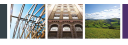



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## Avoiding Professional Negligence Claims

Duncan Greenwood  
DAC Beachcroft LLP

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Avoiding Professional Negligence Claims 

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### 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)

I didn't  
say it  
was your  
fault

I said I  
was going  
to blame  
you

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"*

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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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**Quantum** 

- 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

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**Loss : Example**

Valuation £2.5m – Loan £2m (2014/2016)  
 Security £1m (2017) – Arrears/Realisation/Interest £800,000  
 True Value £1.95m – Margin 15% (£2.24m)

SAAMCO - £550,000 plus interest

Transaction Loss - £850,000 plus interest

Discount over 35% will bite




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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




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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
- Maintain comparable records
- Retain record of methodology
- Electronic records – written/photographic
- Being helpful! (Follow up advice)
- Use of email – retain it
- Document all handovers



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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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Avoiding Professional Negligence Claims 

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**Common Problems**



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Avoiding Professional Negligence Claims 

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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 Professional Negligence Claims 

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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



- Webb Resolutions v e.surv (2012) – poor method / influence value
- Canada Square v Kinleith Folkard & Hayward (2015) - time
- Titan v Colliers International (2015) – importance of history
- Tiuta International v De Villiers (2016) – "but for"
- Barclays Bank Plc v Christie Owen & Davies Ltd (trading as Christie & Co) (2016) – wrong methodology
- Barclays Bank Plc v TBS&V Ltd (2106) – care home 1% margin
- Bank of Ireland v Watts (2017) – scope / fee = sets the scene

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Avoiding Professional Negligence Claims 

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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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Avoiding Professional Negligence Claims 

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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



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