Engaging with Dilapidations: A Question of Ethics

By

Keith Firn and Michael Watson

Reprinted from **Landlord & Tenant Review**
Issue 4, 2009

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

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Keith Firn, MRICS, MFPWS

Commercial Surveying Partner, Barker Associates

Michael Watson

Partner, Property Litigation and Risk Management, Chadwick Lawrence LLP Solicitors

LT Dilapidations; Ethics; Guidelines; Professional conduct; RICS; Surveyors

In June 2008, the Royal Institution of Chartered Surveyors (the RICS) published the latest version of the ''Dilapidations Guidance Note'' (5th edn), (the Guidance Note). Since publication, there has been an ongoing debate over some aspects of the Guidance Note with some surveyors, solicitors and even members of the judiciary expressing concerns at the clarity, quality and accuracy of the RICS guidance in a few key areas, notably ethical standards and surveyor terms of engagement.

The issue

On the one hand, 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.

As the debate continues, it is probably worth the community taking a little time to step back and look beyond the Guidance Note examining the issue in the context of both relevant case law and other RICS published policies and guidance documents.

The RICS guidance on dilapidation surveyor ethics

It is worth starting any review by looking at what the Guidance Note has officially recommended to chartered surveyors on issues of the dilapidations surveyor's ethical service obligations. The Guidance Note sets the following professional standards:

> ''1.6 Surveyors should not allow their professional standards to be compromised in order to advance clients' cases. . . .
>
> 2.2.1 Surveyors . . . have an obligation to act in accordance with the RICS Rules of Conduct and their duties to their clients.
>
> 2.2.3 Surveyors should undertake their instructions in an objective, professional manner.
>
> 3.1.2 Surveyors should bear in mind that, in addition to their duties to their clients, they have duties to RICS (in maintaining the reputation of the Institution and complying with its rules). Surveyors will also have duties to any tribunals to which they give evidence.''

In addition, the Guidance Note includes some fairly straight talking sections on the likely consequences for surveyors who do not follow the expected professional standards of the Guidance Note should they find themselves involved in disciplinary proceedings or on the wrong end of a professional negligence claim. Whilst the official guidance is not a mandatory ''Practice Statement'' for surveyors to follow, it is important to remember that the RICS consider that the guidance remains the relevant professional benchmark for assessing a surveyor's professional

competence and so require that each surveyor should be up to date and familiar with the Guidance Notes within a reasonable time of their promulgation.

The Guidance Note extracts repeated above may appear relatively straightforward and innocuous on first reading but in order to fully understand the ethical and professional standards of conduct required of Chartered Surveyors, one needs to look at the recommendations in more detail and in the context of the RICS Bye-Laws and Rules of Conduct.

RICS Bye-Laws, Rules and Codes of Conduct

As a respected and long established professional body, the RICS rightly holds itself out to the public as representing a body of trustworthy and reliable property experts. In no small part the RICS is able to enjoy its worldwide institutional reputation because of the commitment to professional and ethical standards of service, transparency and consumer protection enshrined in the RICS Royal Charter and Bye-Laws 1973 (as amended) (''the Bye-Laws'').

In terms of standards of conduct, Section V of the Bye-Laws is of particular relevance to surveyors engaged in the debate on dilapidations ethics. Some of the primary rules set down in Bye-Law 19 state:

> ''19(1) Every Member shall conduct himself in a manner befitting membership of the Institution.
>
> (2) Every Member shall comply with the Regulations which may be laid down to govern the manner in which Members carry on their profession or business.
>
> (3) Every Member shall comply with the requirements of the Regulations as to the avoidance (so far as possible) of conflicts of interest and the management of such conflicts of interest as may arise.''

Bye-Law 19(3) has since been incorporated into the RICS ''Rules of Conduct for Members, 2007''; and ''Rules of Conduct for Firms, 2007''; both of which contain an express obligation in their respective rules that RICS Regulated Members and Firms ''act with integrity and avoid conflicts of interest . . .''. When publishing these simplified rules for members and firms in 2007, the RICS stated that in doing so, they had,

> ''created a set of rules that apply equally to all members . . . whatever their chosen field of activity . . . (and) that these Rules provide a strong foundation for . . . protecting both the public and the reputation of the profession . . .''.

