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PROFESSIONAL INDEMNITY INSURANCE: DECISIONS AND VISIONS, RATIONALE AND REALITY

Surveyors and Valuers: Liability and Aspects of Coverage

27 February 2013

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Partner

How to sue your surveyor if the valuation is wrong: The Guardian, Saturday 12 April 2008



"Falling property prices have turned the spotlight on valuations and the surveyors who provide them - especially in the fast-falling world of two-bedroom new-build flats.

Over the past weeks, Guardian Money has revealed how valuations issued as recently as last summer were up to 70% higher than their real worth while forecasts of rental income - essential for a buy-to-let mortgage - were overegged by as much as 100%.

Those who bought on these poney valuations now face remortgaging at unaffordable rates, bankruptcy, or losing their own homes as lenders chase them for shortfalls.

Instead of going bust, owners can get even through the courts, say solicitors. We've seen rental estimates for Docklands flats that are pure cloud cuckoo land...

Some of these rental figures on valuation certificates are no more than fraud..."

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Housing market hit by rise in writs against surveyors: Estate Agent Today, 23 May 2011



"THE HIGH LEVEL OF CLAIMS BEING BROUGHT BY BANKS AND OTHER LENDERS IS LEADING TO A NEAR DOUBLING IN INSURANCE COSTS FOR SOME SURVEYORS AND MILLIONS OF POUNDS IN EXCEPTIONAL COSTS...

INSURERS SUCH AS US GIANT TRAVELERS HAVE PULLED BACK FROM THE INCREASINGLY LITIGIOUS MARKET.

PAUL DINWOODIE, DIRECTOR AT INSURANCE BROKER HEATH LAMBERT, SAID: "SURVEYORS UNDERTAKING VALUATION WORK HAVE BEEN HIT TERRIBLY BY HUGE HIKES IN INSURANCE PREMIUMS. IN THE MAIN, THE CLAIMS RECORDS OF THESE FIRMS HAS BEEN DREADFUL.

"IT HASN'T REALLY BEEN A KNEE JERK REACTION BY INSURERS – JUST APPLYING COMMON SENSE TO A PROFESSION THAT GOT BADLY CAUGHT OUT BY THE RECESSION."

RESEARCH BY *THE DAILY TELEGRAPH* HAS UNCOVERED A SHARP RISE IN THE NUMBER OF LEGAL DISPUTES TAKING PLACE IN THE HIGH COURT. MANY MORE ARE LIKELY TO HAVE BEEN SETTLED BEFORE THEY GET THAT FAR."

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Claims pile in against over-valuing by surveyors: The Telegraph, Wednesday 25th May 2011



"Surveyors are facing a rise in the number of court actions brought by lenders over valuations they made before the housing market crashed in 2008. Countrywide alone is expecting to pay up to nearly £12m in claims.

The increase in cases has led to a near doubling of their insurance premiums.

Research carried out by The Daily Telegraph revealed that Countrywide, the UK's largest estate agency chain, faced 35 writs in the High Court last year from mortgage lenders including Barclays and Bank of Scotland. The paper says a further 12 writs have been filed this year, with five in March alone.

The issue at the heart of these claims, says the Telegraph, is the valuations surveyors put their names to in the lead up to the housing crash.

"While prices were rising, no one contested the valuations. When prices started to come down, lenders looked to see if they could pin the liability on surveyors.

"For that reason a lot of the claims date back to valuations undertaken prior to 2008. With these types of claims normally subject to a six-year limitation period, the clock is counting down."

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The crystal ball: 2011 commentary



"I do not understand the validity of this. A valuation is surely that which is applicable at the time?
Who can foresee the future which is out of the surveyors control?
Am I missing something? "

"House prices are an opinion - debt is real"

"THE ISSUE AT THE HEART OF THESE CLAIMS IS THE VALUATIONS SURVEYORS PUT THEIR NAMES TO IN THE LEAD UP TO THE HOUSING CRASH. WHILE PRICES WERE RISING NO ONE CONTESTED THE VALUATIONS. WHEN PRICES STARTED TO COME DOWN LENDERS LOOKED TO SEE IF THEY COULD PIN THE LIABILITY ON SURVEYORS"

"IF I SPECULATE ON AN INVESTMENT, A SHARE FOR INSTANCE, AND IT FALLS, THE GOVERNMENT WILL NOT SOCIALIZE MY LOSSES "

"WHAT THEY MEAN IS THEY SYSTEMATICALLY MIS-VALUED PROPERTIES AS COLLATERAL FOR MORTGAGES AND NOW WANT TO AVOID FINANCIAL RESPONSIBILITY"

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The latest case law: negligent valuations



