

Practice & Law

ROOM FOR IMPROVEMENT

Dilapidations The RICS Guidance Note has reached its sixth edition – but can it be developed further to benefit surveyors and their clients?

April saw the introduction of the sixth edition of the RICS Dilapidations Guidance Note (the Guidance Note).

It is the third edition published since the introduction of the Civil Procedure Rules (CPR) in April 1999 and the first since the formal adoption of the Dilapidations Protocol under the CPR in January 2012.

The Guidance Note states that it is intended to represent best practice, ie to set the benchmark for delivery of professional advice to meet the “high standard of professional competence” required.

Has this goal been achieved?

Evolving standards

The Guidance Note has developed over various editions and will no doubt continue to evolve and improve in response to practitioner feedback and ideas.

One current source of debate, discussion and development of evolving standards and expectations in dilapidations is on LinkedIn’s “Dilapidations discussion forum and interest group” (see: www.linkedin.com/groups?gid=4006639).

Issues raised on it include:

- the need for further guidance relating to taking client instructions;
- the role of the surveyor prior to the issuing of court proceedings;

- the need for additional guidance on the possible consequences for clients of surveyors adopting contingency fee-based terms of engagement;
- common law principles of loss; and
- recovery of professional fees as part of a claim.

This article will discuss these issues with a view to stimulating debate as to how dilapidations guidance might be further developed for the benefit of surveyors and their clients.

The taking of client instructions

Part 1.1 of the Guidance Note provides guidance on the duties owed to a client by



inside

Rights of light

How local authorities could help developers avoid costly disputes

PAGE 91

Mainly for students

Factors that can facilitate the development of listed buildings

PAGE 92

Planning notes

Why national planning policies should not be accorded automatic primacy over local plan policies

PAGE 94

Legal notes

James Driscoll considers the largest enfranchisement claim ever made

PAGE 95

Case summaries

Harrison and others v Shepherd Homes Ltd, Kensington and Chelsea Royal London Borough Council v Secretary of State for Communities and Local Government

PAGE 96

Law reports

Earl Cadogan and another v Magnohard Ltd, Barker v Hambleton District Council

PAGE 98

ONLINE THIS WEEK HEAD

Intergraph (UK) Ltd v Wolfson Microelectronics plc [2012] EWHC 528 (Ch) highlights the importance of checking title deeds to ensure that nothing has been missed when exercising break rights in leases. See PP 2012/94 at www.egi.co.uk

a surveyor. The wording of this section is to some extent analogous to the requirements of the CPR in relation to the duties of an expert witness, by instructing surveyors that they should seek “fully to understand the client’s position, the reasons why the surveyor’s advice is sought and the use to which that advice might be put”.

It essentially requires the identification of the client’s strategic aims by the surveyor as part of the process of taking instructions.

Part 3 of the Guidance Note specifically relates to the taking of instructions and opens with:

“Instructions relating to dilapidations should be taken in accordance with the RICS Rules of Conduct.

“Particular regard should be paid to notification of terms and conditions of engagement to be provided in writing to the client.

“Instructions in dilapidations claims are no different in this respect from any other instruction.”

Confusingly, no such requirements exist in the current RICS Rules of Conduct for Firms 2007 (v5, 1 January 2012), or in the current RICS Rules of Conduct for Members 2007 (v4, 1 January 2011). This misleading anomaly has yet to be explained.

REX FEATURES

Surveyor's role prior to court proceedings

The Guidance Note provides subjective guidance on the "role of the surveyor". It states that the surveyor may act as "adviser", "expert witness" or "dispute resolver". However, it does not sufficiently explore or explain the degree of crossover between the listed roles; nor the extent to which steps taken in one role, such as an initial "adviser", could impact subsequently, for example, once preparing evidence for court proceedings.

There is also no acknowledgment of the role of the surveyor as a "witness of fact". Paragraph 2.2.2 refers to the role of "adviser" but clearly acknowledges that this can involve providing a dispute resolution "negotiator" role within the meaning prescribed in Appendix B of the RICS Practice Statement and Guidance Note *Surveyors acting as advocates* (2008), in addition to merely advising on strategy and tactics.

Those advising on the procedure and strategy in dilapidations claims are advising under the governance of the CPR. The relevant parts are the CPR Terminal Dilapidations Protocol (the Protocol) in terminal dilapidations claims and the CPR Practice Direction – Pre-action Conduct in interim dilapidations claims.

There are, however, many other parts of the CPR that will affect the claim should it progress towards trial. It is important therefore, that actions taken in the early stages of the claim, before a solicitor is retained, do not cause subsequent difficulties.

