

## REPORTING TO THE CLIENT:

### TERMS AND CONDITIONS



Small comfort to a surveyor who sets out terms of engagement, and expresses the limitations of survey, only to find that an aggrieved client decides to sue for a defect which has been missed, and has proved costly to remedy.

#### Terms of engagement and 'limitations'

Merely stating a limitation and saying that part of the inspection could not be carried out may not be sufficient to avoid liability. Prudently, an explanation should be given of why the area could not be examined. Advice should be offered about the level of risk which might be assumed by not inspecting the part omitted and the consequences which might ensue.

#### Example

Conducting a survey without proper process, is like following tail lights in a fog on a motorway, or indeed buying a house without a structural report. Nine times out of ten there is no incident, but on the tenth time an event occurs which could have been avoided.

Take the case of a town house without a ready means of access - possibly where the drainage system is routed under the house to the public road. Reasons for not inspecting might be the total lack of manholes within the plot; a screw-down cover which cannot be removed; or even a 'wimpish' excuse once offered on the old SAVA-accreditation courses that it is 'reasonable' not to inspect the drains in an instance where a 'heavy' cover needs to be lifted e.g. a concrete cover commonly in use in 1960's properties. In such a case, stating in the 'terms and conditions' that ... "the drainage system was not inspected..." might not be sufficient to avoid liability if a problem is subsequently encountered.

#### Explain fully

Whilst it might seem demeaning or even silly to report apologetically ... "because the cover was too heavy for me to lift"!, the client is entitled to know what prevented inspection, and what consequences might arise if the purchase proceeds without the drains being inspected.

It may be, despite lack of visual inspection, that the main sewer lies within two metres of the building, and the surveyor operated the ground floor toilet ten times, to confirm free disposal of waste water - in which case, say so.

Alternatively, the drain may be 100 years old, pass under trees and neighbours garden walls and be at risk of damage by roots. Merely stating that the drains could not be inspected, without specifying the consequences of possible problems, and recommending (with reasons) further inspection, could be the fore-runner of a claim for negligence.

#### Cross v. David Martin & Mortimer 1989

It matters little whether a 'building survey' or an HBRV are being undertaken, the duty of care remains the same. Consider, for example, the case of **Cross and another v. David Martin & Mortimer** ([1989] 1EGLR 154 at 155): Mr Justice Phillips, with regard to the relevant standard of care, said:

#### HBRV and Structural Survey

#### "No difference in duty of care"

*"The HBRV is now a common form of survey for the domestic house purchaser, but no reported case yet gives guidance as to the nature and extent of the duty of a surveyor who carries out such a survey. It has been suggested, apparently, in some quarters that an HBRV constitutes a more perfunctory survey than that which is described as a structural survey. In July 1984 a Report of the Joint General Practice and Building Surveyors Division Working Party on Structural Survey Advice to the Profession on Residential Property expressed the view, under the heading 'Expertise': "We are convinced that the same level of expertise is required from the surveyor in*

## Summary of events

*carrying out an HBRV as that for a structural survey." Having heard the expert witnesses in the present case and considered the HBRV form, it seems to me that this conclusion is well founded. The HBRV form has 32 heads against which the surveyor makes his entries. Most of these heads consist of specific features of the house surveyed. Against some heads the form notes limitations on the extent of the survey that will be effected, but I doubt if these do more than state expressly what would be the limitations reasonably implicit in a structural survey of a domestic house."*

*... In my judgement, **a house-purchaser can properly expect to be informed of any feature of the property that involves uncertainty as to its condition, present or future, even if the surveyor's opinion as to its significance is reassuring.**"*

The case concerns Mr and Mrs Cross who purchased a semi-detached house of 1968 origin. Mr Mortimer, a Chartered Surveyor, had previously advised them that the appropriate survey was an RICS Home Buyers Report and Valuation in standard RICS format.

Mr and Mrs Cross subsequently took action against their surveyor: firstly, on the basis that they were not sufficiently warned about subsidence in the solid ground floor slab (signs of which included a hump in one part and a gap of 8mm below a partition wall in another; secondly, misalignment of doors at first floor level, including distortion in the openings and various doors which failed to operate properly; and thirdly, the consequences of interference with the function of roof trusses which had enabled the loft to be converted to a room; work which, whilst not compromising stability, subsequently prevented the room from being used other than for light storage). Mr and Mrs Cross claimed they had suffered loss as a result of inadequate advice. The defendant firm denied that there was evidence of structural fault or significant disrepair to substantiate Mr and Mrs Cross' claim.

Mr Justice Phillips accepted that Mr Mortimer had not carried out a 'slap-dash' survey. However, in relation to subsidence in the floors he ruled that ...*"a house purchaser can properly expect to be informed of any feature of the property that involves uncertainty as to its condition, present or future, even if the surveyor's opinion as to its significance is reassuring ..."* Continuing, he ruled that ...*"it is necessary to have regard not merely to (an) opinion of the probable significance of the feature but also to any significant alternative possibilities ..."* which cannot be affirmatively ruled out.

