Dilapidations—Liability for and Recoverability of Surveyor Fees and Costs

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LT Business tenancies; Chartered surveyors; Claims; Dilapidations; Fees; Guidelines; Liabilities; RICS

Chartered surveyors typically act as the lead adviser and, arguably, the expert on commercial property dilapidations claims and disputes and often are the specialist directly responsible for appraising and claiming (or defending against claims) the tenant's liability for the landlord's professional fee costs. Over the last decade, there has been increasing concern amongst surveyors, lawyers and clients that too many dilapidations claims which include claims for landlord's professional fees are often pursued on a misleading basis. This article reviews the legal guidance on liability for professional fees which should be considered when preparing or defending against dilapidations claims.

Introduction

An earlier article on costs relating to dilapidations claims entitled "Dilapidations—Landlord's Costs and Fees" (K. Firn, P. Stell, and M. Watson, [2011] L. & T. Review 84) suggested that, if chartered surveyors are to be the predominant professional services provider involved in the management of the "pre-action" phase of commercial property dilapidations claims (as opposed to solicitors, property managers, claims handlers, agents, engineers, et al), then in addition to advising on the dilapidations liability itself, early advice should to be given as to the tenant's liability for the landlord's surveyor's professional fees from the inception of any dispute. Indeed, it was suggested that advice on the strategy in relation to costs should be a fundamental aspect of the provision of a professional service in relation to breach of contract claims relating to disrepair, and so forth.

RICS Dilapidations Guidance Note— landlord's fee recovery

A chartered surveyor seeking to advise their landlord or tenant client with regard to the recoverability of surveyors' fees ought to do so having first taken into consideration the available guidance, such as the guidance provided by the Royal Institution of Chartered Surveyors (RICS)

as set out in the RICS *Dilapidations Guidance Note* (5th edn, June 2008) (the Guidance Note). The Guidance Note (at paras 2.1.4, 2.1.5 and 6.7.2) provides advice on the costs provisions of the Civil Procedures Rules (CPR), drawing attention to CPR Pt 44.3, advising that a competent surveyor would be expected to be familiar with the relevant parts of the CPR.

In summary, the Guidance Note contains general warnings that the court will "have regard" to the conduct of the parties both prior to and during proceedings when awarding costs. This limited guidance is correct, but could go further when it comes to the more specific issue of rights of recovery for professional fee costs.

The current Guidance Note addresses the issue of recovery of surveyors' costs and fees briefly as follows:

> "4.6 **Recovery of fees**
>
> 4.6.1 As a general principle, the fees incurred by a landlord for preparing and serving a schedule of dilapidations cannot be recovered from the tenant. …"

Due to the potential significance of the liability for costs and the impact that this might have on the tactics employed by landlords and tenants, it is worth reviewing whether this statement is accurate and sufficient; and if not, what further direction should be incorporated within future editions of the Guidance Note.

Judicial clarification—the PGF II case

In 2010, H.H. Judge Toulmin QC in the case of *PGF II SA v Royal & Sun Alliance Insurance Plc* [2010] EWHC 1459 (TCC); [2011] 1 P. & C.R. 11 addressed the very issue covered by the RICS Guidance Note, para. 4.6.1, (i.e., whether, as a general principle, fees incurred by a landlord for preparing and serving a schedule of dilapidations can be recovered from the tenant). The learned Judge concluded:

> "340. I cannot see any reason of principle as to why a reasonable sum should not be recoverable from a tenant for serving a Schedule of Dilapidations at the end of a lease. The Schedule is required as a direct consequence of the tenant's breach of covenant …
>
> 341. … I find therefore that in this case the reasonable cost of preparing a Schedule of Dilapidations is the direct consequence of the tenant's breach and is recoverable."

Consequently, and as a general principle, the fees incurred by a landlord for preparing and serving a schedule of dilapidations *can* be recovered from the tenant as a head of damage even if there is no express lease covenant that expressly permits such a claim.

