DILAPIDATIONS AND PROFESSIONAL OBLIGATIONS

An investigation into lease end commercial dilapidations

and the appropriateness of surveyors providing professional services

on contingency fee terms of engagement

by

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ABSTRACT

About the Research

This research examined if contingency fee arrangements are an appropriate means of remuneration for professional building surveyors involved in lease end commercial dilapidations and if by engaging in contingency fee arrangements surveyors demonstrate a greater willingness to act in an unprofessional and unethical manner.

The research was based on a large online questionnaire survey of 634 surveyors and 850 Solicitors, it achieved response rates of 18% and 15% respectively. A Technology and Constriction Court Judge also agreed to participate.

Why is it important

There is evidence to suggest that despite the introduction of Civil Procedure Rules (CPR) in 1999 a culture of exaggeration and understatement in dilapidations disputes continues and that the financial conflict or interest created by contingency fee arrangements maybe a significant factor. The RICS considers it important that the profession maintains and strives for the highest ethical and professional standard, that its members uphold their obligations and protect the consumer.

Key findings

Contingency fee arrangements are not appropriate unless subject to full disclosure to all parties. Contingency fees are subject to the rules of champerty and the way they are currently being applied by surveyors at the pre-litigation stage is at odds with CPR rules. The common law supports the view that contingency fee funding at any stage of a dispute including the pre-litigation stage is unacceptable. The courts have also ruled that surveyors on a contingency fee cannot maintain objectivity even if they genuinely believe they can. A surveyor should therefore see themselves as an 'expert from the start'. They cannot as some believe simply swap fee arrangements at the point of litigation commences.

The judiciary are not in favour of contingency fees and the majority of solicitors who have formed an opinion believe that they are resulting in exaggeration and understatement.

Surveyors who act on a contingency fee basis regularly are acting under a financial conflict of interest, the research demonstrates that as a result they exhibit a lower regard for their professional obligations and duties of care than surveyors operating with other means of remuneration.

Recommendations

The RICS has the professional rules and ethical standards in place to protect the consumer however the RICS need to take a greater interest in this area of surveying and improve education to increase transparency and remove the ambiguity in the current dilapidations guidance that allows the status quo to continue.

DECLARATION

I, the undersigned, declare that this is my own work, unless due acknowledgement is made to the contrary.

I also agree that, subject to any confidentiality agreement, the College of Estate Management is permitted to use and/or make reference to the material contained in this document within its study materials or any other publication, provided appropriate acknowledgement is made.

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ABBREVIATIONS

APC	Assessment of Professional Competence
CPR	Criminal Procedure Rules
DWG	Dilapidations Working Group
TWG	Transparency Working Group
GN	Guidance Note
LLP	Limited Liability Partnership
MRICS	Member of the Royal Institute of Chartered Surveyors
PLA	Property Litigation Association
QC	Queens Council
RICS	Royal Institute of Chartered Surveyors
TCC	Technology and Construction Court

CHAPTER 1 – INTRODUCTION

1.1 The problem 2

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1.1 The Problem

Claims in commercial dilapidations disputes at lease end have been described by 'Firn *et al.* (2008) as having a culture of exaggeration and understatement'. The part played by the financial interests of the professional surveyors advising in these matters they argue is a significant factor in this exaggeration, resulting in loss of professional objectivity and increased financial risk to clients. Furthermore, there is an absence of clear guidance from the Royal Institute of Chartered Surveyors (RICS) as to the appropriateness of contingency fee arrangements.

Within this void the professional surveying community has become polarised between those who believe that fees related to the quantum gained or saved for the client is an acceptable means of remuneration, and those who do not (Firn and Stell 2008). The debate continues as to whether these fee arrangements are compatible with the underlying rules covering the provision of services in this field in relation to court actions, professional regulations and ethics.

1.2 Context

Ross (2010) and McChesney (2014) describes how due to the recent state of the property market, the number of long leases granted in the 1980s but coming to an end in the next few years and the general trend of shorter lease length, the number of dilapidations cases is expected to increase.

Surveyors have traditionally worked on a contingency fee basis for all aspects of surveying work, including dilapidations. The RICS promoted this system of remuneration until February 2000, when it was forced to withdraw its guidance by the Office of Fair Trading (RICS 2012a). Percentage fees themselves were not criticised, rather that the RICS was operating a cartel. The RICS accepted this judgement, stating that fees are a matter of "private contractual agreement" between surveyor and client (RICS 2012b).

Modern dilapidations disputes are subject to the Civil Procedure Rules (CPR) applied to cases since 1999 (Justice 2013). To support the ethos of narrowing the issues prior to litigation, the CPR introduced "pre-action protocols". They are given force by Practice Direction – Protocols. After lobbying by the Property Litigation Association (PLA), Dilapidations received its own Protocol in 2012 (PLA 2012)

The RICS itself provides its members with practical guidance through its Dilapidations Guidance Notes (GN) the most recent being the 6th Edition (RICS 2012b).

1.3 Theoretical framework

This research focuses on the theoretical arguments put forward by Firn and Watson (2008) that surveyors' contingency fee arrangements have polarised the community into Traditionalists and Modernists. Traditionalists defend the right to continue to offer services on a contingency fee basis and Modernists reject them.

The arguments put forward by Firn and Watson identify Traditionalists as being motivated by psychological egotism and that, ultimately, the defence they give to the perpetuation of contingency fee arrangements is that of financial self-interest.

Modernists, on the other hand, are seen to take a normative ethical position. Their decision making process acknowledges that, despite the unlikelihood of being brought to account, rules exist and should be applied because doing so is morally correct and will protect the surveyor, client and the profession.

Firns and Watson's theory also suggests that corporate guidance has triumphed over corporate ethics and that the role of the RICS in polarising the dilapidations community cannot be overlooked. The RICS Code of Practice and professional ethics guidance does not openly endorse the pursuit of financial self-interest but the professional guidance it embodies and gives to dilapidations practitioners appears to leave the door open to it.

1.3 Value of further investigation

The issues considered in this research have been discussed at length within the dilapidations community, most notably on the RICS Dilapidations Forum and the LinkedIn Dilapidations Forum and Interest Group, but no comprehensive research has been undertaken to determine the effect of contingency fee remuneration on professional ethics and obligation, whether the issues are fully understood, or if they are understood but are being ignored.

There is real concern among many in the dilapidations community that the RICS advice on this subject is misleading and based on poorly conceived academic investigation (Firn and Watson 2010). The RICS efforts to settle the argument over the appropriateness of contingency fees have been met with heated criticism that has propelled the debate forward. Advice commissioned by the RICS that has come out in support of the argument has been widely disseminated as gospel across the dilapidations community in Roadshows and CPD events but without full and transparent debate (Firn and Watson 2012).

Part of this research will look at the ethical aspects of this type of fee arrangement. Surveys of ethical behaviour and attitudes in the surveying community have been undertaken previously (Plimmer *et al*. 2009). However, there have been no formal studies into the ethical conflicts posed specifically by contingency fees in dilapidations disputes. Further research was recommended by Edwards *et al.* (2009) into the ethical practices of different built environment disciplines. Recently, the profession has been undertaking an introspective evaluation of its ethical practices and behaviours (Edwards and Pottinger 2010). This research is, therefore, intended to add to the literature analysing formal guidance and ethical standards adopted by the profession.

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2.1 Aims of the dissertation

The aims of this research are;

a) to explore the justifications for contingency fee arrangements as an appropriate means of remuneration for professional building surveyors involved in pre-action dilapidations disputes.

b) to investigate whether building surveyors engaging in contingency fee arrangements are more willing to act in an inappropriate manner than surveyors working without an interest in the quantum of the claim.

c) to assess the dilapidations community's understanding of the subject and to comment on potential dangers and risks highlighted by Firn and Watson (2008) over contingency fee arrangements.

   In doing so, weaknesses that could be addressed by appropriate guidance and training can be drawn to the attention of the dilapidations community and form part of the ongoing improvements to RICS standards.

2.2 Hypothesis

Contingency fee arrangements are not compatible with professional obligations; those who adopt them are doing so at risk.

2.3 Objectives

1. Examine how well contingency fee arrangements stand up to scrutiny when viewed in the light of Common Law, the Law of Champerty and Maintenance.

2. Investigate how compatible contingency fees arrangements are with RICS Ethics, Rules of Conduct and Guidance.

3. Examine how surveyors, solicitors and the judiciary view the appropriateness of surveyors' contingency fees and in what ways they differ.

4. Investigate if surveyors acting on a contingency fee basis are more willing to set aside their professional obligations.

5. In light of the research findings, make recommendations to the dilapidations community with regard to producing future guidance.

2.3 Limitations

Certain issues have been identified that will limit the scope of this research viz.

a) There are problems defining the survey populations for stakeholder groups,
b) the large size of these groups,
c) limited access to contact details and
d) prohibitive costs make it impractical to canvas their entire populations.

This research, therefore, does not seek empirical generalisation but, instead, aims to provide an illustration of shared understanding by focusing on knowledgeable groups that undertake dilapidations work regularly within these communities. Access to particular one particular group of stakeholders, judges, was expected, and proved to have, a low response rate.

The surveyor and solicitor groups' survey populations chosen contain an anticipated bias. The aggregated data produced will contain a positive bias in the areas of the respondents' depth of knowledge of dilapidations and their level of seniority when influencing decision making within firms.

There is a lack of quantitative data available regarding the level of exaggeration of claims and links to contingency fees. Due to a lack of empirical data from reported court cases and according to the RICSs own disciplinary section on its website, the small numbers of RICS members being investigated and disciplined, this research has focused on the qualitative responses of the research populations and the findings should, therefore, be accepted as their aggregated opinions.

Previous ethical studies of the surveying community have focused attention on gathering detailed demographic data of those canvassed.

This research takes no account of such data as it was suspected that the conclusions resulting from its adoption viz. no definable correlation between ethical principles and age of respondents or size of organisation, have possibly masked the outcomes revealed herein.

However, it became apparent through a cursory analysis of qualitative responses that a link may exist between the level of experience and contingency fee arrangements that should have been explored. This is an area that would benefit from further research.

CHAPTER 3 – LITERATURE REVIEW

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3.1 Traditionalists v Modernists

'…there is the view expressed by some that surveyor appointments on financial performance related "contingency fee" terms are acceptable because such terms have been commonplace for a very long time and that clients prefer to make appointments on such terms. On the other hand, there is the view that incentivised contingency fee terms for surveyors pose a conflict of interest that appears to be both unethical and unprofessional.'

Firn and Watson (2009)

A dilapidations dispute arising at the end of a commercial tenancy is one of the few forms of civil dispute where lawyers are not the principle advisers during the key pre-litigation stage of a claim. Surveyors are often the professional adviser who 'run' the dispute on behalf of landlords and tenants. Edwards *et al.* (2008) The dilapidations surveyor maybe only one of a number of advisers who will be called upon consult and give advice however amongst all others the roles the surveyor is central to advising and coordinating the client's strategy.

Jay (2012) has described how since the abandonment of RICS fee scales approximately twenty years ago, surveyors involved in dilapidation disputes have been negotiating their own rates. The question of how surveyors are remunerated for the services they provide has become a contentious issue that divides opinion in the surveying community. According to Gilbert (2012) fees are normally set on a fixed fee basis for the preparation of schedules and notices, and either time charge or contingency fees for negotiation or monitoring. Contingency fee agreements being a success-based means of remuneration were in the context of dilapidations a surveyor receives a fee in proportion to the quantum of what is achieved or saved for the client.

The contingency fee debate began as the community started to communicate in real-time and discuss issues in earnest with setting up of the online RICS Dilapidations Forum in 2006. Prior, surveyors had few opportunities to meet and debate issues outside of Continuous Professional Development (CPD) events organised by the RICS and the annual RICS Dilapidations Conference.

In 2008 for the first time the RICS Dilapidations Working Group (DWG) posted a draft version of its Dilapidations Guidance Note (GN) the RICSs specific guidance for dilapidations for building surveyors for general RICS member's consultation. The draft GN was met with heavy criticism on multiple issues including the role of the surveyor and misrepresenting the common law principles of diminution, leaving some in the community to describe it as being unfit for purpose (Scouller 2008a).

Despite amendments Hunt (2008) has indicated how the subsequent Fifth Edition of the Dilapidations GN (RICS 2008) was poorly received. The distinction it made between surveying roles was described by Scouller (2008b) as 'flawed' and containing 'fractured logic'. Firn (2009) went as far as suggesting the Working Group had been ignoring calls for change and should be disbanded, and an alternative one instructed. One of the reasons he cited was the Working Groups reluctance to deal with the issue of contingency fees in two previous Guidance Notes. In the Fifth Edition of the GN Firn *et al*. (2010) highlight the reversal of the wording on the previous Fourth Edition GN that implied that the services provided by a surveyor pre-litigation were those of an "expert" and, replaced it with "adviser". The GN provides subjective guidance on the role of the surveyor. Stating that the surveyor may act as "adviser", "expert witness" or "dispute resolver". However, at no point does it explain the degree of crossover between these roles; nor the extent to which steps taken in one role, such as an initial "adviser", could impact subsequently on being a witness in court. Fundamentally there no acknowledgment that in almost every service provided by a dilapidations surveyor the role they undertake is one of a "witness of fact". The surveyor is the person who records the state of repair during the survey at lease end. They may also become the expert

witness (pre or post litigation). Regardless they therefore owe a duty under the CPR to the court to tell the truth in relation to all evidence as a “witness of fact” and as they are subject to the CPR they cannot act under contingency fee arrangements (Firn 2009).

Firn *et al.* (2010) describe how the RICS Transparency Working Group (TWG) was later forced to instruct an Independent Legal Review of RICS Dilapidations GN (RICS 2008 b), in direct response to criticism of the draft and following views expressed by two High Court Judges at the Dilapidations Conferences in 2008 & 2009 that ran contrary to its guidance and appeared to support one side of an increasingly polarised community; initially focused on whether the role of the surveyor at the pre litigation stage was one of an ‘expert’ or an ‘adviser’ and later to encompass the arguments over the appropriates of contingency fees.

The decision was made with the support of the RICS Knowledge Board in the autumn of 2009 to appoint Guy Fetherstonhaugh Queens Council (QC) to carry out this legal review on behalf of RICS (Stell 2012). In his review the QC found surveyors acting at the pre litigation stage could charge contingency fees. This opinion was promoted to ‘provided clarity’ to the dilapidations community and implied that it categorically determined ‘that surveyors engaged pre-action do not have expert status’ Firn (2011)

His independent review was in heavily criticised for its lack of a categorical or definitive statements that determine that surveyors can or cannot be an expert at the pre action stage. The guidance that there might be grounds where they are able to act depending on circumstances and the clients intensions according to Firn (2012) appeared completely inadequate. The QC also suggested that chartered surveyor could be ‘economical with the truth’ during the pre-litigation stage of a dilapidations. The claim was widely criticised for being incompatible with the duty of good faith, RICS Professional Standards and case law such as *Logicrose v Southend United Football Club* (1988) There has also been heavy criticism that the questions put to the QC where not published to give context to his remarks Stell (2012). The arguments given for this lack of disclosure being that the instructions were given on the basis that they would remain

confidential. This has led Davis (2012) to remark that the community was now questioning the transparency of the Transparency Group! Calls for a further review proved fruitless however the QC did subsequently pen an article, published in the Estates Gazette where he defended the continuing employment of contingency fees by surveyors and argued that the rules against champerty did not apply prior to the instruction as an expert witness. Fetherstonhaugh (2012). The article was declared by Jon Rowling (2012a) head of the DWG to have 'put the argument to bed' but the article did little to turn the debate in favour of Traditionalists and Kevin Woodman one of the members of the DWG later declared that he was changing his position having read the champerty case law and no longer believed that contingency fees were compatible. Woodman (2012). Rae (2012) described his views as wrong and it was as complete fiction to say that that a surveyor can act as an advisor to his client and therefore on a contingency fee basis before proceedings are issued only to become an expert later, there is he says no period of time that comes before "PRE".

This 'expert' or 'adviser' debate was not just semantics. According to Firn and Watson (2008) it was an important issue because under; the Civil Procedure Rules (CPR) rule 7.6 contingency fees could not be offered or excepted because it would contravene an expert's duty to the court and compromise their independence (Justice 2013). The 'advocate' or an 'expert' debate became so particularly polarised it prompted Firn and Watson (2008) to describe the two camps as "Traditionalists" and "Modernists".

The Traditionalist view being the surveyor can wear two-hats initially as an 'expert' producing the schedule and then act as a partisan advocate/negotiator during the pre-litigation negotiation stage. There is a belief among Traditionalists if you serve a schedule with no intension of litigation the CPR protocol rule 7.6 does not apply (Wood 2009). However if the issue does move to litigation the surveyor will simply change his or her fee agreements to comply with the protocol Chesser (2009). Others simply are of the opinion that contingency fees are harmless if the surveyor thinks there is little likelihood

of the matter ending up in court Blanchard (2009). Rowling (2007) appears to take issue with the fact that some Modernists have forced their opinion on others that the on by refusing to deal with surveyors who are appointed on contingency fee because they are seen to be 'conflicted'. Those who defend the practice of charging contingency fees have published far less on the subject than Modernists. David Jay and Andrew Marshall and Guy Fetherstonhaugh QC publishing the only recent articles containing an explicit defence of contingency fees. There has however been a great deal of support of contingency fees expressed on the online dilapidations forums. Most of the support has focused on the merits of such arrangements. The main arguments made in addition to contingency fees being harmless if there is no likelihood of the matter ending up in court are that; clients prefer this kind of fee arrangement, they encourage surveyors to get their clients to compromise on points of disagreement and settle. They discourage extreme positions and arguments and help surveyors focus on the issues Moor (2009). In some cases, they argue contingency fees work better than when they are paid hourly fees, where there is an inherent disincentive to settle because of the temptation to run the claim out and so charge more Jay (2012).

The main arguments made by Marshall (2011) are that contingency fees allow surveying firms to engage in risk-and-reward, that contingency deals are an effective measure of how successful the advice has been and that they are well suited to small claims and particularly long and complex ones. Jay (2012) writes that 'contingency fees are particularly well suited to tenant clients where there is a clear difference between the claim and the settlement allowing fees to be calculated on the amount saved'.

The 'Modernists' argue that this approach to fees is fundamentally flawed Edwards *et al.* (2008). Dilapidations claims are a legal' claim of damages. Evidence from the very beginning must be gathered and prepared 'in contemplation of litigation'. The individual doing this role is therefore an 'expert' from the start and dilapidations become litigious at the point parties confirm in writing that there is dispute.

Firn et al. (2011) argue that current RICS Dilapidations guidance is wholly inadequate with regards the guidance given by the courts as to the appropriateness of contingency fee arrangements, that there is in fact strong evidence from the courts that, in the majority of cases clients will not be able to recover contingency fees as damages. They cite the comments of H.H. Judge Toulmin in the case of *PGF II SA v (1) Royal & Sun Alliance Insurance Plc* (2010) as evidence of this view. Contingency fees are not compatible with evidence in court. Stell (2012) cites Lord Neuberger (2011) in his RICS Dilapidations Conference Key Note Speech when he stated that evidence gathered at the pre-litigation stage may not be accepted if the matter is decided in court. 'It is clear that an expert witness must be completely honest. The overriding duty to tell the truth may involve having to sell his client down the river'.

The Fifth edition of the RICS Dilapidations GN (RICS 2008) has been described as 'vague' on the matter of recovery of fees by Firn et al. (2011). The Sixth edition, of the Dilapidations GN (RICS 2012) also contains no explicit comments on the recovery of contingency fees, only that the 'landlord may be entitled to recover such costs as part of its claim to damages, but should seek appropriate legal advice before attempting to do so'.

