extent to which it is being suggested that chartered surveyors can be *'economical with the truth'* during the pre-litigation phase of a dilapidations claim seems to be at odds with the CPR, the PLA Dilapidations Protocol and other RICS policy and Rules of Conduct.

The duty of good faith and honesty

In the scenario set out at paragraph 27 of the Independent Legal Review, the landlord's chartered surveyor clearly knows that the schedule of dilapidations and claim that he is preparing for his client is specifically intended for service by his client on the former tenant as the initial pre-litigation step in the pursuit of a claim for damages alleged to flow from a breach of contract. Therefore, when considering whether a chartered surveyor may indeed be "economical with the truth" at the pre-litigation stages of a dilapidations claim, a sensible starting point would be to first establish whether or not the surveyor ought to owe any duty of care to anyone other than their client when making representations that are intended to be central and of material relevance to a legal claim; and if so, what standard that third party may reasonably expect the chartered surveyor to have adopted in the provision of their services.

It is an established legal principle that the duty of good faith which exists between parties extends to any process, whether by negotiation or otherwise, designed to bring about the termination of that relationship (see, *Blisset v Daniel* (1853) 10 Hare 493) and this duty of good faith could be said to apply in lease-end dilapidations claims. Also, in the notable dilapidations case of *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2008] 3 EGLR 105, (TCC), HHJ Toulmin CMQ QC confirmed that, even at pre-litigation stages, the former tenant was:

> "entitled to assume that the claim was being put forward (by the landlord and their appointed surveyors/advisers) in good faith based on sound advice…."

Furthermore, this duty of good faith when making representations during negotiations in circumstances such as a dilapidations claim has been held to carry with it a further duty that the "parties act honestly": see, *Logicrose v Southend United Football Club* [1988] 1 W.L.R. 1256.

Having regard to the guidance on such matters provided in the judgments of the courts, it seems unlikely that the landlords surveyors may legitimately disregard their duty to act in good faith and be anything other than entirely honest in the representations they make.

RICS professional standards

The RICS states that members of the public can have "unparalleled … confidence" in the services they receive from RICS regulated Chartered Surveyor members and firms who provide "… certainty of professional standards and ethics" that will be provided to the "… highest standards of excellence and integrity". In their recent publication entitled "Maintaining Professional and Ethical Standards", April 1, 2010, the RICS sought to remind its members of the core professional values for chartered surveyors as follows:

- **RICS Core Value 1:**

  "*Act honourably* … Never put your own gain above the welfare of your clients or others to whom you have a professional responsibility. Always consider the wider interests of society in your judgements".

- **RICS Core Value 2:**

  "*Act with integrity* … Be trustworthy in all that you do— never deliberately mislead, whether by withholding or distorting information."

It is also relevant to remember that within the RICS *Dilapidations Guidance Note* (fifth edn, 2008), there is a further reminder to chartered surveyors that states that: "surveyors should not allow their professional standards to be compromised in order to advance clients' cases".

In terms of acceptable ethical conduct, the RICS stated within the *Professional Ethics Guidance Note*, (2002) that members are required to give:

> "… one's best to ensure that client's interests are properly cared for but in doing so the wider public interest is also recognised and respected. … The need for professional ethics is based upon the vulnerability of others …"

and that clients and the wider public interest/community:

> "… must be protected from exploitation in a situation in which they are unable to protect themselves because they lack the relevant knowledge to do so …."

The Independent Legal Review gives the example of the surveyor (who is not acting as an expert witness) and states that he is "allowed to be economical with the truth". In the context of RICS policy, rules and guidance, this is simply not correct.

The surveyor's obligation under the PLA Dilapidations Protocol

Recent press coverage suggests that the Property Litigation Association (PLA) Dilapidations Protocol may shortly be formally adopted by the Ministry of Justice as a Civil Procedure Rules Pre-action protocol. This will formalise an approach to dilapidations claims from lease-end that has been widely publicised by the PLA since 2002.

Among other procedural obligations, the PLA Dilapidations Protocol requires a statement to be signed by the landlord's surveyor to confirm that:

- All works set out in the lease-end schedule are reasonably required in order to put the premises into the state required by the terms of the lease.
- Full account has been taken of the landlord's intentions for the property.
- The costs claimed are reasonable.

The question, therefore, arises as to whether the surveyor who is "economical with the truth" after lease-end (but before litigation) is making a deliberate misrepresentation and, consequently, whether this accords with the surveyor's obligations under the PLA Protocol. From a legal perspective, it is doubtful whether a surveyor preparing a knowingly exaggerated/overstated claim (i.e., one who is being economical with the truth) could issue the schedule complete with the signed endorsement required by the RICS *Dilapidations Guidance Note* (fifth edn) and/or the PLA Dilapidations Protocol (version 3).

The standard of surveyor conduct set out in the example used in the Independent Legal Review is incompatible with other RICS guidance and case law.

Dishonest conduct?