Interestingly, whilst determining the judgment in the *PGF II* case, H.H. Judge Toulmin also considered the issue of the scope of professional services that can be legitimately considered to form an integral part of preparing and serving a schedule of dilapidations and, therefore, what may be sought and recovered as damages. When considering the landlord's claim in the *PGF II* case for £18,000 towards landlord surveyor costs and fees (which were seemingly all claimed as "damages"), the learned judge accepted the defence position that such costs and fees were "unreasonable" for preparing the schedule and awarded the claimant only £6,000 plus VAT as damages on the basis that it would "provide fair remuneration" for the preparation of the Schedule of Dilapidations in the context of that specific dispute. The Judge did not award the remainder of the landlord surveyor's professional fees and costs as damages as a review of the surveyor

invoices showed that the majority of the fees and costs were largely incurred in relation to the later repeated revisions and re-issuing of amended schedules and the provision of advice and dispute resolution "negotiation" services. These additional landlord's surveyor services were all supplied after the schedule was served on the tenant and the dispute had arisen and so were not accepted as being a direct part of preparing the original schedule of dilapidations and claim. The Judge also observed that:

> "341. Subsequent costs may be recoverable in the litigation … and are, in any event, a matter for later assessment."

In other words, it is clear from the *PGF II* judgment that the landlord's reasonable professional fees and cost incurred in obtaining and issuing a schedule of dilapidations are recoverable as a direct damage flowing from the tenant's breach(es); but liability for the landlord's professional costs and fees incurred after that point will follow the basic principles of costs recovery in all civil litigation.

What next for RICS guidance?

The view of the RICS Dilapidations Working Group, expressed in June 2009, that: "the subject of costs is a complex one" is undoubtedly correct, but their insistence that it would be "inappropriate" for the Guidance Note to cover this issue "in any great detail" is debatable purely because it is the objective of any RICS Guidance Note to provide "Best Practice" guidance.

The Property Litigation Association Dilapidations Protocol (the Protocol) has sought to provide additional guidance on pre-litigation conduct in dilapidations claims. The Protocol has been held out by many to be a benchmark standard of reasonable pre-litigation conduct and indeed, is incorporated into the current version of the Guidance Note. More recently though, it has been announced that an official "Dilapidations Protocol" based on the current PLA Protocol, but with some important improvements, will be formally adopted for incorporation within the Civil Procedure Rules with effect from January 2012.

When the Dilapidations Protocol is formally adopted the RICS Guidance Note will need to be updated and provide more comprehensive guidance on matters of legitimate costs claims so that all surveyors preparing the "Quantified Demand" on behalf of their landlord client are able to competently and properly "…explain the legal basis for the recovery of losses" as required by the protocol. The RICS advise that a revision is currently being drafted; however whether this includes any updated guidance on the liability for (and recovery of) professional fees is not known.

As a summary of current common law on such matters, the Guidance Note perhaps ought to provide clarity to surveyors on the following liability issues:

Stage 1: Fees and costs for preparing and sending the schedule to the tenant:

Reasonable costs are recoverable either pursuant to a specific clause in the lease or as a direct consequence of the tenant's breach(es) and therefore are recoverable from the tenant as a head of damage: see *PGF II*, above.

Stage 2: After sending the schedule of dilapidations to the tenant:

a. As a general principle, costs (including surveyor fees) are not recoverable by a party who prepares for litigation which is never instigated, save that CPR 44.12A provides an exception whereby the parties to a dispute, who have reached agreement on all

issues (including which party is to pay the recoverable costs) but have up to that point failed to agree the amount of those costs, can have the amount of those costs determined: see cases such as *Reeves v Blake* [2009] EWCA Civ 611.

b. If the surveyor is *not* providing the services of an expert witness but is acting as an advocate/negotiator; and if the client has not yet appointed a solicitor to provide advocacy services, but the surveyor's services are of the type of advocacy service that would ordinarily be provided by the solicitor (as is fairly common place in dilapidations disputes), then, by comparison to analogous common law decisions, the costs of the surveyor advocate are seemingly unrecoverable: see *Cuthbert v Gair (t/a The Bowes Manor Equestrian Centre)* [2008] EWHC 90114 and *Agassi v HM Inspector of Taxes* [2005] EWCA Civ 1507.

   Explanatory Note: In *Cuthbert v Gair & Anor (t/a The Bowes Manor Equestrian Centre)* [2008] EWHC 90114, the fees and expenses of loss adjusters in progressing a claim without a solicitor were held to be unrecoverable from the other party. By analogy, therefore, if a client relies on the surveyor to manage a claim in future, that is to say, the surveyor conducts the litigation in accordance with the CPR after the sending of the schedule, then because the surveyor is undertaking work normally carried out by a solicitor, the costs of that work will not be recoverable (unless they are engaged by a solicitor to provide services for and on behalf of the solicitor on an agency basis, in which case the surveyor costs may become recoverable as legal disbursements in any court action if commenced).

c. the surveyor's costs in acting as an expert preparing evidence for court action and/or as an expert witness will be potentially recoverable subject to the established CPR rules on costs (see CPR Pt 44).