The Modernists view appears to be supported by two judges who gave the Key Note Speeches at RICS Dilapidations Forum Annual Conferences in 2008 and 2009. Firn and Stell (2008) quote Her Honour Judge Hazel Marshall QC during her 2008 Key Note Speech, that in her opinion "Surveyors should be 'experts' right from the start". In 2009 the Honourable Mr Justice Coulson QC echoed this opinion when he said "Surveyors act as experts from the start". These views it should be noted by the justices own omission are purely a personal opinion.

Firn (2012) has recommended that as a matter of 'Best Practice' for surveyors the RICS should adopt and similar safeguards. Given its Royal Charter obligations there is a strong arguments that potentially exploitative, prejudicial or detrimental terms of engagement should be restricted or prohibited unless and until appointment terms, options and risks

are transparently explained in advance of an appointment so an appointment can be made on the basis of true 'informed consent'? Some within the community who have objected to the robustness with which they have sought to push forward their views have labelled their efforts a crusade Barnes (2009).

Firn and Watson (2009) comment that RICS places at the heart of its guidance an explicit emphasis on avoiding conflicts of interest and promotes the merits of acting ethically and with integrity. This standard, they argue, cannot be achieved with contingency fee arrangement. If the public are to have “unparalleled … confidence” in the services they receive from RICS members and firms who provide “… certainty of professional standards and ethics” that will be provided to the “… highest standards of excellence and integrity” contingency fees should not be employed Firn *et al.* (2010).

‘Ethics for Surveyors’, by Plimmer *et al.* (2009) was published by the RICS and investigated professional ethics in multidisciplinary real estate practices. This research report concluded that different determinants were at play between large and small firms. Hence size appeared to count in the ethical practice of surveyors.

The question of size was further investigated by Edwards and Pottinger (2010) when they explored the extent to which differences in approach to ethical issues exist between small and large firms. They concluded that the culture and attitude to ethics of a firm is not determined by the size of the firm but set at management level. They identified particular areas of practice where ethical standards where under particular pressure. These areas included; valuation, residential agency, investment, commercial agency, development and professional advice. Professional advice being the area of practice covering dilapidations.

According to Firn and Stell (2008) contingency fees encourage exaggeration and understatement. The main factor influencing misrepresentation is the basis of the fee

agreement reached with the client Firn *et al.* (2008 b). Surveyors may be tempted to skew evidence in their clients favour because of commercial pressure. Most of the support for contingency fees has focused on the merits of such arrangements and proponents insistence that clients prefer this kind of fee arrangement. Jay (2012) writes that contingency fees are particularly well suited to tenant clients where they want to see a clear difference between the claim and the settlement allowing fees to be calculated on the amount saved; and there are suggestions clients like percentage fees and often impose them on surveyors, therefore the practice is likely to continue until/unless they are "banned" Moor (2012). Some supporter believe contingency fees are good for business and allow surveying firms to engage in risk-and-reward, that contingency deals are an effective measure of how successful the advice has been and that they are well suited to small claims and particularly long and complex ones Marshall (2011) are that.

It is generally accepted that there is a natural desire for Landlord and Tenant clients to skew evidence, to gain a more preferential settlement than their true liability or damage suffered, it is natural commercial pragmatism. 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’’ (Firn & Stell 2008).

Firn et al. (2010) warn that this kind of dishonest misrepresentations may constitute the criminal offence of fraud by false representation under the Fraud Act (2006) and that it is essential that surveyors maintain their professional objectivity.

Assessing the wider community’s following and understanding of the contingency fee debate is difficult to judge. There RICS does not appear to have made any formal assessment of this issue by polling their members according to their website. Nor has any other organisation. The Property Litigation Association did conducted a survey in 2012 on matters relating to the introduction of the CPR Dilapidations Protocol (PLA 2012) which had 200 responses from surveyors but unfortunately the issue of fees was not raised as part of the questioning.

A number of straw polls have been raised on the online forums Firn, (2012) asked the question to members of the Linkedin Dilapidations and Interest Group ‘Dilapidations action be considered to be a matter of litigation from the outset of a claim’. The question produced an equal spit of yes and no responses. However there were only 44 responders from an online forum of 860; far too few for a meaningful study, so it is unknown if the views of those who responded will mirror the views of the wider community. Clearly there is scope for further investigation of the community’s views and understandings of these matters.

3.1 Maintenance and Champerty

Firn et al. (2010) advise that Common Law does not support contingency fee arrangements. They cite the case of *Factortame v Secretary of State for the Environment, Transport and the Regions* (2002) in which Lord Phillips felt an expert's independence would be affected by a financial interest and therefore he considers contingency fee arrangements highly undesirable. Firn (2012 b) also points out the surveying community has no real comprehension of the Doctrine of Champerty or the public policy that applies in dilapidations disputes.

Maintenance has been defined in the case of *British Cash and Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd* (1908) as:

"the wanton and officious intermeddling with the disputes of others in which the maintainer has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse".

Champerty 'occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit' Chitty (2014). Therefore champerty is a form of maintenance that has been described as Elliott (2001) as having the added feature that the agreed reward for assisting in the litigation is a share of the proceeds of the action. Lord Denning MR in 1963 said of Maintenance and Champerty *Re Trepca Mines Ltd*. (1963):

"Maintenance may, I think, nowadays be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse

The common law condemns champerty because of the abuse to which it may give rise Trepca Mines Ltd. The doctrine applies to the English justice system and is not based on moral grounds rather the administration of civil justice *Giles v Thompson*.

Until the Passing of the Criminal Law Act (1967) maintenance and champerty were both crimes and torts. Although these forms of criminal and tortious liability have been abolished, it remains the law that a contract involving maintenance or champerty is contrary to public policy, illegal and as such a contract cannot be enforced. (Elliott 2001).

The principles for deciding if a person is a champertous maintainer were considered in the case of *R (on the application of Factortame) v Secretary of State for Transport* (1990) Lord Phillips stated that must look at the facts of the case and decided if the agreement in question might:

"tempt personal gain, inflame the damages, and suppress the evidence, to suborn witnesses or otherwise undermine the ends of justice".

However it was has been stated more recently by the courts *Hill v Archbold* 1968 that because the law in relation to maintenance depends upon public policy it therefore must be kept under constant review. Ng (2012) argues it is no longer appropriate to use the doctrines of champerty and maintenance as blunt instruments with which to strike down third-party funding arrangements instead that a wider analysis of the type arrangement is required in order to genuinely decide if they poses a risk to the integrity of the process.

In the judgement of Lord Phillips M.R in *Factortame Ltd v Secretary of State for the Enviroment, Transport and the Regions* (2003) has been described by Firn and Watson (2009) as establishing that any professional expert providing expert opinion to the court acting on a contingency fee is seen to have a significant conflict of interest.

The issue of whether the rules against champerty only apply at the litigation stage or extend to the pre-litigation or pre-action stage of disputes was considered by Perason LJ in *Trepca Mines Ltd* (1963) that:

"The rules relating to maintenance and champerty apply to litigation generally… and are not restricted to actions or suits". Therefore they apply equally to the pre-action stages of inherently litigious disputes.

The question of whether dilapidations contingency fee arrangements fall on the right or wrong site of the Rules of Champerty was taken up by the RICS Transparancy Working Group (TWG) in 2009. The Dilapidations Working Group was asked to respond to the open submission. In response the DWG has argued that two decisions by the courts supported the case that contingency fees were not champertous. *Pickering v Sogex Services (UK)* (1982) and *Picton Jones & Co. v Arcadia Developments* (1988). In both cases the DWG argued that the courts held that the surveyors were entitled to recover their contingency fees.

However in the case of *Pickering v Sogex Services (UK)* (1982) by the RICSs own admission in its draft guidance note Rating Appeals (4th ed.) 15.7 (2013) this was a valuation dispute and as such the ultimate tribunal is a Valuation Tribunal (VT) not a court of law. This means that such fees do not make expert evidence given to VTs inadmissible. However, surveyors are advised to be clear that any such fee arrangement may be incompatible with the duty of impartiality and independence. In the second case cited *Picton Jones & Co. v Arcadia Developments* (1988) is a case the surveyor's where involved in arbitration again a case where the final tribunal is not a court of law but a court of administration. The law of champerty has not been applied when the proceedings envisaged are arbitration proceedings and not litigation.

In *Giles v Thompson* (1993) Steyn L.J.Firn considered that:

"The head of public policy, which condemns champerty, has only done so in the context of civil litigation".

Firn (2012 b) also points out the surveying community has no real comprehension of the Doctrine of Champerty or the public policy that applies in dilapidations disputes. RICS Guidance Surveyors acting as Expert Witness and Advocates; specifically expect Chartered Surveyors to be aware of and familiar with the rules, if Chartered Surveyors practicing in litigation/tribunal related fields such as dilapidations are not aware of the

detail of public policy and the rules against champerty they are they at risk at risk of a being professionally negligent and exposing their clients to avoidable risk (RICS 2011) .

In addition to the fact they are not compatible with the CPR the main arguments put forward against contingency fees by Modernist are that; that contingency fees are a form of Maintenance and that the rules of Champerty apply to even at the pre-litigation stage because dilapidations disputes are inherently litigious; that contingency fees promote exaggeration and understatement and this has been allowed to continue because the vast majority of cases settle out of court; and that the way contingency fees are being applied are not compatible with RICS Ethics and Rules of Conduct.

Despite these objections they do not propose prohibition. There is in their opinion nothing to prevent the surveyor from being instructed on a contingency fee basis as long as both the client and the opposing party are aware of the arrangement and have given their informed consent in the way proposed by Lord Justice Jackson in 2010 when considered ethical/consumer protection safeguards that should be introduced if lawyers were to be able to provide legal services on a contingency fee basis (Ministry of Justice 2010). Although in an address to the RICS Dilapidations Forum 2011 Conference the Master of the Rolls stated that “it may (still) affect the judge’s view of the expert’s credibility.” (Firn *et al.* 2011 L&T)

CHAPTER 4 - METHODOLOGY

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4.1 How the problem was investigated

Both qualitative and quantitative objectives contributed to fulfilling the research aims.

The research was conducted in two stages;

1. The first stage had a primary aim of gathering quantitative data from practising surveyors via questionnaires with a closed question structure. Primary quantitative data was also gathered from two further dilapidations 'stakeholder' groups; solicitors and judges.

2. The second stage involved both qualitative and quantitative analyses of the spontaneous responses received via e-mail from respondent's receiving the request to participate.

4.2 Sampling techniques

Population sampling for the purpose of statistical analysis was undertaken by selecting suitably qualified individuals from the surveyor and solicitor communities. The relatively small size of the Judges group who know how to deal with dilapidations disputes did not warrant such sampling and the entire Technology and Construction Court list of judges was selected as a survey population.

The quantitative data gathering was undertaken via an online platform in an entirely paperless exercise. A questionnaire was deemed the most appropriate form of data collection for taking a 'snap shot' of surveyor and solicitor groups; two relatively large survey populations.

Interviews would have been a more preferable way of investigating judges' attitudes, given the smaller survey population. However, a number of issues were identified that would prevent this approach from being successful, including the protected access to judges via clerks and court managers and their unwillingness to give judgement on matters outside of court. Therefore, despite not being the preferred option, an anonymous questionnaire was considered the only viable means of approach.

Questionnaire delivery by post was not feasible due to the prohibitive cost associated with posting a large number of questionnaires and providing return pre-paid envelopes. These costs, in addition to the amount of preparation time and organising distribution and collection, also made a web-based questionnaire with a built-in analysis function the most suitable option. A pre-designed template, hosted on the website Survey Monkey, was selected. This is well laid out, professional, avoids all paperwork, offers speed and accuracy in terms of data collection and enables results to be sent instantaneously to a database for analysis.

Respondents, upon selecting a link, were directed to a web page holding the questions. The questionnaire could then be completed using a 'tick box' system. Surveyors were asked to answer 11 questions; only two questions offered the option to expand to give an open answer. Solicitors were asked 10 questions, all with closed answers. Judges were asked 13 questions, 10 with closed answers, two with multiple option answers and one with an open answer. Survey questionnaires can be found in (Appendix A-1 to A-3).

4.3 Respondent contact protocols

The target group was sent the web-based questionnaire via e-mail, directly to the individual respondents, inviting them to participate. In the case of Judges, their e-mails were sent via clerks or Court Managers. The e-mail acted as a cover letter and included within the body of its text a hypertext link to the questionnaire housed on the Web Monkey website (Appendix B-1 to B-3).

The three groups were sent e-mails from one of three e-mail addresses assigned to their administrations. With the large number of e-mails being sent, this system would help keep track of bounced e-mails, messages indicating that staff members had left their current employment, or were absent on maternity leave or for other reasons.

The e-mail addresses were chosen to be generic, giving the researcher's name but making no reference to any employer or academic institution.

The cover e-mail provided the background information about the research, full details of the academic institution the research was being conducted under, student number and contact address. The cover e-mail stressed that all data would be handled confidentially and that no personal information would be taken or requested. As the approach was unsolicited, details were also given of how to complain if not satisfied with the way the research was being conducted.

As questionnaires were being sent to members of knowledgeable communities no stress was placed on questionnaire completion as a voluntary exercise. The tone of the cover letter simply requested participation, rather than risk appearing patronising to the judiciary and members of forums who are asked to participate in polls and surveys on a regular basis.

The cover letter e-mails to surveyor and solicitor groups ended by thanking them for participating and offering them a summary of research outcomes upon request. This leaves an opportunity for further dialogue and collection of qualitative data.

4.4 Size of the sample

In total 634 dilapidations surveyors, 850 property litigation solicitors and 35 Judges were sent questionnaires.

A request to RICS Customer Services has confirmed that, as of November 2013, there were 7,821 RICS Chartered Building Surveyors in England and Wales. Additionally, of the 14,392 Regulated firms 1,783 have stated that they undertake dilapidations, representing 12% of the total Regulated firms. No information was available to establish how many of the Regulated Building Surveyors undertake dilapidations work (Appendix C).

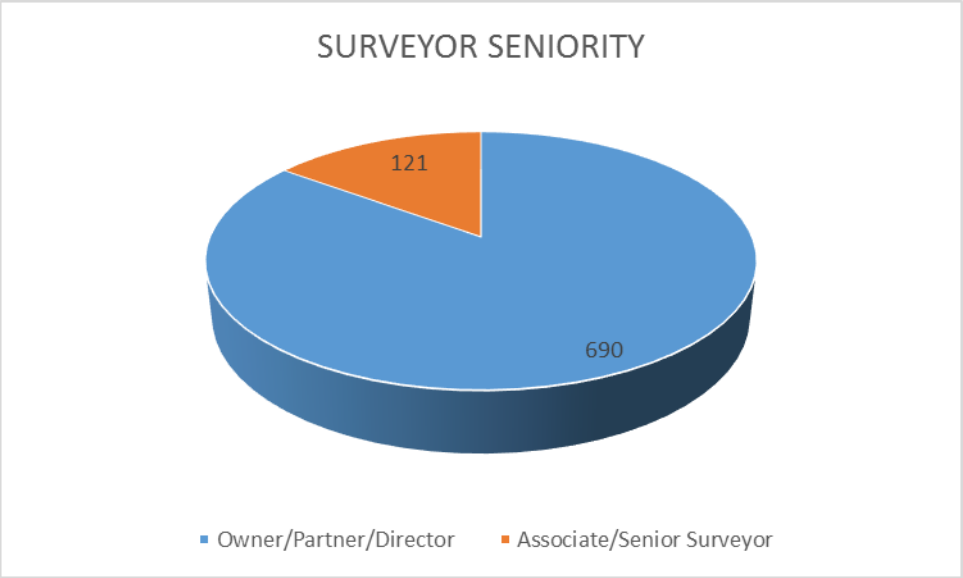
The Law Society's Research Unit reported in 2010 that of the 115,475 solicitors who were practising certificate holders, 20,176 worked in the field of commercial property, representing 17.5% of the total number. In the most recent summary for 2012 the total had increased to 128,778 a 10% increase, suggesting the total number of solicitors working in commercial property to be approximately 22,194. No information was available as to how many of these solicitors undertake dilapidations work. (Law Society 2014)

Dilapidations disputes are determined by TCC Judges. The Technology and Construction Bar Association website has an open directory of all the 52 TCC judges currently sitting in both the High Court and the regional centers and how they might be contacted.

4.5 Method of selection

Surveyors were selected from the membership of two online dilapidations discussion forums. By focusing on the members of these forums the study was able to identify surveyors who undertake dilapidations, the population size could be defined and a profile of the members' seniority and size of company the members work for could be established without explicitly asking. The survey population was found to be primarily senior level practitioners.

Chart 1.



The RICS Dilapidations Forum, set up in 2006, is the first group of its kind and the official forum for RICS members. The group had approximately 1000 members in December 2013 and is a moderated forum, where member's posts are vetted prior to posting. The second group 'Dilapidations Discussion Forum and Interest Group' is housed on the LinkedIn social interest website. Set up in July 2011, the group had 1160 members as of December 2013. Contributions are not vetted prior to posting but the group is moderated.

Both groups' membership required filtering to separate dilapidations surveyors from members of other dilapidations stakeholder groups including RICS staff, solicitors, surveyors involved in valuation work, barristers, property owners and tenants. Non-qualified members including university students and APC candidates were also excluded by way of experience. Group members practicing in Scotland were also excluded, the focus of the research being solely on surveyors operating in England and Wales.

Solicitors were selected from their membership of the Property Litigation Association (PLA). This is an organization representing legal professionals involved in (amongst other fields) commercial litigation. The PLA website suggests that its members come from a variety of firms in terms of size and location. This group, according to its membership database, has approximately 1100 members. This group was vetted to confirm that its Members operate in England & Wales. It was not possible to establish if members of this group specifically carry out dilapidations work, as profiles of members on their company websites were often too vague to categorically include or exclude from the study.

Judges were chosen from the list of Technology and Construction Court (TCC) Judges who preside over dilapidations cases. A total of 52 TCC Judges are listed including: five TCC permanent High Court Judges, seven High Court Judges, made available by arrangement with the President of the Queen's Bench Division, three TCC judges who may be available when necessary and by arrangement with the President of the Queen's Bench Division and a further 35 Judges based in regions across England & Wales.

4.6 Statistical analysis

Because the individuals being selected for surveyor and solicitor data analysis are members of particular interest groups and may demonstrate particular bias, the sample group cannot be described as a random sample of the general surveying population.

Severe skewing of results and its deleterious effect on conclusions could easily arise from a straightforward analysis of responses to the questionnaire. Factors such as age and experience of respondents is simply not known.

The answer to reducing this bias in surveyors' responses is to use the respondents' answers to a specific question concerning the fee arrangements they employ to create sample groups of Traditionalists and Modernists, against which the responses to other questions can then be analysed.

To reduce the bias in solicitors' responses the same technique is employed but, in this instance, focus on separating the Traditionalists and Modernists is achieved by asking if surveyors should stop acting under contingency fees.

Hence, a crucial part of the evidence for demonstrating the effect of financial practices, principally fee arrangements, on other areas of interest can be gleaned from analysis of these comparisons.

CHAPTER 5 – DATA COLLECTION

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5.1 Surveyors

5.1.1 Summary

The questionnaire had a response rate of 18.1% and the questionnaire was completed in full by 93.4% of the respondents. Three surveyors gave detailed qualitative responses via email.

