

DILAPIDATIONS' FAULT LINES

■ Can an initiative from the RICS stop surveyors making fraudulent claims?
Mark Jansen reports

EARLIER THIS YEAR, EDWARD SHAW, DIRECTOR OF building consultancy at Savills, came across what he believed was a clumsy attempt at dilapidations fraud.

A landlord's surveyor was claiming £1m for the cost of repairs to a building formerly occupied by a tenant represented by Shaw.

A quick check on the landlord's own website confirmed the building was to be extensively refurbished later this year, which meant most of the repairs were unnecessary and the tenant was not legally obliged to pay up. The claim was eventually settled at less than £200,000.

Shaw will not name the surveyor involved, but he believes the episode sums up the problem with dilapidations: too many surveyors exaggerate claims to win a large settlement for the landlord, regardless of the true extent of the repairs needed, and often earning a performance-related fee.

'Tenants are being ripped off by landlords and I don't think it is a situation that should be allowed to continue,' he says.

MOMENT OF TRUTH

New guidance will be issued by the RICS at the end of the month that aims to clean up the world of dilapidations.

For the first time the RICS will recommend that building surveyors sign a declaration of truth, or 'endorsement', when preparing a claim. The guidance, which is not binding, has been drafted by the RICS dilapidations working group, which is chaired by Shaw.

For further advice on what the endorsement should say, the RICS will refer surveyors to the Dilapidations Protocol published by the Property Litigators Association. This protocol has existed in various forms since 2002 but has been

updated to coincide with the RICS launch.

It says building surveyors should sign an endorsement that confirms that:

- the works set out in the claim are necessary to restore the premises to the condition required by the lease
- full account has been taken of the landlord's intentions for the property – in other words, that there is no plan to redevelop or refurbish the building, which would render the works unnecessary
- costs quoted for the works are reasonable.

The big question is whether surveyors will take any notice. The Dilapidations Protocol has contained a requirement for an endorsement since 2006, but few surveyors are believed to have used it. The latest version has been reworded to try to answer claims that building surveyors were being asked to act as valuers.

Of those that *Property Week* contacted, several said they would still be reluctant to sign an endorsement because of the legal liabilities and responsibilities it might entail.

All these issues will be debated next week at a seminar on dilapidations fraud organised by the RICS. It will be held at the London offices of law firm Mishcon de Reya. Around 100 surveyors are expected to attend.

It will be chaired by Keith Firn, partner at building surveyor Barker & Associates. He says at least half the dilapidations claims he receives from landlords' surveyors contain 'suspicious representations'.

Firn qualifies this by saying that half the 'suspicious' claims are made in good faith but happen to be wrong. Roughly one quarter are prepared negligently and another quarter are 'knowingly false and fraudulent', he claims.

The seminar has been designed to raise



awareness among surveyors of what constitutes a misleading claim and remind them of their duty under RICS rules to tell the truth.

It was also inspired by the passing of the Fraud Act 2006 on 15 January 2007, which clarified previous legislation. While no surveyor has been prosecuted under the act, Firn believes this may only be a matter of time.

'People don't realise it is an offence,' he says. 'There is insufficient focus by surveyors on this issue.'

DEAF EARS

Yet many surveyors are likely to resist this message. Firn says his company always asks for declarations of truth from surveyors when receiving dilapidations claims but it 'very rarely' gets them. Landlord surveyors often try to conceal the fact that a building has already been relet, or sold to another investor, because this may disprove any claim for a loss in value.

Some also attempt to invoice tenants for VAT on repair works, which they also claim back from Revenue and Customs, Firn adds.

Simon Edwards, associate partner at Drivers Jonas and another speaker at next week's fraud seminar, says claims by landlords are routinely negotiated down to just 20% or 30% of their original value. Yet he is reluctant to describe the claims as fraudulent and says many can be defended as a surveyor's genuine opinion.

Typical arguments revolve

around whether a ceiling or a roof can be repaired or needs to be replaced, and that is often debatable.

Edwards would be reluctant to sign endorsements. 'I would be taking on board an extra [legal] liability and I wouldn't be paid extra for it, so I can't see why anyone would wish to sign it,' he reveals.

He believes a tenant's best defence against an inflated claim is to commission a valuation to assess how much less the building is worth as a result of the disrepair.

A claim cannot legally exceed the landlord's loss and, in some cases, the tenant will not have to pay anything at all. The law does not require the landlord to undertake such a valuation before making a claim, although it becomes a requirement if and when a disputed claim enters the courts.

Mark Tatlow, director of building consultancy at CB Richard Ellis, will be attending next week's seminar, but says he would only sign a declaration of truth if the claim went to court.

Nearly all dilapidations claims are served on tenants before their leases expire and, at that stage, a landlord is unlikely to know for sure whether to rebuild or attempt a new letting. Why, Tatlow argues, should a surveyor guarantee that there are no plans to rebuild at such an early stage?

Firn believes performance-related fees give surveyors an incentive to exaggerate

claims made by landlords – his own practice charges by the hour. But Tatlow believes clients expect surveyors to offer a performance-related deal.

'Deliberate misrepresentation is very rare,' he adds. 'I will know most of the people that are presenting claims to me and I'd expect to deal with them again.'

The RICS has never disciplined any member for making exaggerated dilapidations claims. Shaw argues that this is 'part of the problem', adding that familiarity among surveyors makes it difficult for them to report misleading claims.

'It is very difficult to prove and, in order for it to happen, a surveyor has to do in another surveyor,' he says. 'It's a small industry and to get a reputation as someone who shops other surveyors is not good.'

In spite of the apparent reluctance of some surveyors to sign endorsements, Daniel Levy, head of property litigation at Mishcon de Reya and a speaker at next week's seminar, suggests a 'cultural shift' may be taking place.

'The industry is not rife with fraud, but I do think it is rife with overstatement,' he says. 'Surveyors are just not having enough regard to the fact that there is a legal framework out there and just because something has been common practice for 50 years, doesn't mean that it's right.'

Next week's seminar should reveal whether they are prepared to change their ways. ■



Dilapidations at fault

23 May 2008

Sir, I write in relation to the article 'Dilapidations fault lines' (Property Week, 16.05.08), in which various comments are attributed to me that I feel have been inaccurately portrayed.

I spoke with your writer in advance of the article to discuss my opinions and concerns of misrepresentation in the dilapidations claims community.

I made it clear that it was not just landlords' claims that were suffering from exaggeration and suspicious representations but also tenants' defences that were being deliberately understated. I talked through various examples from real cases with your reporter but his article omitted to mention the balanced view.

I also suggested that the degree of misrepresentation encountered when attending to claims was that in half the cases there are suspicious representations.

Of these, 30% appear to be made in good faith and are probably 'innocent' misrepresentations; 50% are more likely to be 'negligent misrepresentations' because of a lack of appropriate professional knowledge, expertise and guidance; and the remaining 20% are so suspicious that they could possibly be found to be knowingly false or fraudulent if they were ever forensically investigated by the proper authorities.

I also explained that the issues affect not just surveyors but other professionals and also clients involved in claims and defences.

During my conversation with your writer I took care to consider my words and to express my opinion in a manner that made it clear that it was anecdotal, as my clients have not chosen to refer suspicious claims or defences for investigation.

However, my views have been misreported and presented out of context of the conversation so that it paints a far more definitive picture than the opinion and comment I actually provided.

Keith Firn, partner at Barker & Associates