VALUATION IN PROFESSIONAL NEGLIGENCE CASES

THE LESSONS TO BE DRAWN FROM LITIGATION IN THE LAST RECESSION.

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Property Law in the Recession

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Introduction

1. "*It's like the tide going out and things being washed up on the beach. One can't see them when the tide is in, but once it goes out they are visible.*"[1]

2. The last recession occurred in the early 1990s. As the tide went out, a number of negligent valuation cases were gradually exposed. Here are a few of the lessons to be drawn, ready for the current falling tide.

Duty of care

3. Extent of the duty in any given case will depend upon what particular task the surveyor was engaged to carry out (i.e. his instructions). But:
   (a) in addition to the instructions, in any given case the duty will usually include a duty to warn of risks and (by analogy) a duty to advise of benefits in embarking upon, or refraining from taking, a particular course of conduct: McIntyre v Herring Son & Daw [1988] 1 EGLR 231;

[1] Sir Kim Lewison commenting on the likely emergence of cases of negligence following the recession in his interview with the Estates Gazette published in the 31 January 2009 issue.

(b) however, professionals are under no duty to warn about commercial wisdom of transaction, particularly where the client has expertise: Credit Lyonnais SA v Russell Jones & Walker [2002] 2 EGLR 65; Stone Heritage Developments Ltd v Davis Blank Furniss [2007] EWCA Civ 765;

(c) but where valuers are under a particular responsibility to their client to ensure that their instructions to other professionals are carried out, the valuers may be contributorily negligent for mistakes carried out by others: Theodore Goddard v Fletcher King Services Ltd [1997] 2 EGLR 131.

Breach of duty – the bracket

4. If the valuation falls outside the range of possible values at which the non-negligent valuer would arrive ("the bracket"), a prima facie case of negligence arises and the burden of establishing that the valuation was not negligent falls upon the defendant: Merivale Moore plc v Strutt & Parker [1999] 2 EGLR 171.

5. Hoffmann LJ in Zubaida v Hargreaves [1995] 1 EGLR 127:

> "In an action for negligence against an expert, it is not enough to show that another expert would have given a different answer. Valuation is not an exact science; it involves questions of judgment on which experts may differ without forfeiting their claim to professional competence. The fact that a judge may think one approach better than another is therefore irrelevant… . The issue is not whether the expert's valuation was right, in the sense of being the figure which a judge after hearing the evidence would determine. It is whether he has acted in accordance with practices which are regarded as acceptable by a respectable body of opinion in his profession."

6. Bracket-width:

- Banque Bruxelles Lambert v Eagle Star Insurance [1994] 2 EGLR 108:

> "when valuations are based on comparables, one competent valuation may differ from another by as much as 20 per cent."

- <u>Mount Banking Corporation Ltd v Brian Cooper & Co</u> [1992] 2 EGLR 142:

> "I do not think it proper to apply it mechanistically in any case, so as to say that any valuation outside the consensus of the experts or, if they differ, outside their average valuation by more than 10% is prima facie negligent. Rather… I think the judge must approach the question, first, by asking where the proper valuation or bracket of valuation lies. Then, if the defendant is more than the permitted margin outside that proper figure, the inference of negligence should be drawn."

- <u>Singer & Friedlander Ltd v John D Wood & Co</u> [1977] 2 EGLR 84:

> "In exceptional circumstances the permissible margin, they say, could be extended to about 15 per cent, or a little more either way."

7. Getting a component of the value negligently wrong - consider:

(a) <u>Mount Banking Corporation Ltd v Brian Cooper & Co</u> [1992] 2 EGLR 142:

> "If the valuation that has been reached cannot be impeached as a total, then, however erroneous the method or its application by which the valuation has been reached, no loss has been sustained because … it was a proper valuation. I do, however, accept that if and where errors are demonstrated either in the approach or in the application of the approach, then any judge should look carefully at whether that valuation is, despite those errors, none the less an acceptable value … ."

(b) <u>Craneheath Securities v York Montague Ltd</u> [1996] 1 EGLR 130:

> "Since Craneheath did not establish that the figure of £5.25m was wrong, then…Craneheath's action must necessarily fail. It would not be enough for Craneheath to show that there had been errors at some stages of the valuation, unless they can also show that the final valuation was wrong."

(c) <u>Currys Group v Martin</u> [1999] 3 EGLR 165: defendant negligent only if his determination was one which no reasonably competent surveyor could have reached. In particular, therefore, it did not suffice for the claimant to show that the defendant had been negligent in his methodology in a way that was adverse to the claimant, if the resulting valuation was nevertheless within the permissible bracket.

(d) David Goldstein v Levy Gee [2003] EWHC 1974: valuer not held to be negligent for a share valuation, regardless of errors, where the end figure was within the permissible margin of error bracket.

(e) Lion Nathan Ltd v C-C Bottlers [1996] 1 WLR 1438:

> "It is nothing to the point that the outcome is still within what would have been predicted as the limits of foreseeable deviation. … The purchaser has accepted the risk of any deviation attributable to factors which were unforeseeable, unknown or incalculable at the time of the forecast. He has accepted the risk of such deviation whether its true extent would have been foreseeable at the time of the forecast or not. But he has not accepted the risk of any deviation which is attributable to lack of proper care in the preparation of the forecast. The only tolerable forecast is one which, on its facts, was prepared with reasonable care."

The benefit of hindsight?

8. Arab Bank v John D Wood Commercial [2000] Lloyds LRPN 173: criticism by Court of Appeal of "the use of inadmissible hindsight" in considering whether a subsequent renegotiation justified the valuation which had been produced. Of course, an issue may arise as to whether the valuer should have foreseen, and warned about, future events: in a case from a previous recession, Corisand Investments v Druce & Co [1978] 2 EGLR 86, it was contended unsuccessfully that the valuer should have foreseen in September 1973 the impending property crash which occurred at the end of the year.

Causation

9. Surveyors are not normally responsible for loss resulting from a falling market: South Australia Asset Management Corporation v York Montague Ltd [1997] AC 191.

Measure of loss

10. Not the difference between the wrong value and the extreme of the bracket: Lord Hoffmann in South Australia Asset Management Corporation v York Montague Ltd [1997] AC 191:

> "[The defendants] say that the damage falling within the scope of the duty should not be the loss which flows from the valuation having been in excess of the true value, but should be limited to the excess over the highest valuation which would not have been negligent. This seems to me to confuse the standard of care with the question of the damage which falls within the scope of the duty. The valuer is not liable unless he is negligent. In deciding whether or not he has been negligent, the court must bear in mind that valuation is seldom an exact science and that within a band of figures valuers may differ without one of them being negligent. But once the valuer has been found to have been negligent, the loss for which he is responsible is that which has been caused by the valuation being wrong. For this purpose the court must form a view as to what a correct valuation would have been. This means the figure which it considers most likely that a reasonable valuer, using the information available at the relevant date, would have put forward as the amount which the property was most likely to fetch if sold upon the open market. While it is true that there would have been a range of figures which the reasonable valuer might have put forward, the figure most likely to have been put forward would have been the mean figure of that range. There is no basis for calculating damages upon the basis that it would have been a figure at one or other extreme of the range. Either of these would have been less likely than the mean …"

11. Instead, the normal measure of damages is the difference between the price paid/valuation and the market value at the date of purchase: Keydon Estates Ltd v Eversheds LLP [2005] EWHC 972 (Ch) 9.

Costs

12. Attempt to mediate rather than litigate: Earl of Malmesbury v Strutt & Parker [2008] EWHC 424 (QB).

Proper forensic preparation

13. The house built on air …

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