From the phrasing used in the RICS codes of conduct, it is plain to see just how much importance the RICS attaches to its members acting ethically and with integrity and also how absolute the obligation is for surveyors to ''avoid'' conflicts of interest. So by inference, Chartered Surveyors who fail to avoid conflicts of interest when providing services run the risk of acting in an unprofessional manner and would probably be breaching both the RICS Bye-Laws and Rules of Conduct.

The question, therefore, faced by Chartered Surveyors providing dilapidations services to their clients on financial performance related contingency fee terms is:

Can such terms pose a ''conflict of interest''? Perhaps, this question is best answered by looking at how the courts have considered such issues in the past.

Common law on contingency fee conflicts of interest

Arguably, the most illuminating analogous judicial guidance on issues of ethics and contingency fees for professionals providing legal services can be found in the leading judgment of Lord Phillips M.R. in *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (Costs) (No.2)* [2002] EWCA Civ 932. This case was described as forming ''a notable chapter in the jurisprudence of this country and the European Court of Justice''. The judgment of Lord Phillips M.R. included the following guidance:

- ''A contingency fee agreement which entitles those providing litigation services to a percentage of anything recovered [or a saving against the claim] may give rise to particular objection on the grounds that it poses a temptation to act in an unethical manner in order to achieve the maximum recovery. . . .''
- ''. . . a contingency fee basis [of appointment] gives an expert, who would otherwise be independent, a significant financial interest in the outcome of the case. As a general proposition, such an interest is highly undesirable.''
- ''. . . it is pertinent to consider the role played by the [expert with a contingency

fee appointment] in order to see whether the nature of their interests in the outcome of the litigation carried with it any tendency to sully the purity of justice . . .''.

- ''. . . the expert will often be in a position to influence the course of litigation in a manner in which the funder, or even the lawyer conducting the litigation, will not. . . .''
- ''In many cases the expert will be giving an authoritative opinion on the issues that are critical to the outcome of the case. In such a situation the threat to his objectivity posed by a contingency fee agreement may carry greater dangers to the administration of justice than would the interest of an advocate or solicitor acting under a similar agreement.''
- ''It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence . . .''.
- ''. . . one must today look at the facts of the particular case and consider whether those facts suggest that the [fee] agreement in question might tempt the [expert/adviser] for his personal gain, to inflame the damage, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice . . . The prospect of [the expert/adviser] receiving [#]% of recoveries would . . . provide a motive for [the expert/adviser] to inflame the damages . . . The greater share of the spoils that the provider of legal services will receive the greater the temptation to stray from the path of rectitude.''

Put simply, the court states that any professional expert providing his expert opinion to the court but who is retained on a contingency fee basis *is* considered to have a significant and prejudicial conflict of interest. So the guidance is clear for experts once matters reach a court, but what about at the pre-litigation stages of a dispute? What standards apply then?

The Civil Justice Council ''Protocol for the Instruction of Experts to give Evidence in Civil Claims, June 2005'' acknowledges that an expert can be in attendance on a ''prospective legal claim'' (i.e., before the matter reaches court). Also, in cases such as *Abbey National Mortgages Plc v Key Surveyors Nationwide Ltd* [1995] 2 E.G.L.R. 134 QBD, an ''expert'' has been held to include ''. . . any person who has such knowledge or experience of, or in connection with that question, that his opinion on it would be admissible in evidence''. Consequently, there is strong inference that those who provide pre-litigation ''expert consultancy services'' (such as preparing an admissible schedule of dilapidations, claim or defence document) are ''experts'' within the meaning and intentions of the CPR and are subject to the same public policy on experts as set out in the *Factortame* case (see above). It, therefore, seems logical to suggest that so far as the courts would be concerned, the contingency fee funding of experts in the pre-litigation phase of any dispute would be unacceptable in the same way as it would be unacceptable before the court. If the courts are not prepared to countenance experts acting on contingency fees, why should the RICS, or anyone else, accept a lower standard of professional ethics simply because court proceedings had yet to be issued? What happens in the dilapidations case that, unlike most of them, actually goes to trial—should the funding arrangements be changed once proceedings are issued? Would it be better to have matters in order from the beginning?

But as some parties to the debate have sought to suggest, surely a professional and competent surveyor dealing with a dilapidations claim which is not yet before the courts can act on an incentivised contingency fee terms and still remain professionally impartial and objective as required by the RICS?