5.1.2 Rationale for questions

'Do you act on contingency fees' is not given as the first question in the questionnaire. It has been placed third in the order to avoid putting off those who are perhaps weary of the 'contingency fee debate'. The groupings formed from its four ordinal answers a) Yes, regularly, b) Yes, infrequently, c) No but have in the past d) No, never; become the basis by which the answers to other questions will be compared. The first question asks what surveyors understand as their duty of care. This question is gauging the respondent's adherence to RICS GN and the wider Common Law. The second concerns conflicts of interest and disclosure; are respondents are willing to act with a known conflict of interest without disclosure, therefore threatening their impartiality and acting contrary to spirit of RICS Ethics and Professional Standards? The fourth question seeks to establish which surveyors are aware that, as a 'witness of fact' in a dilapidations dispute, the evidence they gather is subject to the CPR, even at the pre-action stage. The fifth has a focus on consumer protection, specifically the client landlord's ability to recover fees. Common Law has established that heads of claim for negotiations are only recoverable as damages if the matter moves to litigation. This question seeks to discover if surveyors are claiming for them when they have no right to do so and the client has no likelihood of recovering if the matter is decided in court. The sixth is exploring if surveyors are following the RICS Ethics & professional standard that set out that conflicts of Interest do not have to be actual but can just be perceived. The seventh gauges the community's understanding of 'Maintenance'. This question is also looking at surveyors' wider

knowledge, as the RICS Dilapidations Protocol 2.1.6 expressly warns surveyors that dilapidations ‘involves many legal considerations’ and surveyors should not act outside of their competency. The eighth question is an indirect study of attitudes to informed consent and whether those acting on contingency fees are as or less, willing to be more strictly regulated and transparent.

The ninth concerns the enforcement of RICS Rules of conduct, specifically the community’s perception of how well the RICS is dealing with conflicts of interest.

The penultimate question asks the community how successful they believe RICS guidance is in this area and the question drawing the questionnaire to an end is a poll of the community’s perception of the appropriateness of contingency fees.

5.1.3 Response statistics

In total, 115 responses were generated and confirmed to have been received from 634 emails sent, giving a response rate of 18.1%.

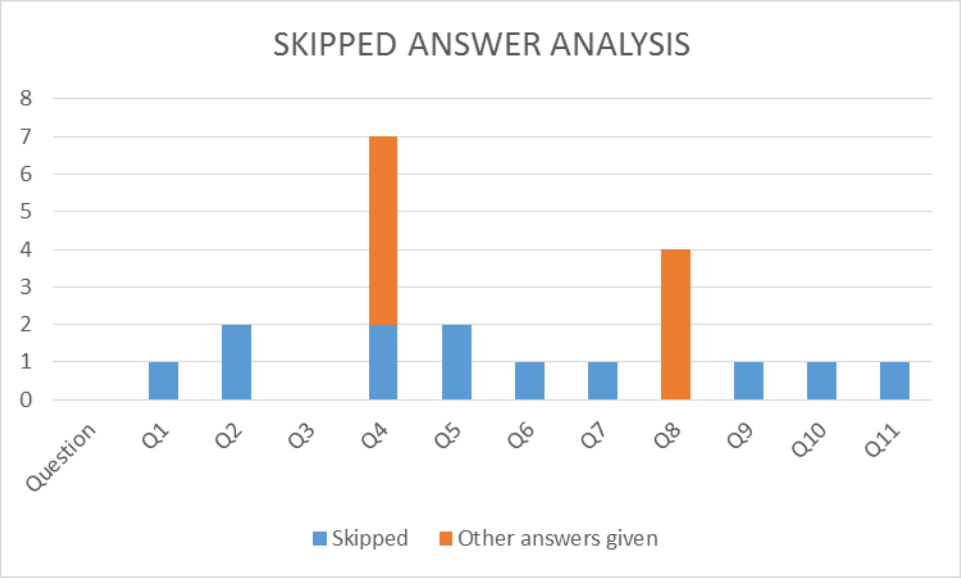


Chart 2.

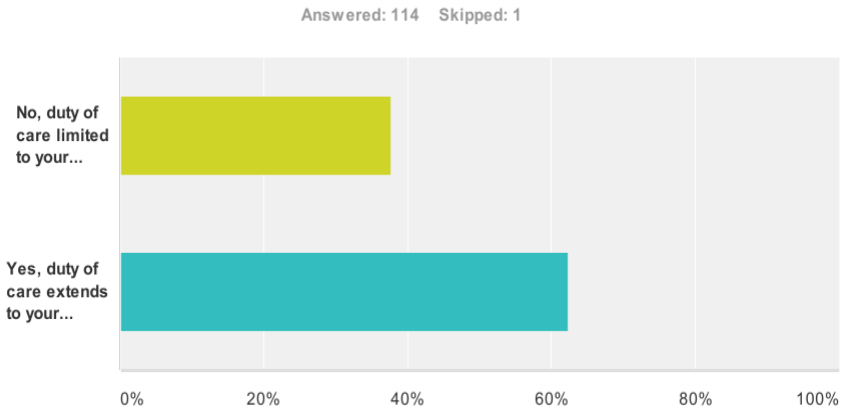
The questionnaires were answered in full by 108 respondents (93.9%). Of the seven respondents who skipped questions, five skipped a single question, one respondent skipped two questions (81.8% completion) and a single respondent skipped four questions (63.6% completion,) making them the only respondent not to complete the questionnaire to a satisfactory level of 80%. Overall the survey questions had a 99.1% completion rate.

All 115 respondents answered the question designated to be used for analysis of the other responses viz. (Question 3) 'When providing dilapidations services do you ever act on a contingency fee basis at the pre-action stages?'

5.1.4 Surveyor questionnaire responses and analysis

Question 1 of 11

Q1. In dilapidations, when preparing a schedule or schedule response to be served on your clients opposing party, do you accept that you owe that party a duty of care in addition to your own client and that they too may rely on the contents of your documents in good faith?

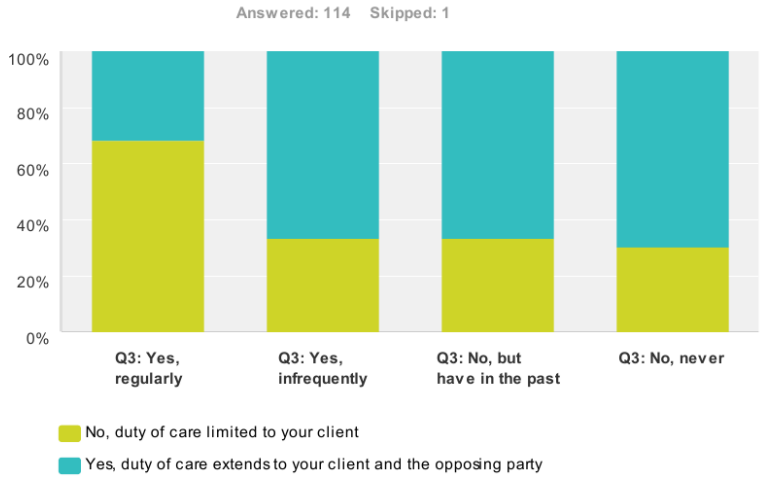


Answer Choices	Responses	
No, duty of care limited to your client	37.72%	43
Yes, duty of care extends to your client and the opposing party	62.28%	71
Total		114

Figure 1.

Question 1 of 11

Analysis of response to Question based on the fee arangement of respondents answering Question 3.

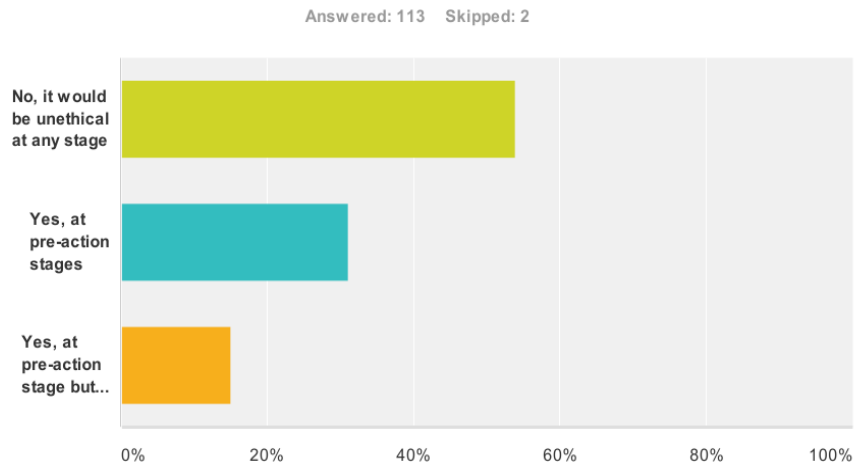


	No, duty of care limited to your client	Yes, duty of care extends to your client and the opposing party	Total
Q3: Yes, regularly	**68.42%** 13	**31.58%** 6	19
Q3: Yes, infrequently	**33.33%** 7	**66.67%** 14	21
Q3: No, but have in the past	**33.33%** 6	**66.67%** 12	18
Q3: No, never	**30.36%** 17	**69.64%** 39	56
Total Respondents	43	71	114

Figure 2.

Question 2 of 11

Q2. Do you think it is ethically appropriate for a professional claims assessor with expertise in the field of surveying to act with a direct financial interest in the quantum of a dilapidation damage claim they are quantifying?

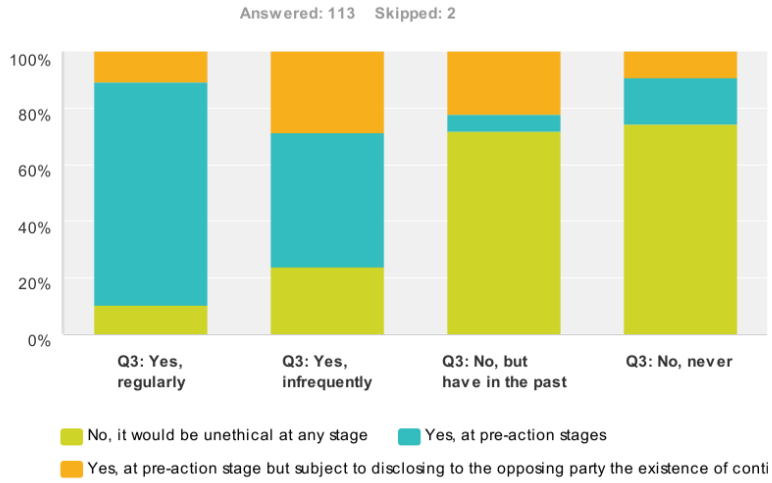


Answer Choices	Responses	
No, it would be unethical at any stage	53.98%	61
Yes, at pre-action stages	30.97%	35
Yes, at pre-action stage but subject to disclosing to the opposing party the existence of contingency fee interests	15.04%	17
Total		113

Figure 3.

Question 2 of 11

Analysis of response to Question based on the fee arangement of respondents answering Question 3.

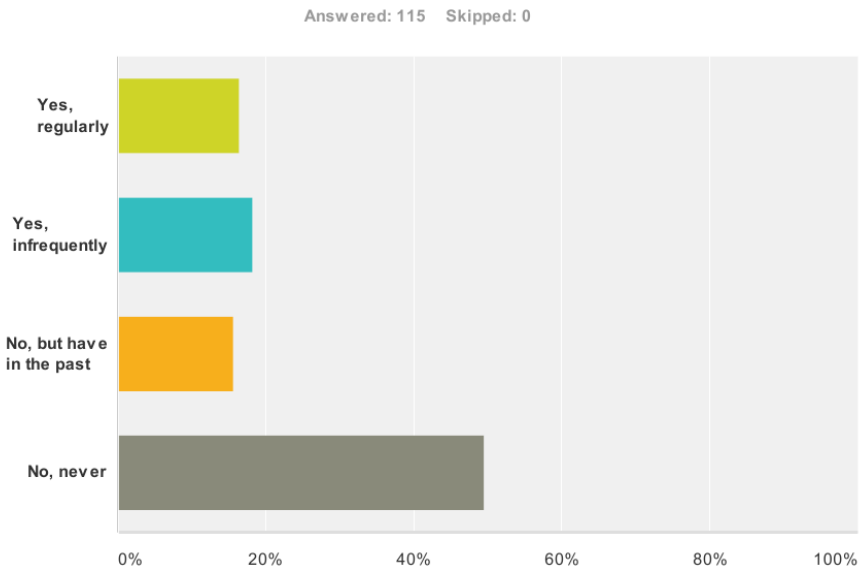


	No, it would be unethical at any stage	Yes, at pre-action stages	Yes, at pre-action stage but subject to disclosing to the opposing party the existence of contingency fee interests	Total
Q3: Yes, regularly	**10.53%** 2	**78.95%** 15	**10.53%** 2	19
Q3: Yes, infrequently	**23.81%** 5	**47.62%** 10	**28.57%** 6	21
Q3: No, but have in the past	**72.22%** 13	**5.56%** 1	**22.22%** 4	18
Q3: No, never	**74.55%** 41	**16.36%** 9	**9.09%** 5	55
Total Respondents	61	35	17	113

Figure 4.

Question 3 of 11

Q3. When providing dilapidations services do you ever act on a contingency fee basis at the pre-action stages?

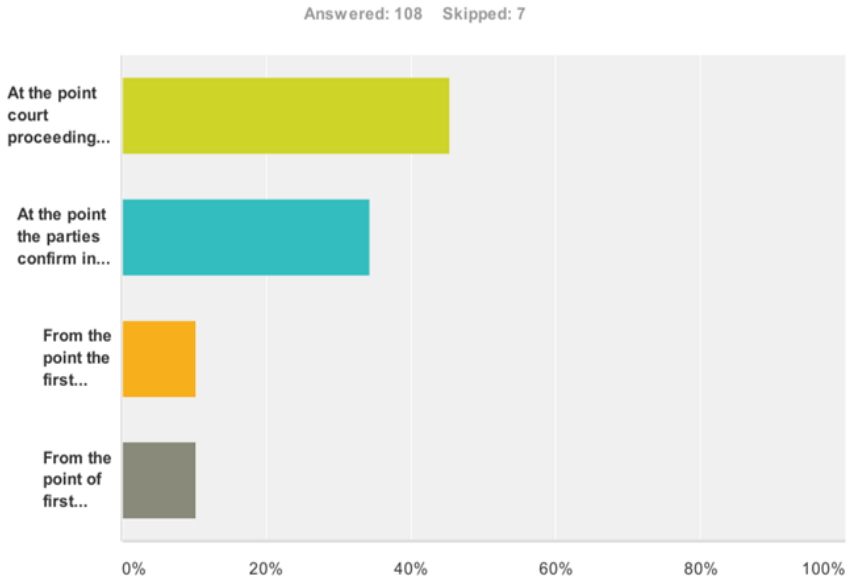


Answer Choices	Responses	
Yes, regularly	**16.52%**	19
Yes, infrequently	**18.26%**	21
No, but have in the past	**15.65%**	18
No, never	**49.57%**	57
Total		**115**

Figure 5.

Question 4 of 11

Q4. At what point do you consider a civil dispute for breach of contract and/or damages to be a matter of 'litigation'?



Answer Choices	Responses	
At the point court proceedings commence	**45.37%**	49
At the point the parties confirm in writing that there is a dispute	**34.26%**	37
From the point the first schedule is prepared	**10.19%**	11
From the point of first receiving instructions from a client	**10.19%**	11
Total		**108**

Figure 6.

Question 4 of 11

This question also contained an option for the respondents to make further comment.

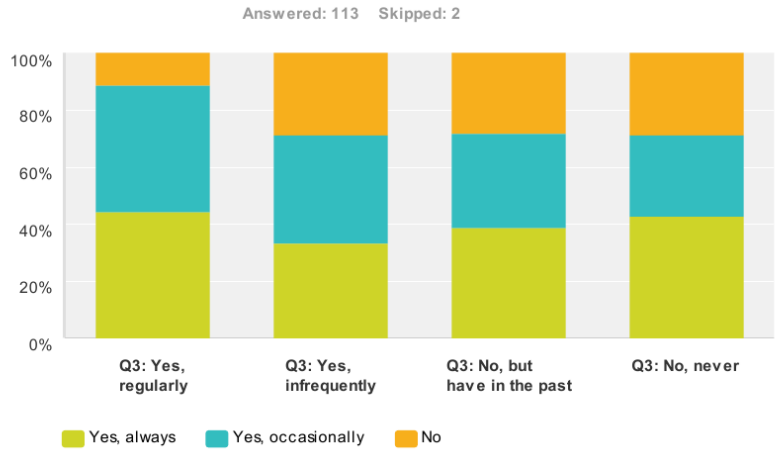
Of the seven respondents who skipped the question only one gave no 'other' comment and one made a point with no link to the question. Therefore, the answer rate can be raised to 98.26% for this question (113 respondents).

The 12 respondents' comments can be coded into the following category of answer for consideration in the qualitative data and as part of the qualitative analysis;

- Comments **4, 9, 10** & **12** are opinions that suggest a surveyor has already become a 'witness of fact' before a matter becomes litigious.
- Comments **1, 2, 3, 6** & **8** are opinions that a dilapidations matter will be a matter of litigation at a stage before a surveyor becomes a 'witness of fact'.
- Comments **5, 7** & **11** relate to points made on other or general aspects of the study.
- The five 'other' respondents gave a comment but skipped the closed answers; **1, 3, 4, 6** & **8**

Question 4 of 11

Analysis of response to Question based on the fee arangement of respondents answering Question 3.

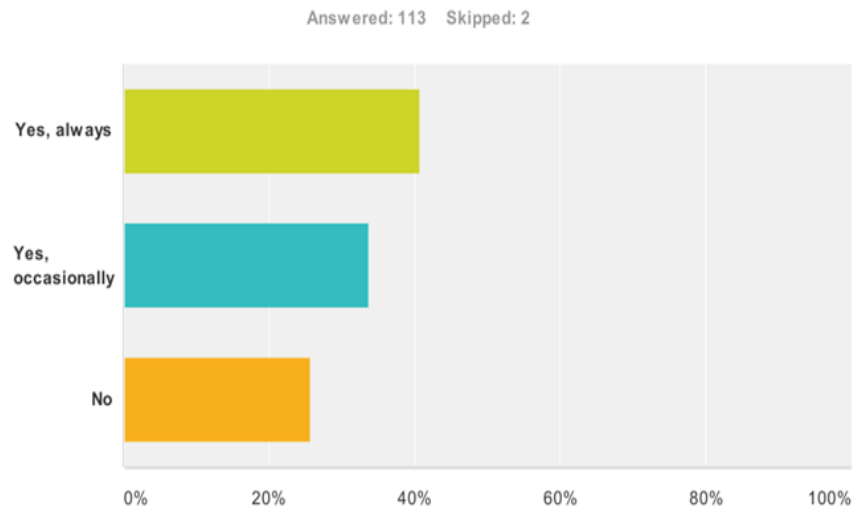


	Yes, always	Yes, occasionally	No	Total
Q3: Yes, regularly	**44.44%** 8	**44.44%** 8	**11.11%** 2	18
Q3: Yes, infrequently	**33.33%** 7	**38.10%** 8	**28.57%** 6	21
Q3: No, but have in the past	**38.89%** 7	**33.33%** 6	**27.78%** 5	18
Q3: No, never	**42.86%** 24	**28.57%** 16	**28.57%** 16	56
Total Respondents	46	38	29	113

Figure 7.

Question 5 of 11

Q5. Do you ever include heads of claim for dilapidations, pre-action stage negotiations, costs and fees within a Quantified Demand claim?