Based on the above, para.4.6.1 of the Guidance Note is ripe for revision when the Guidance Note is next updated to take account of the introduction of the CPR Dilapidations Protocol.

The need for improved guidance on surveyor appointments

Putting aside legal liability for costs issues, the basis of surveyors' costs are of course defined by the terms they agree with their clients. Costs are a major issue in litigation and, as the sending of a schedule of dilapidations will shortly be carried out under the auspices of the formally adopted CPR Dilapidations Protocol and the CPR, from that point it will be difficult to say that this is not a step taken in the process of litigation (or in contemplation of litigation) and therefore, at some point, the costs arrangement surveyors have with their clients could come under scrutiny by the court, as could the extent of their instructions. Accordingly, before taking on any dilapidations instruction, surveyors should have a clear written agreement with their clients identifying specifically (a) what role they are appointed on (i.e. adviser; expert; or advocate?); (b) what service they are contracted to provide; and (c) on what basis they will be remunerated for the provision of their services.

Before they enter into a fee agreement with their clients, the clients ought to be able to make informed decisions as to the options for payment of their surveyors and the consequences this may have in the future. The surveyor is a "witness of fact" (i.e., 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). Either way, they owe a duty under the CPR to the court to tell the truth in relation to all evidence, (i.e., to give an honest view). This does not absolutely prevent the surveyor from

being instructed on a contingency fee basis, although, as the Master of the Rolls has recently stated (in an address to the RICS Dilapidations Forum 2011 Conference) "it may affect the judge's view of the expert's credibility."

In any case, where a surveyor acts in accordance with the CPR to prepare and send a schedule of dilapidations there is always the potential that the claim may actually be heard in court. In discussing fee arrangements with the prospective client, if surveyors are considering agreeing a fee arrangement (i.e., that may ultimately have a detrimental impact on their client's position by affecting their credibility) as the witness of fact or the expert witness, then this is a matter that ought to be made clear to the client at the earliest opportunity.

It is becoming increasingly common to see requests made for disclosure of surveyor appointment terms to support and scrutinise the landlord's claim for costs. It should be a requirement set out within the Guidance Note that the client in giving instructions should be sufficiently advised as to the types of fee arrangement available at the outset to be able to make a fully informed decision and that the agreement and extent of services to be provided should be clearly set out in writing in case this comes to be analysed by the court in relation to the issue of costs.

Conclusion

In the previous article on costs (Firn, Stell, and Watson, [2011] L. & T. Review 84) the lengths to which a landlord went to in order to attempt to secure recovery of costs were examined. It was suggested that, if costs recovery is likely to be an important issue for a client, then surveyors who take on the responsibility for managing and conducting breach of contract claims in relation to property disrepair should ensure that they consider all the options in relation to costs, factor these options into the strategy and that they advise their clients accordingly.

The issues analysed above highlight various lacunae in relation to liability for (and recovery of) costs, particularly where surveyors have the conduct of early stages of litigation. With the impending implementation of the formal CPR Pre Action Dilapidations Protocol with mandatory application to dilapidations claims, it seems that it will be difficult to argue against the proposition that surveyors are either:

- a material "witness of fact"; and/or an "expert witness" under the provisions of the CPR owing a primary duty to the court, with an obligation to ensure they have clear written terms of engagement avoiding fee arrangements that give them an interest in the outcome of the proceedings; *or*
- "advocates" or "advisers" (who may also be a material witness of fact), effectively doing the work of a solicitor for which their costs (unlike the lawyers) are probably not recoverable.

If the ability to recover costs is an issue for landlords (as it appeared to be in the Agricullo case referred to in the previous article and the *PGF II* case referred to above), commercial landlords should, ideally, be represented at the outset by both a chartered building surveyor (appointed as an expert under the auspices of the CPR) and a solicitor (acting as advocate) in order to best protect their position on recovery of legal costs including lawyer's fees and surveyor's fees charged as a disbursement to legal costs.

It is how this strict legal obligation is dealt with on a day to day basis, particularly on the lower value claims that will define the true value added by any chartered surveyor and solicitor acting on commercial property dilapidations claims. Pragmatism based on the issues covered above combined with a CPR-compliant approach will best serve commercial landlords and tenants with the adoption of the revised Dilapidations Protocol in January 2012.

The law is stated as at October 7, 2011.