Maintaining objectivity?

In *Save and Prosper Pensions Ltd v Homebase Ltd* [2001] L. & T.R. 11 Ch D, H.H. Judge Rich Q.C. provided guidance on the consequences for professional objectivity posed by an expert (arbitrator) acting with a conflict of interest that had not been disclosed or jointly accepted by the parties at the outset of his appointment. The learned judge determined that:

- ''. . . it is important to establish whether [the expert] knew of the [existence of a conflicting interest] as appearing to undermine his impartiality. . . . [the expert] has told me, and I have no reason to doubt, that he was uninfluenced by . . . [the interest] . . . That is not the question. The question is whether a reasonable person whom I am supposed to represent might consider, with knowledge of the circumstances, that [an expert] in the position of [the expert] might with reasonable likelihood be

influenced by [his interest] so that there was a real possibility of bias.''

- ''. . . I acknowledge the improbability [in this particular case] . . . that [the expert] personally would not allow such [the conflicting interest] to affect his mind; but that effect upon the likelihood of a prejudice and biased . . . [conduct] is a matter for the parties [to consider and agree] after disclosure of the [interest] . . ., and their acceptance of the integrity of the particular individual . . . In the absence of such disclosure and agreement the question has to be judged whether an [expert], not the particular [expert], whose firm had that [interest], . . . would be likely to constitute a real danger that his [objective opinion] would prove to be biased or prejudiced. Put in the generality I must answer that there is such a real danger . . .''.

In the *Save and Prosper* case, the expert surveyor was compromised by the existence of a conflict of interest so that his opinions were considered to be biased, prejudicial and contrary to the purity and administration of justice. The reasoning supporting the judgment can be said equally to apply by analogy in dilapidations cases where conflicts of interest exist and so whilst a surveyor may genuinely believe that he is able to maintain his objectivity if he takes an instruction on a contingency fee basis the reality is that his personal view on this point is of no relevance.

In the eyes of the reasonable person personified by the courts, evidence and opinion prepared whilst acting under the terms of a contingency fee arrangement will be treated as biased, suspect, possibly prejudicial and posing a real danger to justice. For any surveyor acting at the pre-litigation stages of a dilapidations claim/defence on contingency fee terms, then if the matter does proceed to litigation when the basis of his instructions is revealed to the court, he will have a serious ethical and professional credibility issue to address which is likely to have a detrimental impact on the case of the party instructing him.

Conclusion

So what can be learned from the above review? Well, if one follows the logic of the points made by the court in the cases referred to, it would appear that contingency fee appointment terms for dilapidations surveyors do indeed pose a significant and unethical conflict of interest that would be unacceptable to a court regardless of whether the terms exist during the pre-litigation or litigation stages in the proceedings on any given dispute. Such terms of appointment would also appear to be contrary to the RICS Bye-Laws (1973), Rules of Conduct for Members and Firms (2007) and would also appear to be incompatible with the professional standards recommended in the RICS Dilapidations Guidance Note, 5th edn (2008).

But as most dilapidations claims do not come anywhere near a court or the commencement of formal litigation, are the views of the courts of any real relevance or concern to the surveyor dealing with dilapidations claims on a day-to-day basis whose clients may actually like the idea of a surveyor who is remunerated and incentivised by reference to the quantum of the settlement? We suggest that the answer is and should remain an emphatic: ''Yes''! Professional standards and ethics are of paramount importance if the RICS and its members are to maintain and improve their reputation and standing in dilapidations.

Postscript

In late 2008, the RICS formed a ''Transparency Working Group'' (TWG) that has been tasked to look at issues such as transparency of fees, ethics and consumer protection and report by the end of 2009. Perhaps in light of the above, fees and ethical service standards in dilapidations will now form part of the TWG's review and with luck may lead to their recommendations for further beneficial reform in dilapidations.

Whether the TWG calls for reform or not, ethical terms and standards of appointment remains a matter for each individual surveyor to consider when taking on a dilapidations instruction and we suggest that unethical and unprofessional conflicts of interest should be avoided by surveyors at all costs.

Keith Firn's book, ''Dilapidations and Service Charge Disputes—A Practical Guide'' is published by Estates Gazette Books.

The law is stated as at June 8, 2009.