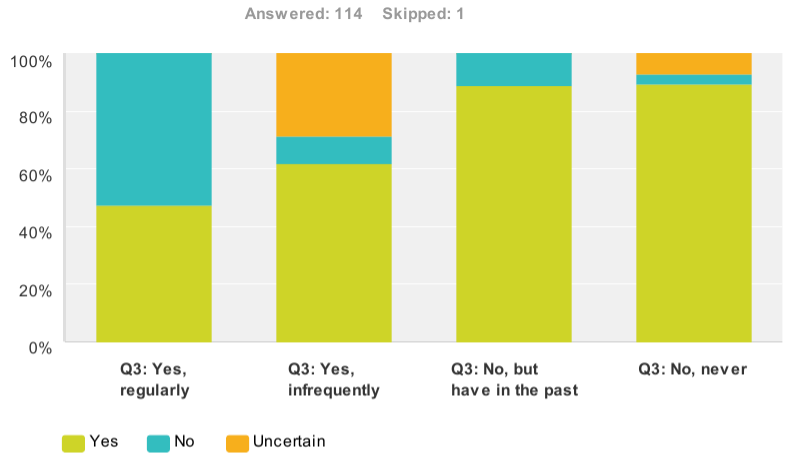


Answer Choices	Responses	
Yes, always	**40.71%**	46
Yes, occasionally	**33.63%**	38
No	**25.66%**	29
Total		**113**

Figure 8.

Question 5 of 11

Analysis of response to Question based on the fee arrangement of respondents answering Question 3.

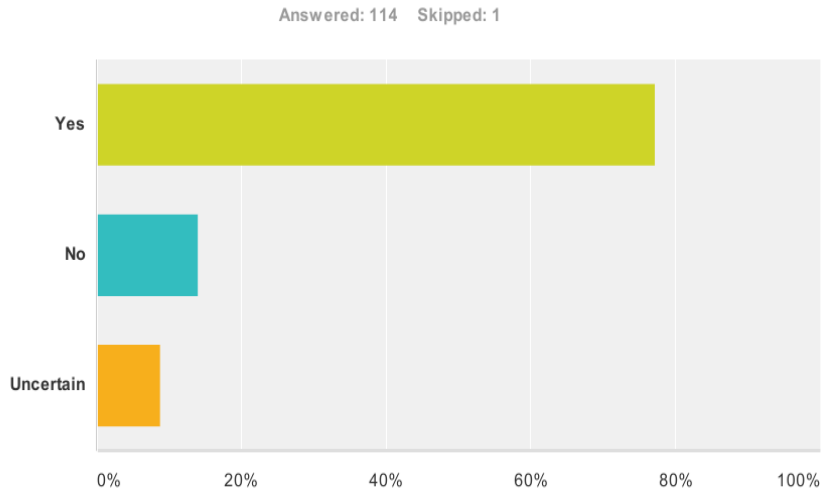


	Yes	No	Uncertain	Total
Q3: Yes, regularly	**47.37%** 9	**52.63%** 10	**0%** 0	19
Q3: Yes, infrequently	**61.90%** 13	**9.52%** 2	**28.57%** 6	21
Q3: No, but have in the past	**88.89%** 16	**11.11%** 2	**0%** 0	18
Q3: No, never	**89.29%** 50	**3.57%** 2	**7.14%** 4	56
Total Respondents	88	16	10	114

Figure 9.

Question 6 of 11

Q6. Would you accept that, when viewed by others (including your client's opposing party), a dilapidations surveyor's contingency fee basis of remuneration could pose an actual bias and conflict of interest that potentially results in compromised objectivity and that could provide the motivation for a distorted appraisal of the damages recoverable at law?

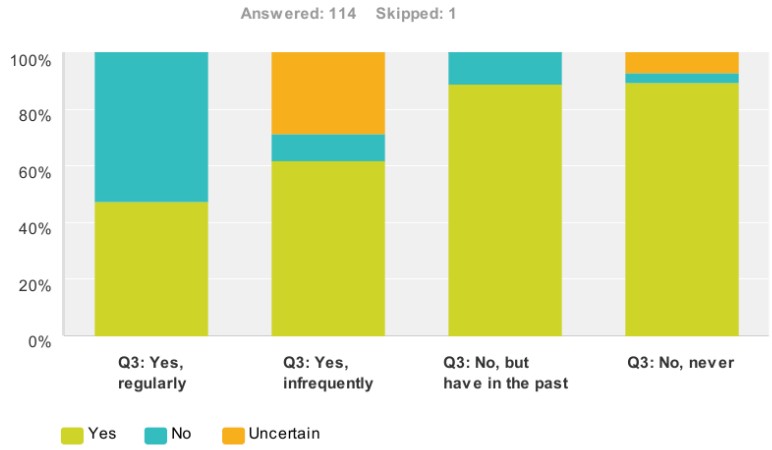


Answer Choices	Responses	
Yes	77.19%	88
No	14.04%	16
Uncertain	8.77%	10
Total		114

Figure 10.

Question 6 of 11

Analysis of response to Question based on the fee arrangement of respondents answering Question 3.

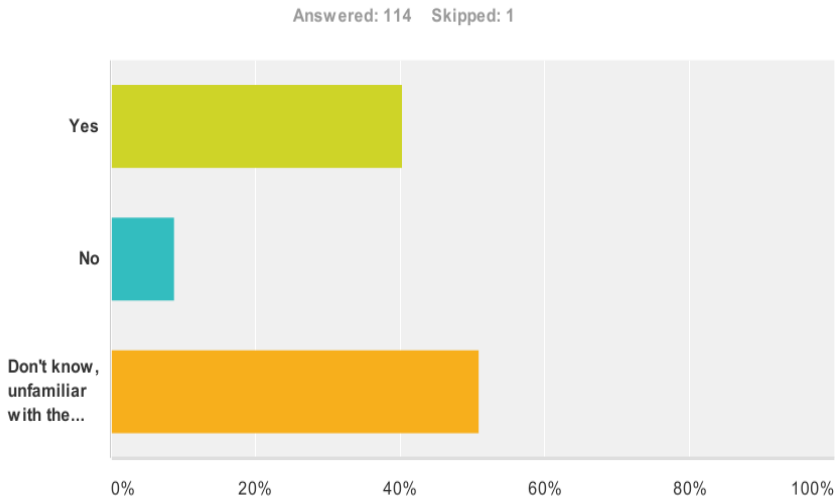


	Yes	No	Uncertain	Total
Q3: Yes, regularly	**47.37%** 9	**52.63%** 10	**0%** 0	19
Q3: Yes, infrequently	**61.90%** 13	**9.52%** 2	**28.57%** 6	21
Q3: No, but have in the past	**88.89%** 16	**11.11%** 2	**0%** 0	18
Q3: No, never	**89.29%** 50	**3.57%** 2	**7.14%** 4	56
Total Respondents	88	16	10	114

Figure 11.

Question 7 of 11

Q7. Are you aware of the litigation cost risk directly to the surveyor/surveying firm arising from the provision of dilapidation services on contingency fee terms and the consequential provision of 'maintenance' to their appointing party?

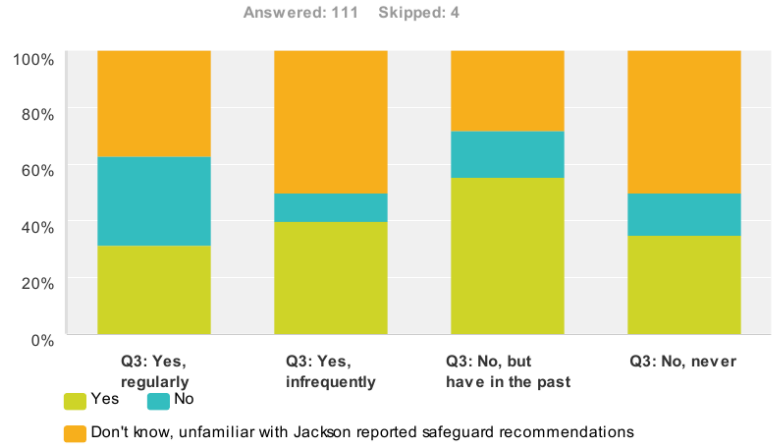


Answer Choices	Responses	
Yes	**40.35%**	46
No	**8.77%**	10
Don't know, unfamiliar with the concept of 'maintenance'	**50.88%**	58
Total		**114**

Figure 12.

Question 7 of 11

Analysis of response to Question based on the fee arrangement of respondents answering Question 3.



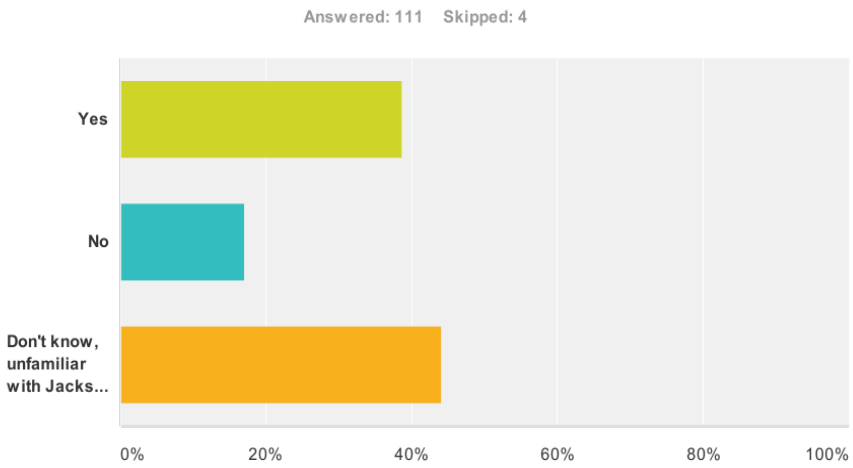
	Yes	No	Don't know, unfamiliar with Jackson reported safeguard recommendations	Total
Q3: Yes, regularly	**31.58%** 6	**31.58%** 6	**36.84%** 7	19
Q3: Yes, infrequently	**40%** 8	**10%** 2	**50%** 10	20
Q3: No, but have in the past	**55.56%** 10	**16.67%** 3	**27.78%** 5	18
Q3: No, never	**35.19%** 19	**14.81%** 8	**50%** 27	54
Total Respondents	43	19	49	111

	Other (please state)	Total
Q3: Yes, regularly	2	2
Q3: Yes, infrequently	2	2
Q3: No, but have in the past	2	2
Q3: No, never	3	3

Figure 13.

Question 8 of 11

8. The Jackson Report recommended safeguards for solicitors providing services on a contingency fee basis. Should surveyors acting in dilapidations be required to adopt similar consumer protection safeguards?



Answer Choices	Responses	
Yes	38.74%	43
No	17.12%	19
Don't know, unfamiliar with Jackson reported safeguard recommendations	44.14%	49
Total		111

Figure 14.

Question 8 of 11

Analysis of response to Question based on the fee arrangement of respondents answering Question 3.

	Yes	No	Don't know, unfamiliar with Jackson reported safeguard recommendations	Total
Q3: Yes, regularly	**31.58%** 6	**31.58%** 6	**36.84%** 7	19
Q3: Yes, infrequently	**40%** 8	**10%** 2	**50%** 10	20
Q3: No, but have in the past	**55.56%** 10	**16.67%** 3	**27.78%** 5	18
Q3: No, never	**35.19%** 19	**14.81%** 8	**50%** 27	54
Total Respondents	43	19	49	111

	Other (please state)	Total
Q3: Yes, regularly	2	2
Q3: Yes, infrequently	2	2
Q3: No, but have in the past	2	2
Q3: No, never	3	3

Figure 15.

Question 8 of 11 cont.

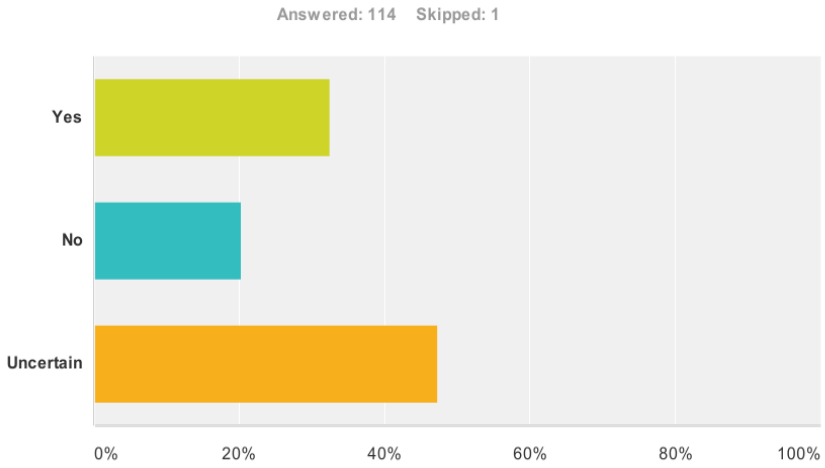
The 9 respondent's comments can be coded into the following categories of answer for consideration as part of the qualitative analysis.

- Comments from respondents **2, 4 & 6** are that the best consumer safeguard would be simply not to act on a contingency fee basis.
- Comments from respondent **3** suggest that surveyors following their own ethical standards should offer adequate consumer protection.
- Respondents **5** & **9** think safeguards should be established to protect the client.
- Comments from respondent **7** suggest safeguards recommended by Jackson are more applicable to solicitors because litigation will have commenced.
- Respondent 8 used the comment section to defend contingency fees pointing out the RICS use to promote them.

Of the three 'other' respondents who skipped the closed answer; **1, 2 & 4** it cannot be determined from the answer from 1 if they favour greater safeguards. For **2 & 4** they agree the greatest safeguard to be no contingency fees for surveyors.

Question 9 of 11

Q9. Is the RICS doing enough to uphold and enforce its own Rules of Conduct against surveyors acting with conflicts of interest?

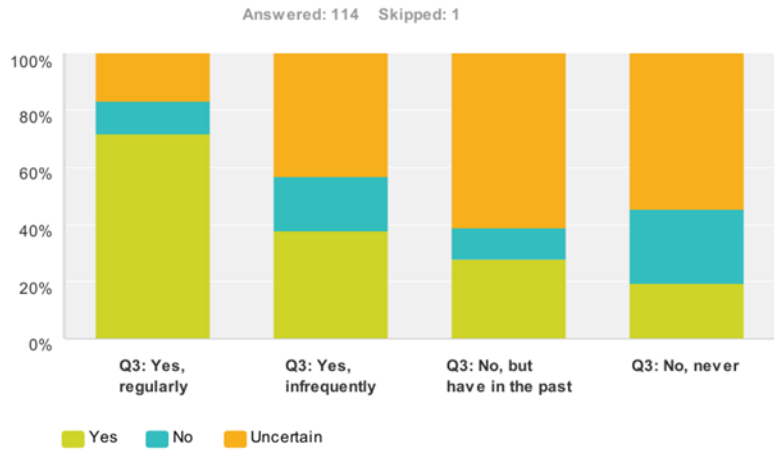


Answer Choices	Responses	
Yes	**32.46%**	37
No	**20.18%**	23
Uncertain	**47.37%**	54
Total		**114**

Figure 16.

Question 9 of 11

Analysis of response to Question based on the fee arrangement of respondents answering Question 3.

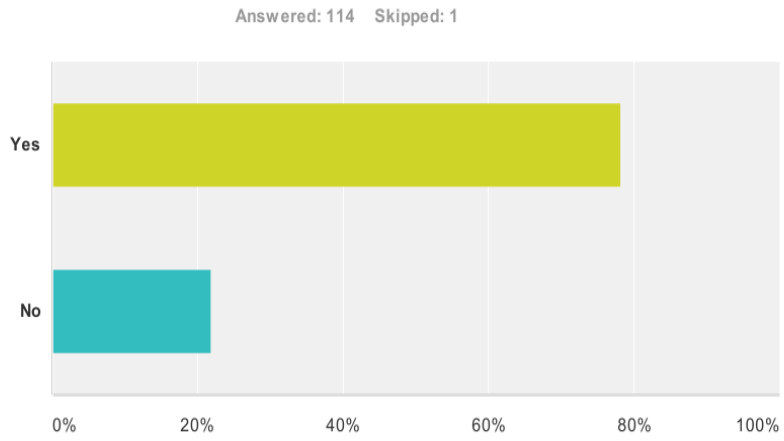


	Yes	No	Uncertain	Total
Q3: Yes, regularly	**72.22%** 13	**11.11%** 2	**16.67%** 3	18
Q3: Yes, infrequently	**38.10%** 8	**19.05%** 4	**42.86%** 9	21
Q3: No, but have in the past	**27.78%** 5	**11.11%** 2	**61.11%** 11	18
Q3: No, never	**19.30%** 11	**26.32%** 15	**54.39%** 31	57
Total Respondents	37	23	54	114

Figure 17.

Question 10 of 11

Q10. Do you think the RICS should give more specific guidance to dilapidations surveyors on contingency fees and any conflicts of interest posed by such terms?

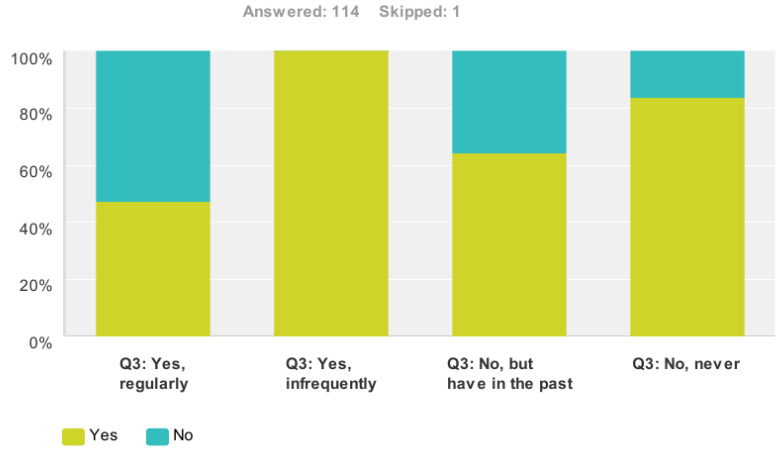


Answer Choices	Responses	
Yes	78.07%	89
No	21.93%	25
Total		114

Figure 18.

Question 10 of 11

Analysis of response to Question based on the fee arrangement of respondents answering Question 3.

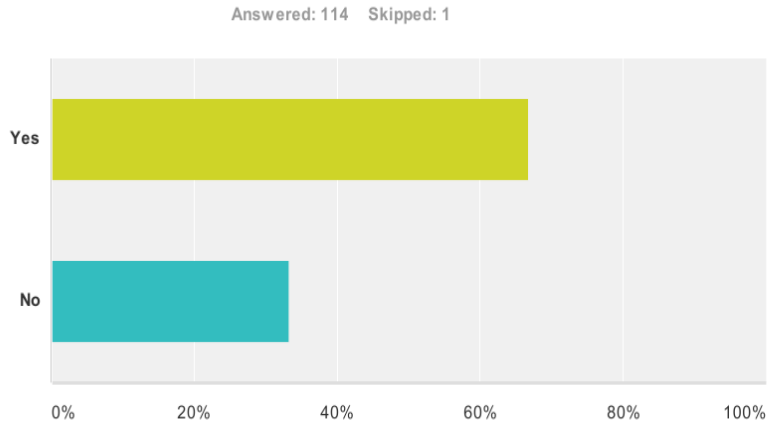


	Yes	No	Total
Q3: Yes, regularly	**47.37%** 9	**52.63%** 10	19
Q3: Yes, infrequently	**100%** 21	**0%** 0	21
Q3: No, but have in the past	**64.71%** 11	**35.29%** 6	17
Q3: No, never	**84.21%** 48	**15.79%** 9	57
Total Respondents	89	25	114

Figure 19.

Question 11 of 11

Q11. Should surveyors stop acting under contingency fees at pre-action stages?