The Protocol should not be viewed in isolation from the other parts of the CPR, which should be within the contemplation of the adviser from the moment of instruction. Examples include: CPR 31, Disclosure and Inspection of Documents; CPR 35, Expert Witnesses; CPR 36, Offers of Settlement; and CPR 43 and 44, Costs.

The Guidance Note does not make this clear, nor does it require surveyors to advise their clients if they are unable to provide advice on these matters. Such guidance would enable clients to make informed decisions about the extent to which the adviser can assist them and whether they can provide full advice on the pursuit of a claim for breach of contract or whether they act purely as a negotiator.

Following the adoption of the Protocol, when a surveyor receives an instruction to act (whether advising a landlord or a tenant), he is engaged in a process that is subject to and measured against the standards and procedures required by the CPR.

Given that the dilapidations claim process is subject to those rules from the initial preparation of the schedule of dilapidations and quantified demand through to final judgment, then it would

be surprising if a standard of conduct required of the surveyor as witness of fact or expert witness were to change during that process.

The guidance should therefore apply from the moment a surveyor receives an instruction in relation to dilapidations and should comply with the requirements of the CPR for expert witnesses and assessors (CPR 35). This would protect both the surveyor and his client should the claim result in the issuing of proceedings.

The role of the surveyor prior to court proceedings is that of a professional preparing the first statement of a claim in accordance with, and under the governance of, the rules of court. Failure to comply with the requirements of those rules potentially exposes their client to sanction in accordance with them. Clearer guidance could have been provided within the Guidance Note.

Surveyor's fees

Part 3 of the Guidance Note addresses the issue of fees, quite properly stating that these are a matter of contractual agreement between the surveyor and his client.

However, the Guidance Note does not make it clear that the fee arrangement between the surveyor and his client could be subject to disclosure to the other party to the dispute. Care must therefore be taken not to engage on terms that could pose a conflict of interest. Any surveyor working on such fees is taking a risk with his client's claim.

Paragraph 3.2.3 of the Guidance Note contains an opaque warning in relation to the possibility of surveyors acting on conditional/contingency fees, with a reference to the guidance contained in the RICS Practice Statement and Guidance Note *Surveyors acting as expert witnesses* (3rd ed, 2008).

The Guidance Note has missed an opportunity to give clear and unequivocal guidance on this issue given that:

- surveyors are now acting under the auspices of the CPR from the moment they receive instructions regarding a dilapidations claim;
- the CPR are the rules of court;
- the surveyor's role will ultimately be to assist the court with their expertise; and
- the courts have repeatedly made their views on contingency fees clear.

To quote Lord Phillips in *Factortame v Secretary of State for the Environment, Transport and the Regions (Costs) (No 2)* [2002] EWCA Civ 932; [2003] QB 381:

"... 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..."

Since contingency fees are viewed by the courts as unacceptable for an expert witness or witness presenting evidence at trial, it is difficult to envisage grounds as to why such terms of engagement pose no less a threat to the purity of justice when the surveyor (witness of fact, claim assessor and potential expert witness) prepares the first representation of the level of claim under the provisions of the CPR. It is easy to see how tactical advantage can be gifted to the other side in a dispute where the surveyor's services are provided while under the influence of inappropriate contingency fee terms.

Given the guidance available on these issues in other RICS publications, such as *Surveyors acting as advocates*, it is arguably a damaging omission that the Guidance Note does not expressly require surveyors to seek their prospective client's "informed consent" if proposing to provide services on contingency fee terms that could pose a conflict of interest that risks compromising the surveyor's client in any future litigation.

Interestingly, surveyors are not provided with any guidance on whether, if they take an instruction to act on contingency fee terms in dilapidations disputes, then they provide legal "maintenance" to their client. They are thus exposed to suffering an award of litigation costs against the maintaining surveyor in the event that the dispute ends in court proceedings.

Final thoughts

A dilapidations claim is a civil claim for alleged breach of contract that is conducted under the governance of the CPR from the moment instructions are given for the preparation of a schedule of dilapidations (and quantified demand). Therefore, those professionals who assume responsibility for the conduct of the pre-action stages of these claims must understand, and be given clear guidance on, the relevant rules and legal principles that apply to such contract disputes and claims.

Part 2 of this article, due to publish on 28 July 2012, will examine the guidance made available on the common law principles of loss along with liability for, and recovery of, professional fees.

Authors: Michael Watson is a partner at Shulmans LLP, Patrick Stell is a chartered building surveyor, solicitor (non-practising) and director of GKS Building Consultants and Keith I Fern is a chartered building surveyor and director of Datum Building Consultancy