

# Review

Property @ction



## Valuers' Negligence – The Scope for Increased Claims in the Economic Downturn

With the increasing prospect of borrowers defaulting on their loans, and in light of the collapse of the property market, there is potentially a greater prospect for claims against valuers.

Lenders will scrutinise original valuations very carefully, particularly where re-sale values are out of all proportion to the original price paid (even taking into account the fall in the property market).

This article is a reminder of some of the issues that may be relevant, not only for those considering a negligence action against a valuer, but also for those valuers that may be on the wrong end of a valuation negligence claim. Specifically, this article briefly considers the general principles applicable to claims against professionals; the margin of error principle applicable to land valuations; the question of contributory negligence in claims against valuers and other potential defences.

### CLAIMS AGAINST PROFESSIONALS: THE GENERAL DUTY

A professional need not possess the highest level of expertise. Put another way, it will not be sufficient simply to get an expert to say that he would have done the job differently. Instead, for a finding of negligence, a claimant will need to show that the error was one which no reasonably competent member of the relevant profession would have made.

### THE "MARGIN OF ERROR"

When it comes to valuing land, the courts have accepted that, due to the various assumptions that need to be made, it will be almost impossible to reach a precise value. Two experts valuing land may reach different conclusions but neither would necessarily be negligent. However, in *Singer & Friedlander v John D Wood & Co*, the court held that "the permissible margin of error is said by the experts to be generally 10% either side of a figure which can be said to be the right figure...in exceptional circumstances the permissible margin, could be extended to about 15%, or a little more, either way."

Any valuation, therefore, which falls outside this margin of error/bracket (which may vary from case to case) will therefore bring into question the competence of the valuer.

One dilemma faced by the courts is whether or not a valuer who has arrived at a value within the bracket is nonetheless negligent if he arrived there fortuitously, having made errors in his approach. In *David Goldstein v Levy Gee*, (albeit relating to a share rather than property valuation) the valuer's methodology was flawed but the eventual figure reached fell within the margin of error. This exonerated the valuer from a finding of negligence. That said, judicial criticism has been levelled at this approach and there may be scope for challenging it in future.

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## ANY DEFENCES?

In a valuer's defence, the question of the contributory negligence of a lender will always need to be considered. Areas in which lenders have previously been found at fault include:

- The failure of a lender to question a valuation which was possibly overvalued;
- where the lender has information affecting the value, which he has failed to pass on;
- where a lender's instructions have been inaccurate or misleading;
- where the lender has failed to carry out proper investigations as to the financial stability of the proposed borrower;
- where lenders have advanced an excessive loan to value, particularly where interest rates are high;
- where lenders have lent on the basis of no status loans (meaning those made with limited enquiry of the status of the borrower, relying solely on the value of the property as security).

## FINAL POINTS

It is probably inevitable that, in the current climate, closer attention will be paid to valuations which, with the benefit of hindsight, appear questionable. That said, lenders and other institutions who go down this route are unlikely to have things all their own way. Lenders stung by the downturn in the property market must bear in mind that, unless specifically instructed to do so, a valuer will have no duty to advise a lender on future movements in property prices. While it is true that the possibility of prices moving up or down may affect current prices (and therefore a valuer's valuation), the valuer's concern is with current value only. A valuer does not guarantee a lender's investment decision or protect it against a future decline in property prices.

## FURTHER INFORMATION

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