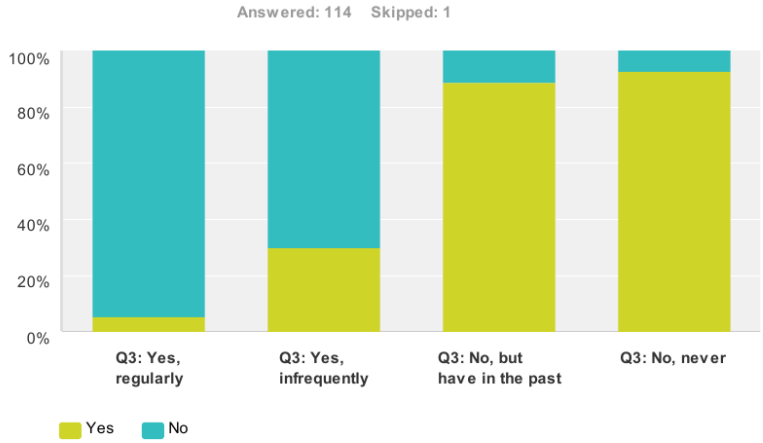


Answer Choices	Responses	
Yes	**66.67%**	76
No	**33.33%**	38
Total		**114**

Figure 20.

Question 11 of 11

Analysis of response to Question based on the fee arrangement of respondents answering Question 3.



	Yes	No	Total
Q3: Yes, regularly	**5.26%** 1	**94.74%** 18	19
Q3: Yes, infrequently	**30%** 6	**70%** 14	20
Q3: No, but have in the past	**88.89%** 16	**11.11%** 2	18
Q3: No, never	**92.98%** 53	**7.02%** 4	57
Total Respondents	76	38	114

Figure 21.

5.1.5 Questionnaire - Significant findings

A total of 31.8% surveyors questioned said that they currently act on a contingency fee basis, while 31% of surveyors believe that it is appropriate to act with a financial interest in the quantum of a dilapidations damage claim without disclosure. The vast majority of surveyors (79%) who act on a contingency fees basis regularly believe this is appropriate.

A large percentage of surveyors (45.4%) believe a civil dispute for breach of contract and/or damages becomes a matter of litigation only at the point court proceedings commence.

Almost three quarters (74.3%) of surveyors include heads of claim for dilapidations, pre-action stage negotiations cost and fees within a QD claim. The vast majority of surveyors who act on a contingency fees basis (88.9%) include heads of claim for dilapidations, pre-action stage negotiations and fees within the QD claim.

Over three quarters of surveyors (77.2%) accept that, when viewed by others, contingency fees could pose an actual bias and hence, conflict of interest. This includes almost half (47%) of surveyors who act on contingency fees regularly and two thirds (61.9%) infrequently.

Only 40% of surveyors are familiar with the concept of ‘Maintenance’.

Only 38.7% of surveyors are familiar with the Jackson Report recommendations.

Surveyors who once worked on a contingency fee basis but have stopped are significantly more familiar with ‘Maintenance’ (72.2%) and the Jackson Report (55.6%) than other groups.

Just under a third (32.5%) of surveyors believe the RICS is doing enough to enforce its own rules on conflicts of interest and from those who work on a contingency fee basis regularly, nearly three quarters (72.2%) are supportive of current RICS guidelines. Of

those who didn't think the RICS was doing enough nearly three quarters (73.9%) did not work on a contingency fee basis.

The vast majority of surveyors (78%) and all the respondents who acted on contingency fees infrequently were of the opinion that more specific guidance should be given on contingency fees and any conflicts of interest posed by such terms.

Two thirds (66.7%) of surveyors were of the opinion that surveyors should stop acting under contingency fees. Almost all surveyors (94.7%) who acted on them regularly wanted them to be retained and only 11.1% of surveyors who didn't act on contingency supported the right of others to do so. In total, 30% of surveyors who acted on contingency fees infrequently felt they should be stopped.

5.1.6 Surveyor significant qualitative findings (Appendix D)

Surveyor 1

In their defense of contingency fees the respondent compares dilapidations disputes to rent reviews, lease renewals and rating.

They suggest that dilapidations cases may generate a formal dilemma that can only be answered by a negotiation and/or compromise.

The respondent suggests that there is no problem with a surveyor taking a financial interest in the quantum outcome and that taking a financial interest does not necessary lead to exaggeration. Indeed that having a financial interest motivates an improvement in service. The respondent acknowledges that contingency fees can be abused but the merits outweigh the risk of abuse.

Surveyor 2

States that those who oppose contingency fees are a vocal minority. Further, that this part of the community does not understand dilapidations, that they are hypocritical and pick and choose the rules they follow and are motivated by inflated fee structures associated with (presumably) a time-charge arrangement.

The basis for determining the success of a dilapidations claim should be the speed of resolution. That, in their firms experience, claims are now taking longer for the same outcome and that meeting RICS guidelines for QD is difficult.

Surveyor 3

Believes that, when working for the client, the surveyor's role is to get the best deal possible that can be defended and, irrespective of fee, it is bad business practice to take a client down the route of litigation if the reasons for doing so are weak.

5.2 Solicitors

5.2.1 Summary

In total, 126 responses were received to the 850 emails that were sent out, giving a response rate of 14.8%. Overall, the survey questions had a 99.2% completion rate.

5.2.2 Rationale for questions

Question eight of the questionnaire asks if surveyors should stop acting under contingency fees at pre-action stages. The groupings formed from its four ordinal answers **a)** Yes & **b)** No; become the basis by which the answers to other questions will be compared. The first four questions assess to what extent solicitors are checking the work of surveyors. The first question established if solicitors are reviewing the surveyor's appraisal of the claim and challenging them. The questions go on to establish what rate of misrepresentation or error is occurring. The third question is an independent assessment of the rate of pre action negotiation fees being misrepresented as damages. The fifth question is to what extent solicitors are protecting their clients from risk and advising their clients of the negative impact of contingency fees. The sixth and eight questions are straw polls of the solicitor community's view of the appropriateness of contingency fees. The seventh relates to solicitors views of suitable levels of disclosure required if acting with a contingency fee interest. The penultimate asks the views on RICS guidance and the final question on solicitor's view of the ethical appropriateness of having a financial conflict of interest.

5.2.3 Response statistics

The total 126 responses where received from the 850 emails that were sent giving a response rate of 14.8%.

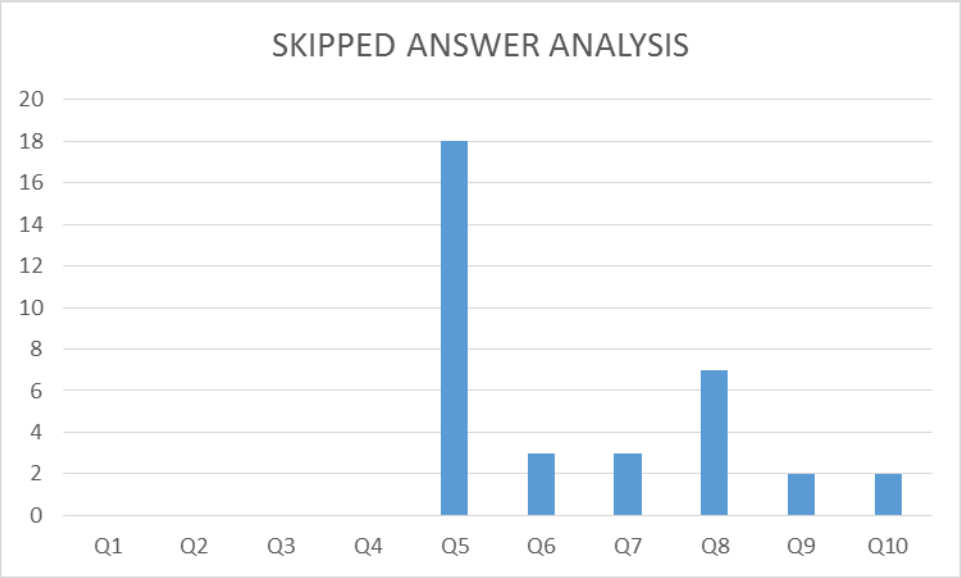


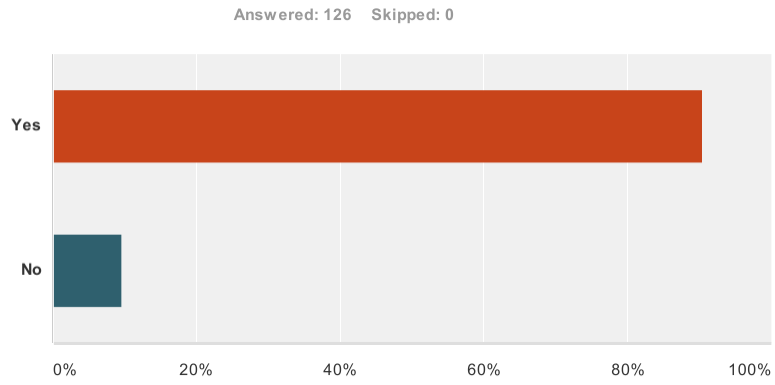
Chart 3.

The questionnaires where answered in full by 105 respondents (83.3%). Of the 21 respondents who skipped questions, 18 (85.7%) skipped **Question 5** and **7** (38.9%) skipped **Question 8**. Two respondents skipped 2 questions. A single respondent skipped **5 questions** (50% completion) making them the only respondent not to complete the questionnaire to a satisfactory level. Overall the survey questions had a 99.2% completion rate.

5.2.4 Solicitor questionnaire results

Question 1 of 10

Q1. When receiving a schedule with a Quantified Demand from a surveyor do you check to see if it has items within it that are erroneous and should not be included in the heads of claim?

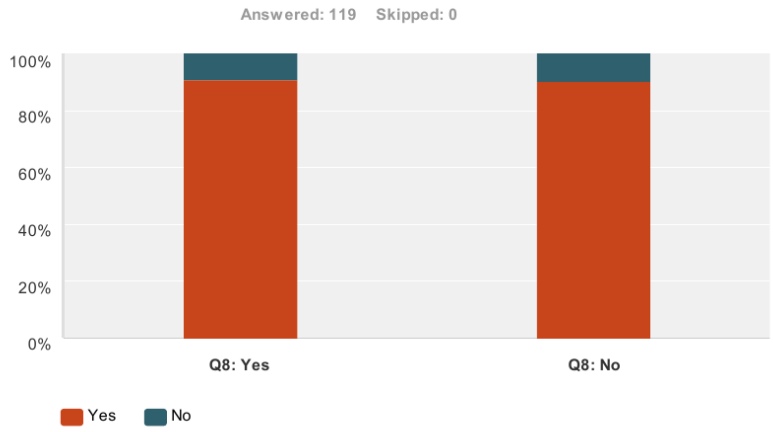


Answer Choices	Responses	
Yes	**90.48%**	114
No	**9.52%**	12
Total		**126**

Figure 22.

Question 1 of 11

Analysis of response to Question based on solicitors attitude to surveyors continuing to act on contingency fee terms Question 8.

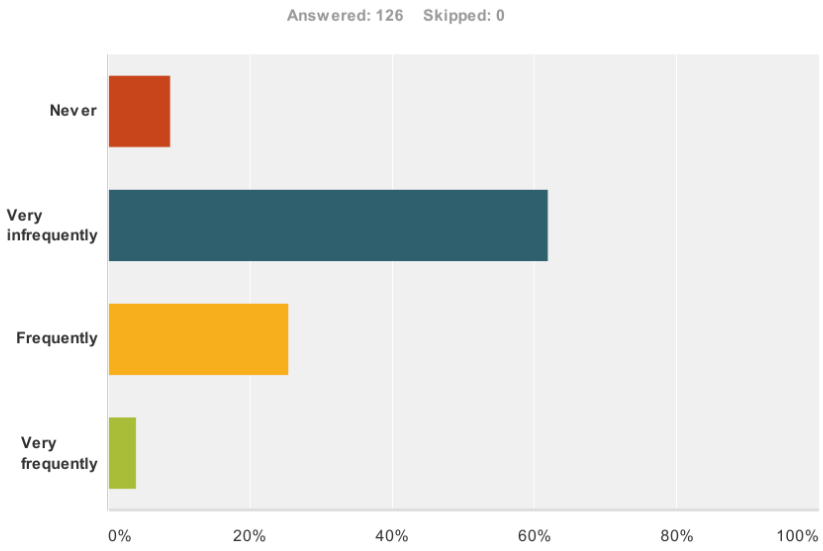


	Yes	No	Total
Q8: Yes	**91.04%** 61	**8.96%** 6	67
Q8: No	**90.38%** 47	**9.62%** 5	52
Total Respondents	108	11	119

Figure 23.

Question 2 of 10

Q2. How frequently do you return schedules and Quantified Demands and ask the surveyors preparing them to revise them and omit erroneous or unjustified heads of claim?

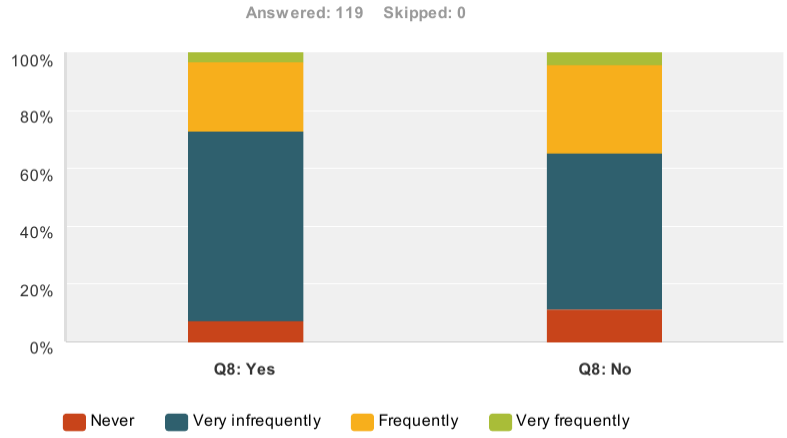


Answer Choices	Responses	
Never	**8.73%**	11
Very infrequently	**61.90%**	78
Frequently	**25.40%**	32
Very frequently	**3.97%**	5
Total		**126**

Figure 24.

Question 2 of 11

Analysis of response to Question based on solicitors attitude to surveyors continuing to act on contingency fee terms Question 8.

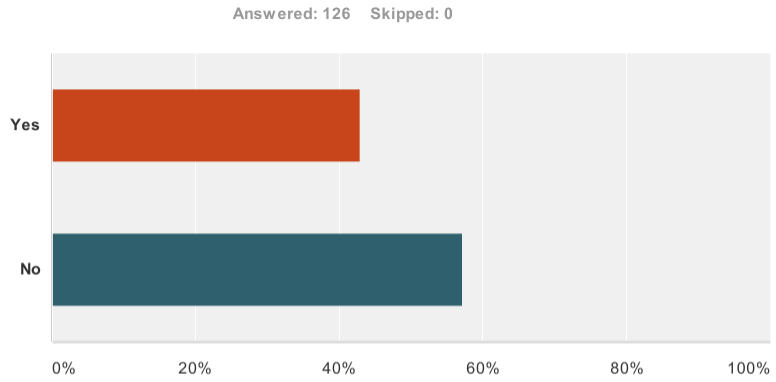


	Never	Very infrequently	Frequently	Very frequently	Total
Q8: Yes	**7.46%** 5	**65.67%** 44	**23.88%** 16	**2.99%** 2	67
Q8: No	**11.54%** 6	**53.85%** 28	**30.77%** 16	**3.85%** 2	52
Total Respondents	11	72	32	4	119

Figure 25.

Question 3 of 10

Q3. Do you ever encounter Quantified Demands that misrepresent pre-action stage litigation costs (for negotiations) as damages?

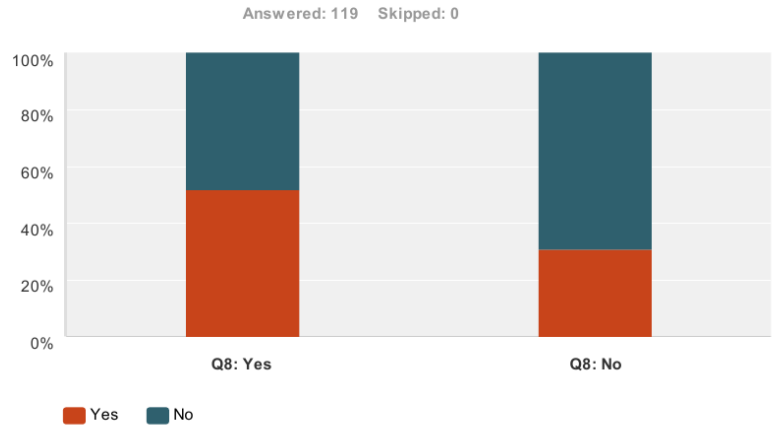


Answer Choices	Responses	
Yes	**42.86%**	54
No	**57.14%**	72
Total		**126**

Figure 26.

Question 3 of 11

Analysis of response to Question based on solicitors attitude to surveyors continuing to act on contingency fee terms Question 8.

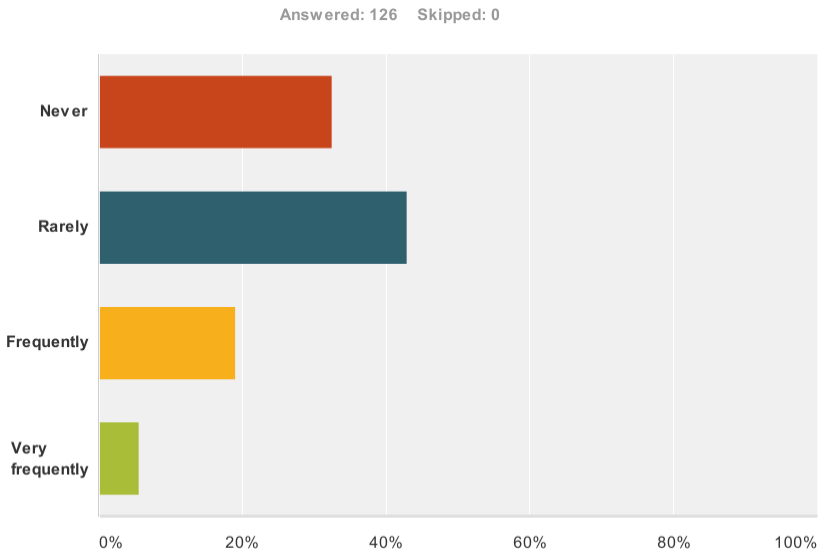


	Yes	No	Total
Q8: Yes	**52.24%** 35	**47.76%** 32	67
Q8: No	**30.77%** 16	**69.23%** 36	52
Total Respondents	51	68	119

Figure 27.

Question 4 of 10

Q4. How frequently do you encounter a Quantified Demand where references are made to future negotiation services of a surveyor intending to act on contingency fee terms?



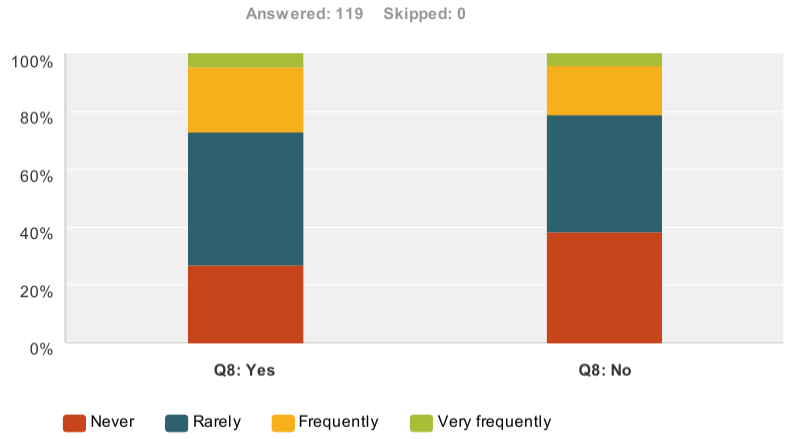
Answer Choices	Responses	
Never	32.54%	41
Rarely	42.86%	54
Frequently	19.05%	24
Very frequently	5.56%	7
Total		126

Figure 28.