Georgina Squire and Melissa Padoa, partners in the dispute resolution department at Rosling King LLP, report on the Blemain Finance Limited and Webb Resolutions Limited cases against e.surv Limited, both of which have important implications for the market

"December 20, 2012 was an important day for lenders in the UK with the handing down of two favourable decisions by Mr Justice Coulson in the Technology and Construction Court. In Rosling King LLP's cases of **Webb Resolutions Limited and e.surv Limited [2012] EWHC 3653 (TCC)** and **Blemain Finance Limited and e.surv Limited [2012] EWHC 3654 (TCC)** the court was asked to decide on the accuracy of valuations provided by e.surv to support residential loans by (i) GMAC, who had assigned their loans to Webb, and (ii) Blemain.

The rulings are a victory for all lenders and have set new legal precedent in the sphere of professional negligence..."

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Duty of care: residential or commercial



“ The firm has prepared the report for use only by the client to assist the client in its appraisal of an application made by the proposed borrower in respect of the subject property... and for no other purposes whatsoever. It is confidential to the client and the firm accepts no responsibility whatsoever to any person other than the client. No person or body other than the client may rely on the report...”

- Caparo Industries plc v Dickman 1990
- Smith v Eric S Bush 1990
- BBL v Eagle Star 1995
- George v Countrywide Surveyors Ltd 2002 (reported in 2009)
- Scullion v Bank of Scotland plc 2011
- Squirrell v Bradleys Surveyors Ltd 2011

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The strict duty: valuing the wrong property



“I certify the property offered as security has been inspected by me and that the above valuations is a fair indication of the current open market valuation for mortgage purposes”.

- Platform Funding Ltd v Bank of Scotland plc 2009
- Application of the Platform decision to the facts
- Overcoming the harshness of the Platform decision
- Materially different considerations in play for a flat?
- Rainy Sky SA v Kookmin Bank 2011

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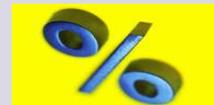
The margin of error



- The law allows a margin of error but it is not a legal principle
- Wikipedia definition: the margin of error is a statistic expressing the amount of random sampling error in a survey's results
- The maxim with regards to the commonly accepted margins of error was established in *K/S Lincoln & others v CB Richard Ellis Hotels Ltd 2010*, namely:
 - 5% for standard residential properties;
 - 10% for one-off properties;
 - Up to 15% for properties with unique characteristics.
- The margin was not a fixed percentage and could change depending on the specific case facts/nature of the property; in this case a higher margin (8%) was justified because of poor comparable data, the buoyancy of the market for this type of property at the relevant time, and as comparable evidence for apartments within blocks was more difficult than for "standard houses"
- Case law post *CBRE*
- Challenging an agreed margin of error by the experts
- The hazards of valuing internally to within 5%

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Contributory negligence



"THE CHAIN OF BLAME CONTINUES - THE BANKS LENT TOO MUCH CASH THROUGH LTV'S THAT WERE TOO HIGH, SO BLAMING THE SURVEYORS IS THEIR WAY OUT. REALITY IS THAT THE BANKS CONVENIENTLY FORGOT THE REASON THEY HAD LOWER LTV'S YEARS AGO WAS TO PROTECT THEMSELVES IF THE MARKET DROPPED."

- Paratus AMC Ltd v Countrywide Surveyors Ltd 2011*
- Blemain Finance Ltd v e.serv Ltd 2013*
- Webb Resolutions Ltd v e.serv Ltd 2013*

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Contributory negligence: the argument that other lenders had a similar policy



- 2 types of argument exist:
 - Lending on the particular facts of the specific case was negligent
 - Any non status lending on a 90% LTV was negligent
- Birmingham Midshires v Parry 1996
- Bristol & West BS v Fancy & Jackson 1997
- Equity “cushions”
- Challenging Mr Justice Coulson’s 2012 first instance decisions
- FSA guidance

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Series of claims...



- The Insuring Clause under the contract and RICS Minimum Terms
- Claim, excess and series of claims definitions v Letter of instruction and Letter of Claim
- What is the “object” claimed
- West Wake Price & Co v Ching 1957
- Haydon v Lo & Lo (A Firm) 1997
- Citibank NA v Excess Insurance Company Ltd 1999
- Mabey v Johnson Ltd v Ecclesiastical Insurance Office Ltd (No. 2) 2004
- Same “event or cause”
- Axa Insurance (UK) Plc v Field 1996

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RICS Guidance: January 2013



- Risk, liability and insurance in valuation work
- PII Working Group
- Proportionate liability
- Liability caps
- Fees
- Third party reliance
- Self Test and Checklist

Questions?