In relation to the example of the allegation of roof disrepair given at para.27 of the Independent Legal Review where "economies with the truth" were cited as acceptable, it is arguable that both the landlord and his surveyor conspired to make serious misrepresentations to the tenant. This raises the question of whether ultimately the courts might consider such "economies with the truth" to be serious enough to constitute dishonesty (i.e. a lie).

There is no current statutory definition of dishonesty. Law enforcement bodies such as the Economic Crimes Department of the City of London Police turn to the tests for dishonesty set out in *R. v Ghosh* [1982] Q.B. 1053, where it was held that whether or not an act was dishonest would depend on whether first, the defendant's conduct was dishonest according to the ordinary standards of reasonable and honest people; and second, the defendant realised that it was dishonest according to those standards (as opposed to his or her own standards). In the context of the *Ghosh* test for dishonesty, the surveyor and the landlord client must know beyond reasonable doubt that their "economy with the truth" would be considered dishonest by the standards of most reasonable people and that the misrepresentations were inherently dishonest.

The answer to whether the example of the false claim for roof replacement is dishonest depends on whether the party making the statement knew from the outset that their exaggerated claim could not be justified in court if the dispute proceeded to litigation. While the conclusion that such conduct would be dishonest is relatively easy to reach, the further question arises as to whether such dishonest professional conduct also constitutes a criminal act.

Fraud and/or a conspiracy to defraud?

For dishonest misrepresentations to constitute the criminal offence of fraud by false representation (see s.2 of the Fraud Act 2006), the misrepresentation in question must be considered to be one concerning a matter of fact; and that in making (or attempting to make) the representation the party intended an unjust gain or to cause an unjust loss to another (see, ss.2 and 5 of the Fraud Act 2006).

If any attempted fraud is carried out by more than one party in collusion together to perpetrate or initiate the fraud, then it may also constitute the separate criminal offence of a conspiracy to defraud (see s.12(1) of the Criminal Justice Act 1987 and s.1(1) of the Criminal Law Act 1977). Both the separate offences of fraud and conspiracy to defraud carry with them the potential of up to 10 years in prison and a fine, and therefore anyone involved in preparing and or responding to a schedule of dilapidations ought really to consider their position carefully and exercise a high degree of caution.

When considering the potential for fraud offences being committed, one must also consider whether the surveyor's misrepresentations in the above scenario concern statements of fact (as required by s.2 of the Fraud Act 2006) or mere surveyor's informal "negotiator's" opinion. To answer this question, one must first return to precisely why a landlord (or, indeed, tenant) would seek to employ a chartered surveyor to prepare (or respond to) a schedule of dilapidations. The simple answer is that the chartered surveyor has a specialist knowledge and skill in the field of dilapidations relating to the type of property in question. In undertaking the survey of the property and in identifying the extent of alleged breaches, the surveyor also becomes an important witness of fact whose evidence as to the condition of the building will be held as objective, trustworthy, honest, and authoritative. Having regard to decisions such as *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801, there is a general view that where the maker of the statement (i.e. the landlord's chartered surveyor in the above scenario) has special knowledge and acts in an authoritative and supposedly objective capacity, any statement made by the surveyor is more likely to be held by a court to have been one of fact rather than a mere informal opinion.

With regard to the other fraud criteria (i.e. an intent to make a gain or cause loss by the false representation), the "economies with the truth" misrepresentation scenario set out in the Independent Legal Review can be seen as an attempt to exploit a naïve tenant with intent to make an unjust financial gain for the landlord that he is simply not entitled to receive at law. If there were any doubt as to the intention behind the landlord in making the knowingly exaggerated claim, one only need ask the following simple question: if the tenant received the claim in good faith and trusted the landlord's surveyor, and in reliance on this trust accepted the claim at face value and consequently offered to settle the claim by payment to the landlord of the full £65,000 sum claimed, would the landlord and/or the landlord's surveyor:

(a) bank the £65,000 knowing that only £12,000 was the sum which would have been recoverable at law as damages for breach of contract? or

(b) correct the claim and accept only the lesser but justified and true settlement sum due of £12,000, returning the balance of £53,000 to the tenant?

If they chose option (a), would their conduct be considered dishonest by the standards of most reasonable people?

Conclusion

"Economies with the truth" in professional representations have potentially serious consequences that chartered surveyors acting on dilapidations instructions should have regard to, irrespective of whether or not formal litigation has yet commenced. Deliberate misrepresentations and/or exaggeration in dilapidations claims should be discouraged at all stages of a claim. The preparation and service of a schedule of dilapidations is the first step under the provisions of the PLA Protocol which, according to the PLA, is likely to be formally adopted in the not too distant future.

The opinion that surveyor “economies of truth” are permissible during the pre-action protocol phase of a dilapidations claim is starkly at odds with other guidance on conduct and standards issued by RICS. If this curious notion is left unchecked, it will only serve to damage the hard-won and much deserved good reputation of the RICS and its members.