Question 4 of 11

Analysis of response to Question based on solicitors attitude to surveyors continuing to act on contingency fee terms Question 8.

Figure 29.

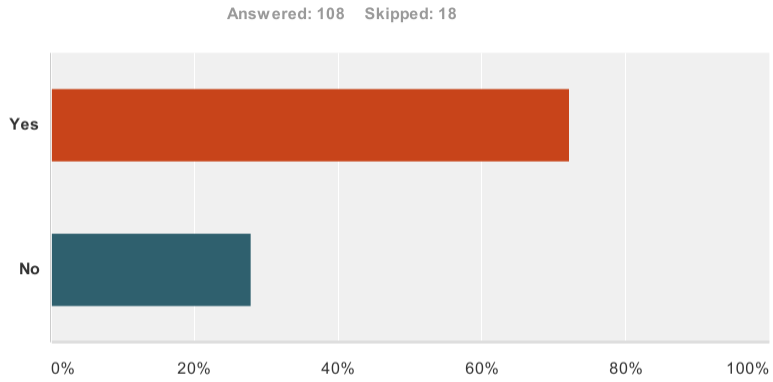


	Never	Rarely	Frequently	Very frequently	Total
Q8: Yes	**26.87%** 18	**46.27%** 31	**22.39%** 15	**4.48%** 3	67
Q8: No	**38.46%** 20	**40.38%** 21	**17.31%** 9	**3.85%** 2	52
Total Respondents	38	52	24	5	119

Question 5 of 10

Q5. When you encounter a Quantified Demand from surveyors with a contingency fee interest in the quantum of the settlement do you advise clients on the detrimental consequences posed by such fee terms?

Figure 30.

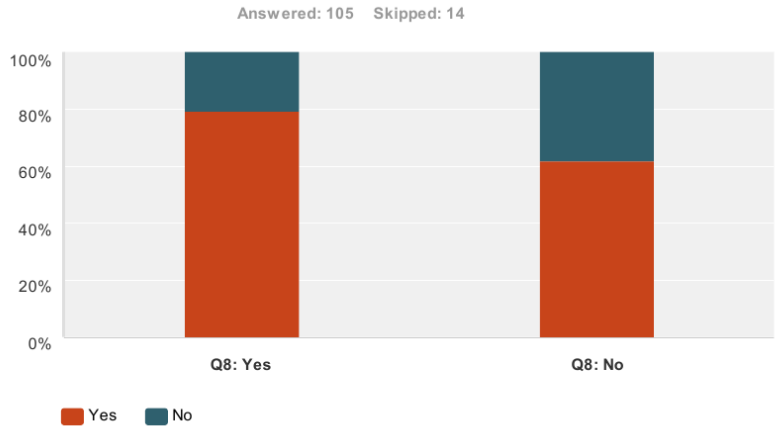


Answer Choices	Responses	
Yes	**72.22%**	78
No	**27.78%**	30
Total		**108**

Question 5 of 11

Analysis of response to Question based on solicitors attitude to surveyors continuing to act on contingency fee terms Question 8.

Figure 31.

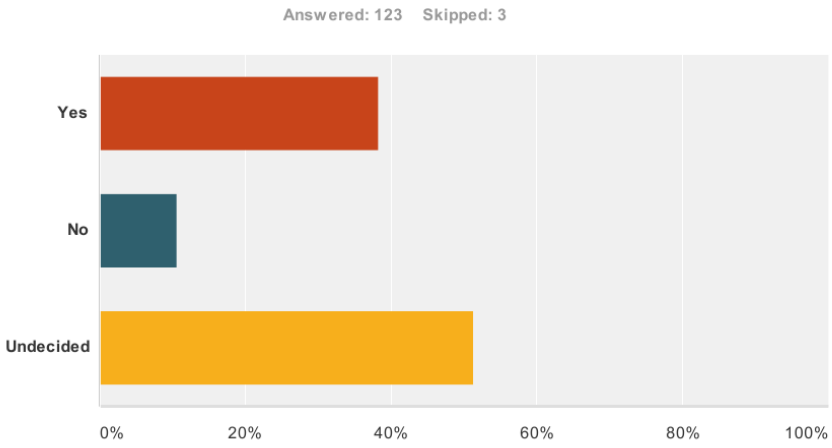


	Yes	No	Total
Q8: Yes	**79.37%** 50	**20.63%** 13	63
Q8: No	**61.90%** 26	**38.10%** 16	42
Total Respondents	76	29	105

Question 6 of 10

Q6. In your opinion when a surveyor acts on a contingency fee basis in dilapidation disputes does it motivate a distorted and bias appraisal of the damages recoverable at law?

Figure 32.

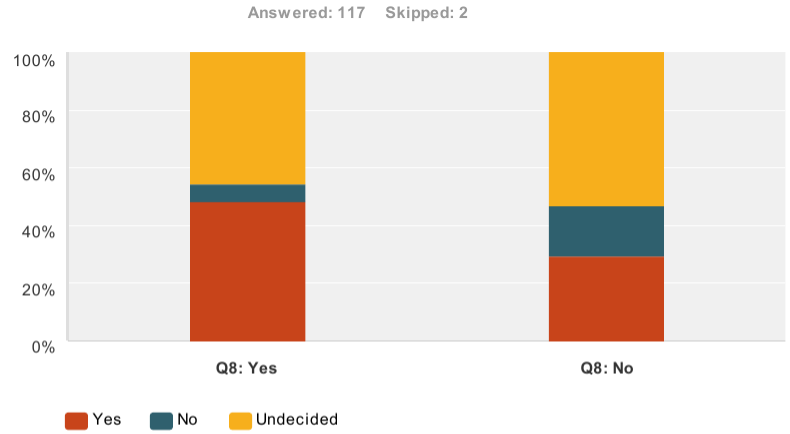


Answer Choices	Responses	
Yes	**38.21%**	47
No	**10.57%**	13
Undecided	**51.22%**	63
Total		**123**

Question 6 of 11

Analysis of response to Question based on solicitors attitude to surveyors continuing to act on contingency fee terms Question 8.

Figure 33.

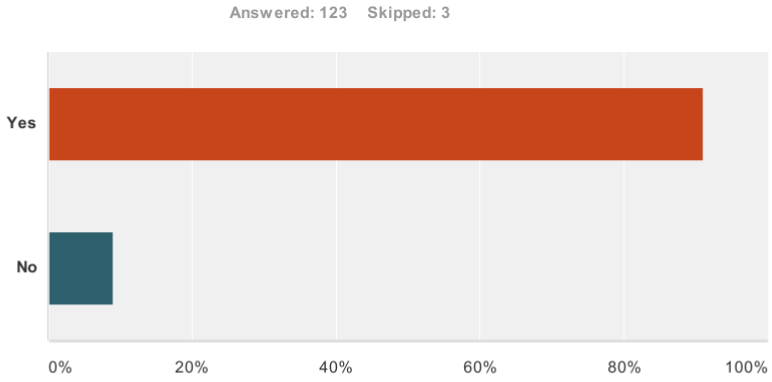


	Yes	No	Undecided	Total
Q8: Yes	**48.48%** 32	**6.06%** 4	**45.45%** 30	66
Q8: No	**29.41%** 15	**17.65%** 9	**52.94%** 27	51
Total Respondents	47	13	57	117

Question 7 of 10

Q7. The Jackson Report recommended safeguards for solicitors providing services on a contingency fee basis. Should surveyors acting in dilapidation matters follow suit?

Figure 34.

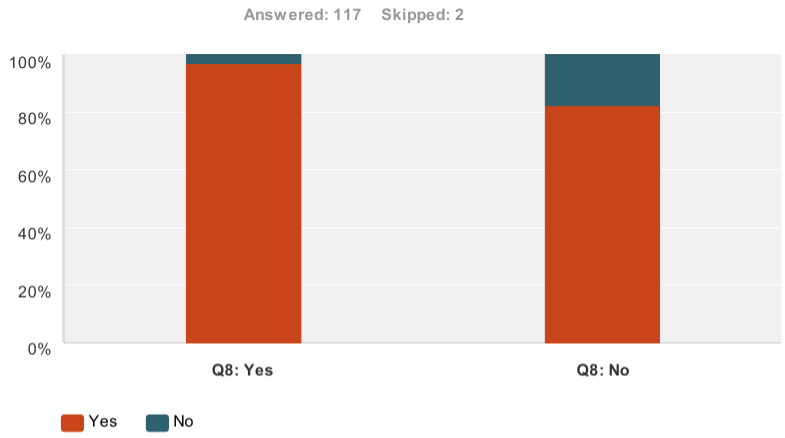


Answer Choices	Responses	
Yes	**91.06%**	112
No	**8.94%**	11
Total		**123**

Question 7 of 11

Analysis of response to Question based on solicitors attitude to surveyors continuing to act on contingency fee terms Question 8.

Figure 35.

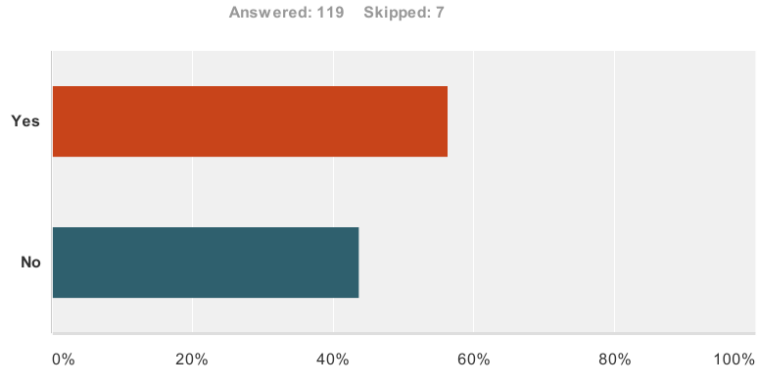


	Yes	No	Total
Q8: Yes	**96.97%** 64	**3.03%** 2	66
Q8: No	**82.35%** 42	**17.65%** 9	51
Total Respondents	106	11	117

Question 8 of 10

Q8. Should surveyors stop acting under contingency fees at pre-action stages?

Figure 36.

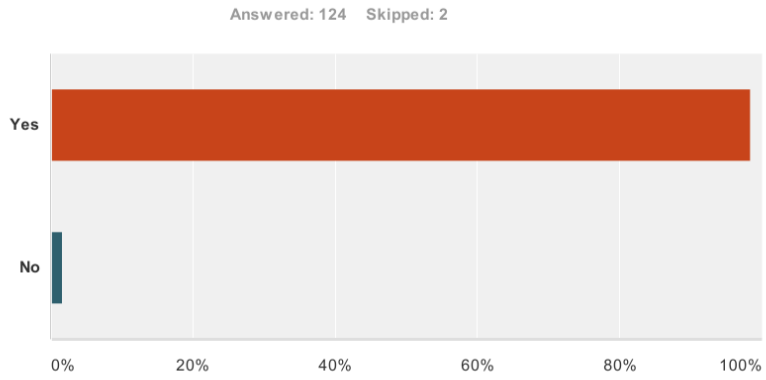


Answer Choices	Responses	
Yes	**56.30%**	67
No	**43.70%**	52
Total		**119**

Question 9 of 10

Q9. Do you think the RICS should give specific guidance to dilapidations surveyors on contingency fees and conflicts of interest?

Figure 37.

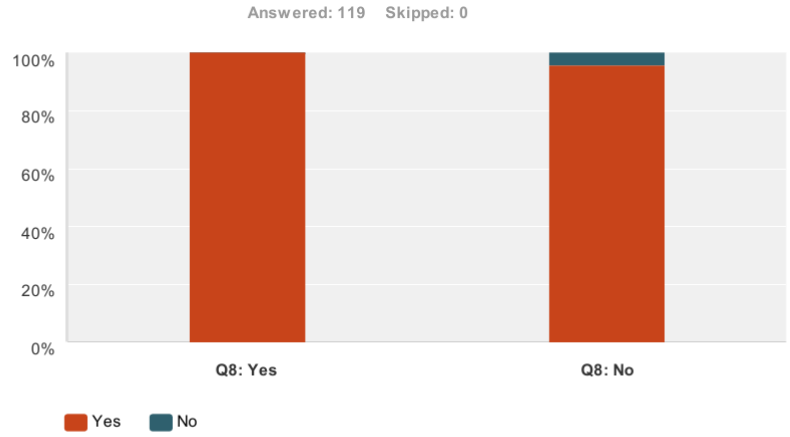


Answer Choices	Responses	
Yes	**98.39%**	122
No	**1.61%**	2
Total		**124**

Question 9 of 11

Analysis of response to Question based on solicitors attitude to surveyors continuing to act on contingency fee terms - Question 8.

Figure 38.

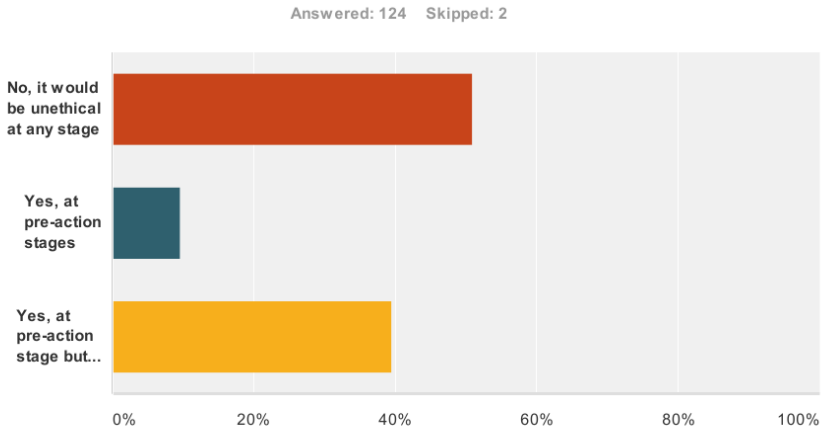


	Yes	No	Total
Q8: Yes	**100%** 67	**0%** 0	67
Q8: No	**96.15%** 50	**3.85%** 2	52
Total Respondents	117	2	119

Question 10 of 10

Q10. Do you think it is ethically appropriate for an expert in the field of surveying to act with a direct financial interest in the quantum of the claim they are involved in quantifying?

Figure 39.

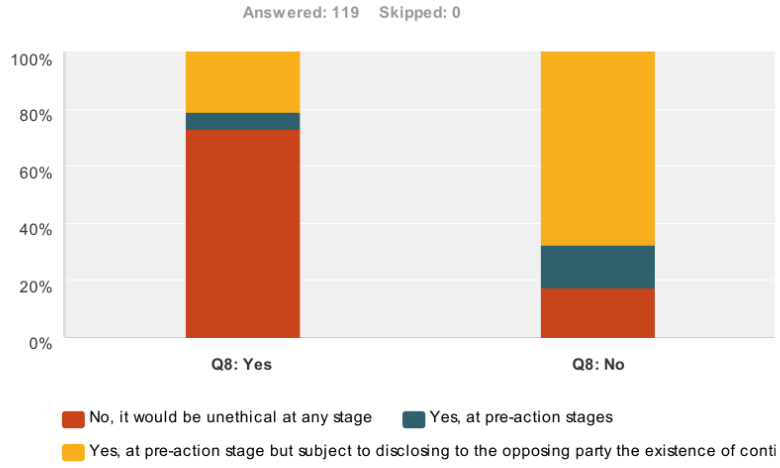


Answer Choices	Responses	
No, it would be unethical at any stage	50.81%	63
Yes, at pre-action stages	9.68%	12
Yes, at pre-action stage but subject to disclosing to the opposing party the existence of contingency fee interests	39.52%	49
Total		124

Question 10 of 10

Analysis of response to Question based on solicitors' attitude to surveyors continuing to act on contingency fee terms - Question 8.

Figure 40.



	No, it would be unethical at any stage	Yes, at pre-action stages	Yes, at pre-action stage but subject to disclosing to the opposing party the existence of contingency fee interests	Total
Q8: Yes	**73.13%** 49	**5.97%** 4	**20.90%** 14	67
Q8: No	**17.31%** 9	**15.38%** 8	**67.31%** 35	52
Total Respondents	58	12	49	119

5.2.5 Solicitor questionnaire - Significant findings

The vast majority of solicitors claim to check the QDs prepared by surveyors but almost 1 in 10 (9.5%) admit that they do not. Of those who return QDs when errors are noticed 46.7% do so either frequently or very frequently. More than half of solicitors (57.1%) claim never to encounter pre-action stage litigation costs (for negotiations) that are misrepresented as damages. Over two thirds of solicitors (67.46%) encounter QDs where references are made to future negotiation services of a surveyor intending to act on contingency fee terms. Of all solicitors, 24.6% say it happens frequently or very frequently but 32.5% report that it never happens. Solicitors who think surveyors should stop working under contingency fees they are almost twice as likely to encounter QDs that misrepresent pre-action stage litigation costs (for negotiations) as damages then those who don't think contingency fees are inappropriate.

Of the solicitors who responded 27.8% do not inform their clients of the detrimental consequences posed their own clients contingency fee interest. A total of 14.3% of the survey population chose to skip this question suggesting a problem with the structure of the question.

Just over 50% of solicitors are undecided if contingency fees distort and cause bias. However of those who have formed an opinion the majority (78.3%) felt that it did.
The vast majority of solicitors (91.1%) felt safeguards for those providing contingency fee services were appropriate for surveyors. Over half respondents (56.3%) thought surveyors should stop acting under contingency fees. Of those who didn't think they needed to stop, the majority (67.3%) agreed, subject to disclosure to the opposing party, it would be appropriate to act with a direct interest in the claim at the pre-action stage. Less than 10% thought it would be appropriate without disclosure.

5.2 Solicitor significant qualitative findings

Full transcript Appendix C3

Some solicitors will not work with surveyors acting on a contingency fee basis. They do not think surveyors can wear two hats and be both an advocate and an expert.
Solicitors may have a difference of opinion on contingency fee arrangements if the surveyor is acting for or against the client and that, ultimately, clients are not interested in the purity of justice. Neither are they unduly concerned by the risks of contingency fee arrangements

There is perhaps an unfair assumption that solicitors have a level of control which may not exist. Also there is often difficulty ascertaining if the other side's surveyor is acting on a contingency fee basis. Solicitors may not bring to the attention of the other side surveyor conflicts of interest, using the knowledge to gain tactical advantage.

Other solicitors have also suggested that schedules being sent out do not receive the same levels of scrutiny as those being received. It is 'expected' that schedules sent by landlords will be exaggerated. It is therefore up to the tenant's professional team to identify them and for this to continue to be the case, regardless of the system of remuneration.

5.3 Judges

5.3.1 Summary

In total 42 of the judges listed were sent emails in this search. Only two emails sent were not received. In total, four Judges participated. One TCC Judge responded in full to the questionnaire and three judges (including two High Court Judges) although not completing the questionnaire, made relevant comments. Given the three Judges giving comment, the response rate was 10%.

A further three Judges responded that their relative lack of experience with dilapidations cases made it inappropriate for them to comment and a further two declined the invitation to participate.