On the matter of distortion of openings and operation of doors, Mr Justice Phillips accepted that the surveyor had tested the first floors and found them to be sound and had recorded no defects in plasterwork to indicate a progressive problem. Furthermore, he did not consider that ...*"a competent surveyor would have advised that the misalignment of the doors was likely to prove symptomatic of the need to incur significant expenditure on structural reinforcement."* He concluded that the surveyor ...*"would properly have left the purchaser with a degree of concern about the first floor doors - but with the belief that the remedial work required was unlikely to be more than adapting the doors and their catches - albeit that the end result would be somewhat less sightly than doors fitting square and flush in their frames ..."*

On the matter of the loft conversion, the surveyor, Mr Mortimer, had drafted his report as follows:

*"Roof void has been mostly converted into a small room with excellent natural daylighting from a window in the flat wall but access is by metal loft ladder only and there is no proper staircase. Specific inquiries should be made as to whether or not this improvement required planning permission or building regulations and certainly if proper access was to be provided then both of these would undoubtedly be required, otherwise the basic construction of the roof is sound ..."*

Later in the report he continues:

*"... No adverse planning or local authority proposals known or foreseen and no apparent contravention of planning requirements or building regulations although I have already stressed that specific inquiries should be made as regards the loft conversion and your solicitor should, however, raise formal inquiries on all matters before exchange of contracts and we shall be pleased to advise you without extra charge in the light of the answers to these inquiries."*

Many surveyors might consider Mr Mortimer's advice as competent and that checking building regulations and planning is the conveyancer's job and not theirs. However, as the case proves, this is not so. A conveyancer is not a building expert and is unable to determine from a sheaf of documents whether a job has been completed properly.

Would a Local Authority Building Inspector actually give consent for a third floor conversion accessed by a metal loft ladder, probably without fire-proofing and other requirements? The surveyor is inspecting the premises as a professional and should give an expert opinion to warn the conveyancer in general, but the client in particular, that there might be a problem with the conversion.

As it turned out, Mr and Mrs Cross did not interpret Mr Mortimer's comments as a warning that the design of the roof alteration might be suspect, and Mr Justice Phillips did not judge that Mr and Mrs Cross should have done so. They had, of course, referred the question of planning and building regulations approval to their solicitor. The solicitor, in turn, had drawn a blank in his enquiries because the conversion had been carried out before the vendors themselves had acquired the property. Mr and Mrs Cross took the matter no further and, feeling reassured, proceeded with the purchase.

... Surveyor should have said ...

Mr Justice Phillips concluded that, in advising Mr and Mrs Cross, the surveyor ... "*should have informed them that unless building regulation approval had been obtained for the conversion it would not necessarily be safe to use the loft as other than a light storage space ...*" Continuing, Mr Justice Phillips noted the surveyors conclusion ... "*that the loft was sound ...*" and in his judgement recognised that it was a fair conclusion, ruling that ... "*Mr and Mrs Cross were entitled to know that the security of the roof they were buying was no longer underpinned by the original design calculations ...*" and that a purchaser should have been advised to consider the house on the basis that no significant credit value should be given for an extra habitable room in the loft.

Essentially, in this case, Mr Justice Phillips' judgement points to failings not so much in the survey itself and how it was carried out, but rather in the form of the report and the extent of advice given.

Heatley v. William H. Brown Ltd 1992

Surveyors might also take account of **Heatley v. William H. Brown Ltd [1992] 1 EGLR**, where a surveyor's casual regard for accurate and detailed reporting led to his aggrieved client making a successful claim for damages.

*Prior to their purchase of 72 High Causeway, Whittlesea, Cambridgeshire, the plaintiffs instructed the defendant firm to carry out a standard structural survey of the property - the Defendants' conditions of engagement made reference to the limitations of the report where parts of the property were unexposed or inaccessible - the plaintiffs believed they could rely on the defendants' report without providing access to the roof voids for inspection - the defendants' report noted that parts of the structure had fallen into disrepair but concluded that the structure was in reasonable condition for its age; the report recommended certain work to be carried out - Following the plaintiffs' purchase, the defendants' surveyor carried out a further survey with access to the roof void - In the event there were substantial defects in the property and by September 1990 the plaintiffs moved out as they saw no alternative to total demolition of the property and the purchase of another house.*

**Held:** *Judgement for the plaintiffs - The statement in the surveyor's report that "the structure of the property was in a reasonable condition for its age" was not correct - The defendants' surveyor failed to gather all the relevant matters together in the report and draw the obvious conclusion, which was that the house was not a good buy at any price other than the site value - There were serious bulges in some of the walls - The defendants' surveyor ought to have made further examination or put suspicions as to the cause in his report and recommended further investigation - The defendants were negligently in breach of contract in relation to both the original report and the subsequent investigation - By reason of the later investigation the plaintiffs were encouraged to stay in the property and spend more money on it and their damages were increased - There was no liability in the tort of negligence - Damages assessed on the difference between the value of the property as it was described in the surveyor's report and its value as it should have been described, namely £50,000; additional damages awarded for distress and inconvenience arising out of the physical consequences of the defendants' breach.*

**Customer expectations**

Regrettably, most customers commissioning the Home Buyer Report in general, or a Building Survey in particular, have only two objectives in mind. Neither of these purposes is a burning desire to provide employment for a surveyor, nor the love of settling down for a 'good read', but rather to build up a case for negotiating the price (downwards) and, if all else fails, as an insurance policy to obtain redress if a serious or costly problem should arise in the future.

**Need to take care**

Any surveyor who has been faced with a claim for negligence, will be aware of the stressful nature of the process, whether or not the claim is justified. A few extra minutes on site lifting an awkward manhole cover, or 'following a trail' can be worthwhile as part of a claims-avoidance policy. More importantly, careful drafting of the report to include a detailed analysis and appraisal may save time, money and professional well-being at some future date.

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