




Avoiding Professional Negligence Claims

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Avoiding Professional Negligence Claims 

Agenda

- Defining negligence
- Understanding your remit and your limitations
- Managing expectations
- Record keeping
- Lessons from recent cases
- Future banana skins

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What is Negligence?


Contract or Tort (common law)

Express – formal commitment / promise - Implied – both contract & tort


"in accordance with practices which are regarded as acceptable by a respectable body of opinion in his profession"


I didn't say it was your fault	I said I was going to blame you
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In Practice 


- ▶ Contractual promises
- Managing Agent : quarterly inspections
- Letting Agent : tenant referencing/identity validation
- Property Agent : serving valid L&T notices
- Building Surveyor : identification of obvious structural defects
- Valuation Surveyor : inspection of right property

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In Practice  OPINION

- ▶ What is the reasonable body of professional opinion?
- ▶ Expert evidence – a frequent aid – but huge disparity of opinions
- ▶ Valuation issues detain courts the most
- ▶ Scope of duty crucial – surveyor not liable for every foreseeable loss which client sustains as result of entering transaction on basis of valuation report


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Valuation Negligence 

- ▶ Primary focus on the result (not how it was arrived at)
- ▶ Judge must determine what the true value was at material time
- ▶ Expert evidence almost always adduced by each party
- ▶ Ultimately a matter for judicial discretion
- ▶ In practice Judge faced with two very different views as to value


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Margin of Error / The Bracket




- Valuation is an art; not a science
- Permissible margin either side of a notional "true" valuation:
 - Standard residential property: +/- 5%
 - An unusual property: +/- 10%
 - An exceptional property: +/- 15% (or even higher in an appropriate case)


See *K/S Lincoln and others v CB Richard Ellis Hotels Limited* [2010] EWHC 1156, per Mr Justice Coulson

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Outcome


- Judge determines true value & margin
- If original outside the range – prima facie negligence established
- Burden then moves to surveyor to establish that the valuation was nevertheless carried out with correct level of skill, care & diligence
- Extremely difficult to do – if outside margin likelihood is mistake in the underlying methodology




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Scope of Duty


- Valuation surveyors only responsible for the loss for which they had assumed responsibility to lender, i.e. the adequacy of the security
- not responsible for all the lender's losses (e.g. collapse in market values) and restricted by reference to the amount of the overvaluation (if less than actual loss)
- South Australian Asset Management Company - SAAMCO



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Survey Negligence


- ▶ What type of survey?
- ▶ Was the defect present and obvious?
- ▶ Did the surveyor follow the trail of suspicion?
- ▶ Need for expert evidence – difficulty in that defect may have been remedied

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Quantum

**COUNTING
THE COST**

- Damages – compensatory in principle – put back in position would have been but for the negligent advice and/or information
- SAAMCO loss cannot be reduced for contributory negligence or failure to mitigate
- Transaction (basic or attributable) loss can be discounted
- Defect claims – diminution in value not repair cost


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Understand the remit & your limitations

- Terms & Conditions + SLA's
- Clear retainer letters
- Stick to your area of expertise
- Establish correct facts
- Explain methodology and assumptions
- Highlight issues to be addressed
- Record what not seen / what information relied upon


What I
don't take
responsibility
for


What I take
responsibility
for

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Managing Expectations


- Conflicts
- Risk vs Reward
- Liability caps vs fee levels
- Record what you have agreed to do
- Third party reliance
- Type of client
- Clear timescale estimates
- Do NOT proffer advice outside agreed retainer without express agreement in writing & fee revision



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Record Keeping

- Attention to detail
- Contemporaneous records – all discussions
- Retain record of analysis behind conclusions
- Maintain comparable records
- Retain record of methodology
- Electronic records – written/photographic
- Use of email – retain it
- Being helpful! (Follow up advice)




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Why is Effective Risk Management Important?

"Why do you have brakes on a car? So you can go faster. Why do you have a good risk management policy? So you can pursue your business goals more energetically."


- Time commitment
- Loss of profit
- Higher future excess(es) & premiums
- Damage to reputation & brand




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Common Problems


- Lack of expertise
- Valuing over the purchase price
- Unique properties
- Failures to justify / explain the valuation
- Methodologies / inputs
- Boundary issues
- Verbal reassurance outside report
- Unjustified/unproven statements (EBITDA)




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Common Problems

- Over-influence by client/borrower/broker/lender
- Failing to take account of recent sale prices / influencing factors
- Compliance with instructions/scope of duty
- Being helpful (follow-up advice)
- Not flagging information you do not have
- Unsafe assumptions



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Common Problems



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Common Problems





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Common Problems





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Common Problems






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Beware of potential duties to Third Parties

"Our valuation report is only for the use of our Client and no responsibility is accepted to any third party for the whole or any parts of its contents"


- Reliance by third parties
- Assumption of responsibility
- Foreseeability/proximity/fair & reasonable



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Avoiding Claims - Vetting

- All valuation reports – internal vetting / peer review
- Is an invaluable risk management tool for reducing claim exposures
- Errors more likely to be picked up
- Opinions can and should be challenged
- Internal risk licencing / sample audit programmes
- SVT / AVM modelling



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Lessons learned from previous cases




- Hubbard v Bank of Scotland Plc (2014) – reasonable conclusion
- Canada Square v Kinleith Folkard & Hayward (2015) - time
- Titan v Colliers International (2015) – importance of history
- Barclays Bank Plc v TBS&V Ltd (2016) – care home 15% margin
- Bank of Ireland v Watts (2017) – scope / fee = sets the scene

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Future Banana Skins


- Groundhog Day - déjà vu
- Adequacy of PII coverage
- Third party liabilities
- Leasehold reforms
- Risk & Reward
- Consumer redress – schemes, Money Court & social media




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Professional Indemnity Insurance

- Don't sit on bad news!
- Notify all claims [whatever the merit]
- Notify any circumstances that might give rise to claims
- Retain all relevant documents/electronic records
- Co-operate fully in defending claims
- Do nothing that could prejudice the defence



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What Next?

- ▶ Brexit
- ▶ Interest Rates
- ▶ Pipelines
- ▶ Regulation
- ▶ Technology