5.3.2 Rational for questions

The questions set out to gauge the Judiciary's view of the appropriateness of contingency fees by examining the following:

- If evidence gathered at the 'adviser' stage by surveyors must be free of financial conflicts of interest.
- If clients will be penalized for costs if their advisers are seen to have acted with a financial conflict of interest.
- If they believe financial arrangements are a matter that should be disclosed from the outset.

Judges were also asked to comment on the legitimate legal basis of the defense offered for contingency fee arrangements by those citing *Factortame Ltd* (2003).

They were asked if the course of justice would benefit from surveyors being prevented from acting on contingency fee arrangements in dilapidations

5.3.3 Judges responses

Full questionnaire response received from TCC Judge December 16, 2013

Q1: Are you aware that the RICS Rules of Conduct for Members and Firms expressly directs them to avoid conflicts of interest irrespective of the service being provided?

- Yes

Q2: Do you consider that the 'man on the Clapham Omnibus' would expect RICS regulated Members and Firms to comply with their institution's rules of conduct when providing services?

- Yes

Q3: Are you aware that in a number of high profile EWHC dilapidations cases decided in the last five years concerning substantially overstated claims, the claimant's chartered surveyor expert/assessor of the damages recoverable at law first formulated their client's claim for damages whilst acting on a contingency fee basis, with a direct financial interest in the quantum of the claim they were supposed to be objectively assessing?

- No

Q4: Would you agree that a surveyor expert/assessor acting to formulate the damages recoverable at law in a dilapidation case under a contingency fee arrangement is materially different to the role and services to, say, the accountants Grant Thornton in R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8) [2002] EWCA Civ 932, [2003] QB 381, where at no point were Grant Thornton the Witnesses of Fact or the Experts in the case?

- Yes

Q5: Do you think that a surveyor expert/claims assessor acting at the pre-action stages with a contingency fee interest in the quantum of the claim is at risk, consciously or otherwise, of inflating or understating the damages recoverable, suppressing the evidence and/or 'sullying the purity of justice'?

- Yes

Q6: Do you think that it is ethically or professionally appropriate for surveyors to act on a contingency fee basis in a dilapidation matter at any of the following stages?

- [ ] Formulation/assessment of claim
- [ ] Formulation/assessment of response
- [ ] Schedule preparation
- [ ] Pre action stage dispute resolution
- [ ] Expert Witness
- [x] None of the above, at no stage is it appropriate.

Other (please specify)

- None of the above, at no stage is it appropriate.

Q7: When should a surveyor expert/assessor disclose the basis of their fee retainer?

- Upon first receiving instruction

Q8: Given the |Judiciary's desire to encourage out of court settlement, would it be beneficial to achieving this objective if surveyors offering dilapidation claims assessment services under contingency fees with an interest in the quantum of the claim were prevented from acting under contingency fees?

- Yes

Q9: Do you agree with the argument that surveyor's contingency fee arrangements facilitate an access to justice that outweighs the risk of sullying justice by such fee terms?

- No

Q10: Given the Jackson Report, if a case came before you where it became apparent that one of the party's' expert surveyor's opinion was formulated under a contingency fee arrangement and the case subsequently collapsed due, or due in part, to that expert's opinion, would you be minded to award any of the significant litigation costs directly against the surveying Member/and or Firm as a consequence of Maintenance?

- No
- **Other (please specify)** I would never sanction appointment of such a surveyor under CPR35 and, if only advising in the background, I would possibly award costs against the party on the indemnity basis but would not promote satellite litigation by investigating the conduct of the surveyor

Q11: If it became apparent during litigation that a surveyor expert/assessor has acted on a contingency fee basis and had, as a consequence, deliberately overstated/understated the claim, would you consider exercising any of the following judicial discretions at an interlocutory hearing?

☒ Ordering that the surveyor/assessor may not/ may no longer act as an expert witness in the litigation

☐ Ordering that and their evidence may not be relied upon at trial

☐ Ordering that they may not be called to give oral evidence at trial

☒ Ordering that they and/or their firm should be joined to the proceedings in relation to the matter of costs

- Ordering that the surveyor/assessor may not/ may no longer act as an expert witness in the litigation
- Ordering that they and/or their firm should be joined to the proceedings in relation to the matter of costs

Q12: Would you consider it fraudulent for a surveyor expert/assessor to deliberately overstate or understate a claim of damages recoverable at law in order to misrepresent that claim in the hope it settles at a figure which is financially advantageous to them under the terms of a contingency fee arrangement?

- Yes

Q13: Should the RICS uphold its own regulations and insist its regulated Members and Firms do not offer dilapidations services under contingency fees arrangements at any stage?

- Yes

5.3.4 Judges significant qualitative findings

The Judge confirms that:

- the independence of an expert witness being remunerated on a contingency fee basis will undoubtedly be affected.
- it is ethically inappropriate for a surveyor to act on a contingency fee ‘at any stage’.
- on balance, the access to justice offered by contingency fees does not outweigh the benefits.
- although they wouldn’t appoint any of the costs of collapsed litigation to a surveyor whose tainted opinion caused the collapse of a case, they would penalize the client, by awarding indemnity costs against them.
- evidence gathered as an ‘adviser’ must be capable of being relied on in court. Therefore, if evidence were to be gathered whilst on a contingency fee arrangement, it may not to be relied on.

5.3.4 Judges significant qualitative findings cont.

Other Judges have added that they are not keen to be drawn into answering questions on ethics or when surveyor conduct might constitute fraudulent behavior and that they do not wish to be drawn to comment because surveyor contingency fees are on the TCC High Court Judges' 'radar' as a matter that might come before them for consideration.

Full transcript Appendix C-4

CHAPTER 6 - ANALYSIS AND INTERPRETATION

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6.1 Analysis

Analysis of the literature review suggests that the argument 'contingency fees are compatible with the rules of Champerty' is fundamentally flawed. The two cases used to defend the position concern areas of surveying where the ultimate tribunal was a court of administration and not, as in Dilapidations cases, a court of law. The TTC judge confirmed this position in his questionnaire response (Judge Question 4). Case law has further established that Champerty applies not only to litigation generally but also to the pre-action stages of inherently litigious disputes. Any service provided to a client on a contingency fee basis where a known future service will be a litigious matter is also, therefore, affected. The data collected indicates that surveyors' understanding of maintenance and Champerty is poorly understood across the Dilapidations community (Surveyor Question 7).

Arguments that it is acceptable for surveyors engaged in 'risk and reward' forms of advocacy that they can only work in the client's interest as a 'hired gun' and that they can be economical with the truth are simply not compatible with the Common Law. Despite this, the qualitative responses and opinions of the surveyors in submitted emails suggest surveyors are happy to align their interests with those of their client. The judge has stated categorically that there are no legitimate arguments that can be put forward for contingency fees to outweigh the risk to justice (Judge Question 9). The courts have made it clear that exaggeration and understatement will not be tolerated and that surveyors owe a responsibility to the client that their position is accurately stated. If the surveyor knows or ought to know that someone is relying on his or her advice, he or she will owe that person a tortious duty of care. The arguments over 'adviser' or 'expert' have been won by the 'Modernists'. Surveyors are 'witnesses of fact' that Dilapidations disputes become litigious at the pre-litigation stage. This position has also been supported by the view of the judge (Judge Question 6). It is apparent from the data that a large proportion of all surveyors, irrespective of fee arrangements, do not understand

that, as established in the literature review, Dilapidations disputes become litigious before proceedings commence and that once a surveyor or landlord has confirmed a dispute or considers evidence of a breach, they are 'witnesses of fact' and therefore subject to the rules of court (Surveyor Question 4).

The literature review also points to a clear risk to clients that judges will not accept the evidence of a surveyor who has acted on contingency fees. This position was, again, confirmed by the judge (Judge Question 11), as leaving clients vulnerable to costs, even if a case is won. Judges will penalise parties at cost if they are seen to exaggerate. The judge was of the opinion that contingency fees pose a very real risk of this happening (Judge Question 5 & 11). It is particularly notable from the data that the majority of surveyors include heads of claim for damages that they are not entitled to (Surveyors Question 5) and surveyors acting on contingency fees regularly are the most likely to make such claims. The analysis of the data from solicitors indicates that misrepresentation of pre-action stage litigation costs (for negotiations) as damages is occurring with apparent regularity (Solicitor Question 3) but with future negotiations less frequently (Solicitor Question 4). One in ten solicitors responding is apparently not checking the demands prepared by their clients' surveyors (Solicitor Question 1). It is also apparent that solicitors are not necessarily informing their clients of the risks posed by surveyor contingency fee arrangements.

It can be demonstrated by analysing the data from Questions 1 and 2 to surveyors, that those who act on a contingency fee basis regularly, are significantly more willing than other groups to believe that it is acceptable to act with a financial interest in the quantum of a claim without the other side being aware. This is a strong indication to support the theory that these surveyors are acting out of financial self-interest. There is also a clear indication that these groups do not see, or are choosing to ignore, the fact that their actions are being seen by others as posing a bias and a conflict of interest that compromises their professional standing. Their stance is notably different to the other

groups who do not act on contingency fees (Surveyors Question 6). The judge was of the clear opinion that surveyors should not act on conflicted fees and that there would be benefits if they were not permissible (Judges Question 8). Solicitors were less willing to recommend that surveyors stop acting on contingency fees outright (Solicitor Question 8). Half of the solicitors polled had not formed an opinion on the question 'Do surveyors acting on a contingency fee basis allow financial conflicts of interest override their professional obligations?' but of those who had made a decision, more than three quarters believed that they did (Solicitor Question 6). Solicitors are also overwhelmingly of the opinion that either surveyors shouldn't act on contingency fees at all or, if they do, it must be done with full disclosure to the other side (Solicitor Question 10). Jackson Report type safeguards were overwhelmingly recommended (Solicitor Question 7). The judge also supported the idea of full disclosure at the start (Judge Question 7).

The literature review indicates the RICS guidance is weak with regard to defining acceptable means of remuneration for Dilapidations disputes because it is left to the parties to agree their own terms. It is also seen to be vague on the question of surveyor status at the pre-litigation stage and weak on the recoverability of fees. Those who do not support contingency fees are particularly unsupportive of the RICS and highly critical of its lack of willingness to enforce rules on conflicts of interest, whereas those who act on a contingency fees basis, are the polar opposite. (Surveyor Question 9). There is also a greater appetite for improved guidance in this area from those who do not act with contingency fee arrangements than from those who do. The results would, therefore, indicate that the theory is correct and that the weakness of the guidance is a deciding factor in allowing self-interest to continue.

6.2 How the results affect existing knowledge of the subject

The results show a clear link between acting on a contingency basis regularly and surveyors' attitudes to duty of care, conflicts of interest and consumer protection issues. That those acting on a contingency fee basis regularly demonstrate a marked reluctance to extend their duty of care to other parties, despite their clear duties to the courts and RICS guidance and ethics, is also evident. They are also supportive of the current status quo.

Of those solicitors who act on Dilapidations matters and who have formed an opinion, the vast majority believe contingency fees are contributing to exaggeration and understatement.

The surveying community has demonstrated a general lack of knowledge in some of the key areas, notably the incorrect claiming of pre-litigation negotiation fees as damages.

6.3 Does the evidence support the hypothesis?

Contingency fee arrangements are not compatible with professional obligations, those who adopt them are doing so at risk.

The evidence suggests this hypothesis is correct and that surveyors should not act on a contingency fee basis at any stage of a Dilapidations dispute unless the terms of their fee arrangement are subject to complete disclosure to all parties**.**

The risks to a number of parties are demonstrated; to the surveyor and his / her professional objectivity; to the client, as the risk that evidence will be disregarded if the matter reaches court and the financial risk that exaggeration will be penalised at costs; To the opposing party the risks are to the purity of justice and that they will be subject to a financial loss arising from exaggeration or understatement.

6.4 Evaluation of the methodology

As a researcher, the web based questionnaire approach proved to be very easy to use, low cost and produced good data results that were easily analysed. Thus, the modest length of the questionnaire and ease of completion also proved well judged. The surveyor group saw no 'tailing off' of the response rate towards the latter stages of questionnaire and with solicitors, this only occurred in the case of one respondent.

The questionnaires to surveyors and solicitors were not successful in gathering qualitative data. In retrospect, an additional field in the online questionnaire itself, particularly for surveyors, allowing respondents to add further comments, would have been beneficial and would have prevented respondents from adding non-question-specific answers in the two unclosed answer boxes.

The method of approach to judges was less successful. However, based on the responses received via email, it is doubtful, even given greater resources and access, the level of response would have been significantly improved.

6.5 Evaluation of survey response

The survey's response rates for surveyor (18.1%) and solicitor (14.8%) groups were high. The collection of quantitative data from surveyors and solicitors was successful and achieved a good response rate with a very low 'failure to complete' rate (one in 241). Based on the very high completion rate, the selected groups were clearly confident in their knowledge of the subject.

6.6 Expanding options in questionnaires

The research would have benefited from more direct questioning of surveyors about the level of exaggeration and understatement they have experienced.

The questions to solicitors, it has been suggested by the qualitative responses, were too general and distinctions should have been made between when solicitors were acting for or against a party with a contingency fee arrangement and also when acting for either the landlord or tenant.

Additional questions could have been raised with the other parties to Dilapidations disputes, specifically landlords and tenants. Questions might have included;

1. What fee arrangements do landlords and tenants prefer?
2. Is there any merit in financially incentivising tenants' surveyors to motivate them to keep the damages claimed by landlords in Dilapidations disputes to a minimum?
3. In tenants' opinions, how frequently do they receive claims of damages for Dilapidations, where the quantum of damages eventually settled at suggests to you that the initial claim was either exaggerated or erroneous?
4. In tenants' opinions, do Landlords' Surveyors ever show bias when preparing the Quantified Demand for Landlords?
5. If they are aware that the RICS Rules of Conduct for Members and Firms expressly direct surveyors to avoid conflicts of interest, irrespective of the service being provided?
6. If they would expect RICS regulated Members and Firms to comply with their institution's rules of conduct when providing service, even if it is against the client's financial interest?

CHAPTER 7 – CONCLUSION

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7.1 Summary

A review of the available literature on the subject demonstrates that there is clear, overwhelming academic evidence to support the arguments against the continued use of contingency fees unless accompanied with full disclosure. The guidance provided by the RICS at the pre-action stage appears to be at odds with CPR rules and legal advice.

The continuing ambiguity over the role of the surveyor, though successive guidance notes has helped to sustain the status quo but appears reckless and has resulted in confusion. It leaves the community with a lack of clarity over the potential risk to themselves and their clients the extent to which they may not be fully aware.

This research has demonstrated that many surveyors regardless of their fee arrangements do not understand the issues, the way many surveyors are engaging in contingency fee arrangements with their clients whether Landlord or Tenant is contrary to surveyor ethics. Instructions are not being undertaken with a suitable level of transparency which threatens consumer protection. Surveyors who act on contingency fees regularly demonstrate a clearly increase disregard for their professional obligations and duties of care. The judiciary are not in favor of contingency fees at any stage and the majority of solicitors who have formed an opinion believe that they are resulting in exaggeration and understatement.

7.2 What conclusions can be drawn from the findings?

The rules to protect the consumer and uphold professional standards are in place. The issue is one of education and enforcement. The RICS needs to take a greater interest in educating the community particularly on suitable levels of disclosure required before entering into contingency fee arrangements, the recoverability of fees and the common law.

7.3 What conclusions can't be drawn from the findings?

This research has not been able to give an indication into the scale of exaggeration and understatement currently occurring in dilapidations disputes. Nor is it able to make the distinction between financial self-interest and other causes of exaggeration and understatement such as surveyor negligence.

7.4 Areas for further research

Explore the links between contingency fee arrangements and the level of experience of practitioners. Are contingency fee arrangements being sustained by practices established before the RICS abolished the fee scales in 2000? Can Traditionalists be described as the 'old guard'?

Is there a link between the financial interests of those who make and monitor RICS dilapidation guidance and the perpetuation of continuing ambiguity in the GNs presented to the community?

CHAPTER 8 - RECOMMENDATIONS

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8.1 Building surveyors

Building surveyors would be advised to follow the current guidance provided by the RICS in its Practice Statements to Firms and Individuals, Ethical Standards and Guidance Notes with greater care and consideration. In particular, those who undertake work on a contingency fee basis need to ensure that their conduct is compatible with the express direction that surveyors should refrain from undertaking work on fee structures with a financial conflict of interest, whether actual or implied.

They must resist client pressure to act as a 'hired gun' and maintain their objectivity. If contingency fees are to be entered into, they must be accompanied by full disclosure to all parties, including the opposing party to the dispute.

Surveyors need to improve their knowledge of case law. The surveyors have a responsibility to understand the wider law because Dilapidations disputes at the end of a commercial tenancy are one of the few current forms of civil dispute where lawyers are not the principle advisers. It is therefore not enough to simply follow guidance notes.

8.2 Solicitors

The research suggests that there is an issue with solicitors simply passing on quantified demands prepared by mutual client's surveyors without checking that what is being claimed is accurate. Solicitors would be advised to show greater levels of due diligence in this area in order to protect their clients from exaggeration or understatement by their own advisers.

8.4 RICS

The RICS has the Ethical Standards, Practice Notes and Guidance Notes to ensure that surveyors uphold their professional obligations and protect the consumer. However, these standards are not being enforced. Future Guidance Notes must either explicitly reject contingency fee arrangements or make it clear that they are not acceptable unless strict levels of transparency are implemented. Furthermore, the RICS must ensure that the level of guidance is more fully understood by surveyors, particularly concerning the recoverability of fees as damages and concerning relevant case law. This can be achieved through targeted CPD events and Assessment of Professional Competency (APC) training.

APPENDIX A - QUESTIONNAIRES

A-1 Surveyor Questionnaire 107

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APPENDIX A

A-1 Surveyor Questionnaire

1. In dilapidations when preparing a schedule or schedule response to be served on your clients opposing party; do you accept that you owe that party a duty of care, in addition to your own client and that they too may rely on the contents of your documents in good faith?

- ◯ No, duty of care limited to your client
- ◯ Yes, duty of care extends to your client and the opposing party

2. Do you think it is ethically appropriate for a professional claims assessor with expertise in the field of surveying to act with a direct financial interest in the quantum of a dilapidation damage claim they are quantifying?

- ◯ No, it would be unethical at any stage
- ◯ Yes, at pre-action stages
- ◯ Yes, at pre-action stage but subject to disclosing to the opposing party the existence of contingency fee interests

3. When providing dilapidations services do you ever act on a contingency fee basis at the pre-action stages?

- ◯ Yes, regularly
- ◯ Yes, infrequently
- ◯ No, but have in the past
- ◯ No, never

4. At what point do you consider a civil dispute for breach of contract and/or damages to be a matter of 'litigation'?

- ◯ At the point court proceedings commence
- ◯ At the point the parties confirm in writing that there is a dispute
- ◯ From the point the first schedule is prepared
- ◯ From the point of first receiving instructions from a client

Other (please state)

5. Do you ever include heads of claim for dilapidations pre-action stage negotiations costs and fees within a Quantified Demand claim?

- ◯ Yes, always
- ◯ Yes, occasionally
- ◯ No

6. Would you accept that when viewed by others (including your clients opposing party) that a dilapidations surveyor's contingency fee basis of remuneration could pose an actual bias and conflict of interest that potentially results in compromised objectivity and that could provide the motivation for a distorted appraisal of the damages recoverable at law?

- ◯ Yes
- ◯ No
- ◯ Uncertain

7. Are you aware of the litigation cost risk directly to the surveyor/surveying firm arising from the provision of dilapidation services on contingency fee terms and the consequential provision of 'maintenance' to their appointing party?

- ◯ Yes
- ◯ No
- ◯ Don't know, unfamiliar with the concept of 'maintenance'

8. The Jackson Report recommended safeguards for solicitors providing services on a contingency fee basis. Should surveyors acting in dilapidations be required to adopt similar consumer protection safeguards?

- ◯ Yes
- ◯ No
- ◯ Don't know, unfamiliar with Jackson reported safeguard recommendations

Other (please state)

9. Is the RICS doing enough to uphold and enforce its own Rules of Conduct against surveyors acting with conflicts of interest?

- ◯ Yes
- ◯ No
- ◯ Uncertain

10. Do you think the RICS should give more specific guidance to dilapidations surveyors on contingency fees and any conflicts of interest posed by such terms?

- ◯ Yes
- ◯ No

11. Should surveyors stop acting under contingency fees at pre-action stages?

- ◯ Yes
- ◯ No

APPENDIX A

A-2 Solicitor Questionnaire

1. When receiving a schedule with a Quantified Demand from a surveyor do you check to see if it has items within it that are erroneous and should not be included in the Heads of Claim?

- ◯ Yes
- ◯ No

2. How frequently do you return schedules and Quantified Demands and ask the surveyors preparing them to revise them and omit erroneous or unjustified Heads of Claim.

- ◯ Never
- ◯ Very infrequently
- ◯ Frequently
- ◯ Very frequently

3. Do you ever encounter Quantified Demands that misrepresent pre-action stage litigation costs (for negotiations) as damages?

- ◯ Yes
- ◯ No

4. How frequently do you encounter a Quantified Demand where references are made to future negotiation services of a surveyor intending to act on contingency fee terms?

- ◯ Never
- ◯ Rarely
- ◯ Frequently
- ◯ Very frequently

5. When you encounter a Quantified Demand from surveyors with a contingency fee interest in the quantum of the settlement do you advise clients on the detrimental consequences posed by such fee terms?

- ◯ Yes
- ◯ No

6. In your opinion when a surveyor acts on a contingency fee basis in a dilapidation disputes does it motivate a distorted and bias appraisal of the damages recoverable at law?

- ◯ Yes
- ◯ No
- ◯ Undecided

7. The Jackson Report recommended safeguards for solicitors providing services on a contingency fee basis. Should surveyors acting in dilapidation matters follow suit?

- ◯ Yes
- ◯ No

8. Should surveyors stop acting under contingency fees at pre-action stages?

- ◯ Yes
- ◯ No

9. Do you think the RICS should give specific guidance to dilapidations surveyors on contingency fees and conflicts of interest?

- ◯ Yes
- ◯ No

10. Do you think it is ethically appropriate for an expert in the field of surveying to act with a direct financial interest in the quantum of the claim they are involved in quantifying?

- ◯ No, it would be unethical at any stage
- ◯ Yes, at pre-action stages
- ◯ Yes, at pre-action stage but subject to disclosing to the opposing party the existence of contingency fee interests

1. Are you aware that the RICS Rules of Conduct for Members and Firms expressly directs them to avoid conflicts of interest irrespective of the service being provided?

- ◯ Yes
- ◯ No

2. Do you consider that the 'man on the Clapham Omnibus' would expect RICS regulated Members and Firms to comply with their institution's rules of conduct when providing services?

- ◯ Yes
- ◯ No

3. Are you aware that in a number of high profile EWHC dilapidations cases decided in the last five years concerning substantially overstated claims, the claimant's chartered surveyor expert/assessor of the damages recoverable at law first formulated their client's claim for damages whilst acting on a contingency fee basis with a direct financial interest in the quantum of the claim they were suppose to be objectively assessing?

- ◯ Yes
- ◯ No

4. Would you agree that a surveyor expert/assessor acting to formulate the damages recoverable at law in a dilapidation case under a contingency fee arrangement is materially different to the role and services to say the accountants Grant Thornton in R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8) [2002] EWCA Civ 932, [2003] QB 381 were at no point where Grant Thornton the Witnesses of Fact or the Experts in the case?

- ◯ Yes
- ◯ No

5. Do you think that a surveyor expert/claims assessor acting at the pre action stages with a contingency fee interest in the quantum of the claim is at risk consciously or otherwise of inflating or understating the damages recoverable, suppressing the evidence and/or 'sullying the purity of justice'?

- ◯ Yes
- ◯ No

10. Given the Jackson Report, if a case came before you where it became apparent that one of the parties expert surveyors opinion was formulated under a contingency fee arrangement and the case subsequently collapsed due or due in part to that experts opinion would you be minded to award any of the significant litigation costs directly against the surveying Member/and or Firm as a consequence of Maintenance?

- ◯ Yes
- ◯ No

Other (please specify)

11. If it became apparent during litigation that a surveyor expert/assessor has acted on a contingency fee basis and had, as a consequence, deliberately overstated/understated the claim would you consider exercising any of the following judicial discretions at a interlocutory hearing?

- ☐ Ordering that the surveyor/assessor may not/ may no longer act as an expert witness in the litigation
- ☐ Ordering that and their evidence may not be relied upon at trial
- ☐ Ordering that they may not be called to give oral evidence at trial
- ☐ Ordering that they and/or their firm should be joined to the proceedings in relation to the matter of costs

12. Would you consider it fraudulent for a surveyor expert/assessor to deliberately overstate or understate a claim of damages recoverable at law in order to misrepresent that claim in the hope it settles at a figure which is financially advantageous to them under the terms of a contingency fee arrangement?

- ◯ Yes
- ◯ No

13. Should the RICS uphold its own regulations and insist its regulated Members and Firms do not offer dilapidations services under contingency fees arrangements at any stage?

- ◯ Yes
- ◯ No

APPENDIX B – COVER LETTERS

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APPENDIX B

B-1 Surveyor Cover Letter

Mr/Ms XXXXXXX

My name is Michael Warren and I am a Surveyor working at a Building Consultancy in Hertfordshire.

I am conducting Masters Research examining the conduct of Building Surveyors acting for both Landlords and Tenants, specifically examining pre-action stage Ethics, Transparency and Consumer Protection issues in dilapidations disputes.

As a member of the LinkedIn Dilapidations Forum and/or the RICS Dilapidations Forum, I would be very grateful if you would agree to participate in this research study by completing the survey accessed via the link below.

https://www.surveymonkey.com/s/RLSBN9F

The following questionnaire is very short and will take approximately 2 minutes to complete. In order to ensure that all information will remain confidential no personal details will be taken.

Thank you for taking the time to assist me in this research. If you would like a summary copy of this study please let me know by return of email.

Sincerely,

Michael Warren BSC(HONS) DipSurv

If you are not satisfied with the manner in which this study is being conducted, you may report (anonymously if you so choose) any complaints to the College of Estate Management, Whiteknights, Reading, Berkshire RG6 6AW (Student Reference 0801685)

APPENDIX B

B-2 Solicitor Cover Letter

Mr/Ms XXXXXXX

My name is Michael Warren and I am a Building Surveyor working at a firm in Hertfordshire.

I am conducting research for a Masters Dissertation examining the conduct of Building Surveyors, specifically examining pre-action stage Ethics, Transparency and Consumer Protection issues in dilapidations disputes.

As a member of the Property Litigation Association, I would be very grateful if you would agree to participate in this research study by completing the survey accessed via the link below.

The following questionnaire is very short and will take approximately 2 minutes to complete. In order to ensure that all information will remain confidential no personal details will be taken.

https://www.surveymonkey.com/s/MNKCXM6

Thank you for taking the time to assist me in this research. The data collected will provide useful information regarding the views of solicitors on some key issues.

If you would like a summary copy of this study please let me know by return of email.

Sincerely,

Michael Warren BSc(HONS) DipSurv

If you are not satisfied with the manner in which this study is being conducted, you may report (anonymously if you so choose) any complaints to the College of Estate Management, Whiteknights, Reading, Berkshire RG6 6AW (Student Reference 0801685)

APPENDIX B

B-1 Judges Cover Letter

The Honourable XXXXXXXXXX
The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

11th December 2013

Michael Warren
XXXXXXXXXXX
XXXXXXXX
XXXXXXX
XXXXXXX

Dear Justice XXXXXXXX

My name is Michael Warren am a Masters Research student investigating Ethics, Transparency and Consumer Protection issues involving surveyor experts/assessors in dilapidation matters.

In 2008 Judge Hazel Marshal keynote speaker at the RICS Dilapidations Forum Annual Conference stated unequivocally that contingency fee arrangements for dilapidations work were 'inappropriate at any stage'. However over 5 years later there is still stiff resistance within the surveying community to the RICS recognising these fee arrangements as being unethical and detrimental to justice.

As part of my research into this area I have recently undertaken a large study of both the legal and surveying community's views of contingency fees. The response rate has been high with over 200 respondents. Broadly the legal community is against surveyors acting under contingency fee arrangement and are of the opinion it distorts claims and responses. The surveying community however are polarised with a large proportion still in favour of retaining such fee structures despite acknowledging that they may be a source of conflict of interest and promote bias.

The logical next stage of this academic study is to look at the attitudes of the judiciary. I am not aware of any such study of TCC judges having taken place before and would therefore be grateful if you would consider participating.

The following online questionnaire is very short and has been designed to take approximately 3 minutes to complete. It is also designed to be anonymous. No personal information will be requested and any correspondence will remain strictly confidential.

https://www.surveymonkey.com/s/NFTJNQQ

Yours Sincerely

Michael Warren BSC(HONS) DipSurv

If you are not satisfied with the manner in which this study is being conducted, you may report (anonymously if you so choose) any complaints to the College of Estate Management, Whiteknights, Reading, Berkshire RG6 6AW (Student Reference 0801685)

APPENDIX C

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APPENDIX C

C-1 Surveyor comments to question 4.

12 respondents made the following comments:

1. ***When negotiations break down***
2. ***Once that parties confirm intent to litigate, the surveyor will be providing advice in that context***
3. ***When no agreement can be made, despite meetings between surveyors and the parties Involved***
4. ***When the lease ends***
5. ***We deal with lots of disputes, we just have to resolve them. Speak to a solicitor who deals with dilapidations and they'll tell you they are a litigation solicitor - not very helpful sometimes***
6. ***When the 2 parties fail to agree and agree to move to litigation***
7. ***For points above, contingency fees are where client insists***
8. ***None of the above. Although I approach every dilap's claim with the thought it could end up in court, I don't consider it to be a matter for litigation until it is clear that the matter cannot be resolved by negotiation.***
9. ***I always assume such disputes are matters for potential litigation and ensure that my client has legal advice from day 1 of the instruction.***
10. ***I consider instructions in respect of dilapidations to be in anticipation of litigation and advise clients that my involvement and conduct is governed accordingly from the start.***
11. ***I think you may be missing the point with some of your questions - give me a call to discuss [redacted] (director) [redacted]***
12. ***When a party expresses a view that an actionable has occurred that they wish to complain of, where the ultimate determination of a dispute would be gained in a court of law***

APPENDIX C

C-2 Surveyor comments to question 8.

This question also contained an option for the respondents to make further comment. 12 respondents made the following comments;

1. ***It depends on the claim***
2. ***Contingency fees should not be appropriate. Question irrelevant***
3. ***We should follow our own Ethical Standards***
4. ***Do not work for a Contingent fee***
5. ***Yes, as the duty of care issue is likely to become significant for surveyors acting as an expert witness***
6. ***A surveyor is usually a potential "expert". Under such circumstances, I don't believe contingency fee agreements are ever appropriate***
7. ***They are doing different things and once a solicitor is appointed under the jurisdiction of Jackson cost controls litigation has almost certainly commenced.***
8. ***Point 9 below - RICS used to 'advise' incentivised fees until a short time ago - did you know this?***
9. ***Yes but limited to seeing true informed consent from appointing party and being transparent and declaring the existence of such terms***

APPENDIX C

C-3 Solicitor qualitative responses

Extracts taken from emails received from six solicitors in response to the questionnaire.

Solicitor 1.

"I have filled in that survey. Just a note though that in your question about "misrepresenting" negotiation fees, I have answered that on the basis they are nearly always listed as part of the damages claim as though they were part of the repair costs. They are usually clearly identified so that is unlikely to be a "misrepresentation" in the legal sense but could be misleading especially if served on the lay client and I imagine that is what you had in mind. If that is not correct then I would need to change my answer."

[redacted]

Partner

Solicitor 2.

I have done it. I don't work with surveyors on contingent agreement basis and your survey has made me think I should perhaps be more vigilant with other side's reports and ask the question. Interested to see the conclusion of your research.

[redacted]

Managing Partner

Solicitor 3.

Done – one thought: there is a huge difference between acting as a client's advocate and doing the best you can for them in negotiating a dilap's claim versus acting as an honest and unbiased expert in the claim. I struggle with how you can do both. There have been lengthy debates about this in the context of rent review and it was suggested that surveyors should act as advocates in proceedings.

It is topical at the moment – see for example the recent case of Proton Energy Group SA v Orlen Lietuva [2013] All ER (D) 206.

[redacted]

Solicitor

APPENDIX C

C-3 Solicitor qualitative responses cont.

Solicitor 4.

Having completed the survey, you may want to consider if you should distinguish between situations where your own surveyor is acting on contingency fees and where the surveyor on the other side is acting on a contingency basis – you may find you obtain different results – I would have answered some of them differently depending on if the fee terms are for my side or the opposition.

Where your own surveyor is acting upon contingency terms, the ultimate decision lies with the client. A solicitor would first advise the client and only if the client agreed it would be unethical would a solicitor revert to the surveyor in respect of their fee terms. The same is true in respect of erroneous heads of claims – Many clients are not bothered by these intricacies at the pre-action stage because they view it as a "negotiation".

This does not tend to arise where the surveyor used is recommended by the solicitor rather than where the client sources a surveyor themselves. Your questions also appear to assume a level of lawyer control over the process that may not actually exist.

[redacted]

Solicitor

Solicitor 5.

To be honest I found the questions a little vague. Are you talking about schedules we serve or receive? Clearly schedules received attract much scrutiny than those to be served and I think it is fair to say that it is almost expected by tenants that landlords' claims will be exaggerated and will contain unjustified heads of claim – the job of the paying party's professional team is to identify them and serve a counter-schedule pointing that out. That process would not change regardless of the method of remuneration of either party's professional team.

[redacted]

Senior Associate

APPENDIX C

C-3 Solicitor qualitative responses cont.

Solicitor 6.

I have completed the Survey which, perhaps inevitably, was a little simplistic

Some brief specific points:

2. This is a matter of tactics. There are lawyers who will return Schedules etc. in such circumstances. My view is that it is better tactics to respond to the Schedule and thereby to take advantage of the defects.

4. The problem for the recipient of a Schedule, etc. is that he is unlikely to know whether the claimant's surveyor is acting on a contingent basis. In litigation, if a Claimant is acting under a CFA a Notice of Funding is required to inform the Defendant of his potential liability for the success fee. I can understand why a claimant's surveyor would not wish to inform the defendant of the basis on which he is acting (as below).

6. The question that should be posed is whether there is a danger that such a surveyor might be so motivated ... The subjective answer is that it will depend upon the honesty of the particular surveyor. The lawyer's objective answer is that it is inevitable that this is a very real danger: hence such a surveyor could not be instructed as an expert witness in subsequent court or arbitration proceedings.

10. A surveyor is under a duty to advise his client of the risks that attach to his being instructed on a contingent basis. One such risk is that if the claim were not to be resolved but were to be determined by the Courts or by arbitration, the surveyor would be disqualified from acting as an expert witness. Particularly (but not exclusively) if remedial work has been carried out (so that the direct evidence as to the condition of the premises at the time that the Schedule was prepared has been lost), the client claimant's interests have been significantly damaged.

I hope that these further comments assist.

[redacted]

Consultant

APPENDIX C

C-4 Responses from judges emails

Extracts taken from emails received from three TTC Judges in response to the questionnaire.

Judge 1.

"(The Judge) can confirm that he opposes any expert witness being remunerated on a conditional or contingency basis as a clear and inevitable impact on his or her independence."

Judge 2.

"Mr Justice [redacted] who regrets that on this interesting topic he does not consider it appropriate to comment given the real chance that the issue might fall for consideration in court cases and it would be wrong to be seen to pre-judge it."

Judge 3.

"…am not sure that it is appropriate for me, as a serving judge to express an informal view about what might or might not constitute the "ethical or professionally appropriate conduct of surveyors" (Q6) and/or what might constitute "fraudulent (conduct) on the part of a surveyor" (Q12).

APPENDIX D

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APPENDIX D

D-1 Surveyor 1. comments

Exracts from emails received from three senior surveyors in response to the questionnaire.

"Beware of the froth around this topic created by a small number of self serving loud mouths who have a twisted view on what dilapidations is. The loudest of these proponents has recently written a letter to a colleague telling them that the protocol is irrelevant to the matter he is pushing for – in direct contrast to his other statements. These same group of people also submit claims with levels of fees associated with them 3-5 times what I would consider the norm.

The only way you can actually offer any objective take on this is to monitor speed of resolution of dilapidations cases, the extent of time input to resolve and the relative level of the settlement versus the claim. Track that over time against the various changes to the process has unfolded to see if they are having any impact on the quality of the outcome.

The data we have suggests that dilapidations are taking longer to get resolution on in terms of duration and time input plus there is no difference between the recovery rates, so the schedules as served are no more accurate than they used to be.
Oh, and I have yet to see a schedule that has been served with a truly compliant quantified demand; the procedural requirements to make one compliant are quite difficult for a matter of any magnitude".

APPENDIX D

D-2 Surveyor 2. comments

Extracts from emails received from three senior surveyors in response to the questionnaire cont.

"I think it's important to remember that, as with rent reviews, lease renewals and rating appeals where performance fees prevail, there is not necessarily a right and wrong answer to any dilap's dispute. The solutions to each of the items claimed can often be numerous and expose either party to a great deal of cost risk. Where there is such a breadth of settlement range (and potential liability) there should be no harm in aligning the surveyor's interest with those of his clients. This does not extend to making excessive or unsubstantiated claims but it does help focus the minds of those involved.

The use of fees proportionate to the settlement sum is not one solely within the landlord's domain as many tenant's surveyors are incentivised on a percentage of saving basis. This approach is equally open to abuse but again the merits outweigh the risks".

APPENDIX D

D-3 Surveyor 3. comments

Extracts from emails received from three senior surveyors in response to the questionnaire cont.

"I have completed your survey, but am worried this presents a simplistic view of the process.

Whist CPR is aimed at avoiding unnecessary litigation, the role of a dilap's surveyor is NOT to provide impartial advice (such as a Party Wall surveyor appointed under the Party Wall Act). He is acting in his client's interest, to get him the best deal he can.

What a surveyor has to do is to be professional, explain the strengths and weaknesses of his case to his client and only allow a claim or response to be put forward that can be defended. This is not the same as saying the response or claim is impartial. It is not. It is the best professional case that can be made in the client's interest.

Once a claim moves to court, it is the duty of the surveyor AS AN EXPERT WITNESS to provide advice to the court, not to his client. This is a different obligation and here the advice to the court should be impartial in that it should not be influenced by the outcome, but should explain the merits of the claim / response.

It follows that it is a foolish surveyor who attempts to defend a weak aspect of a case in court, just to support his client, or because it is what was claimed initially. Indeed it is very common for issues to become "narrowed" during the pre trail period as information is exchanged and a route to settlement explored.

In practice, it is simply not good business (or professional) to lead a client down a route of incurring more costs through litigation on the chance of making a bit more fee by defending a tenuous aspect of a claim or response.

People who do this lose clients".

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