Top 10 for the 10s

Claims against surveyors and valuers

May 2020

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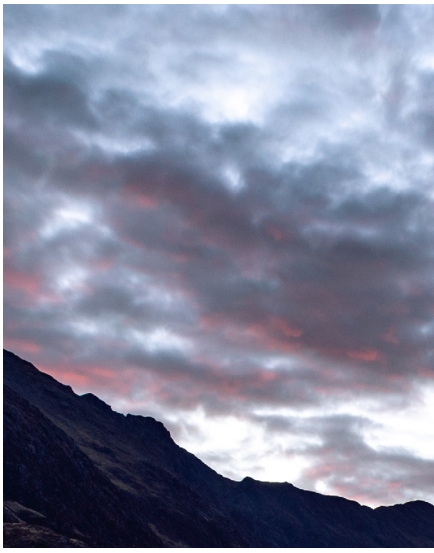
The 2010s started with an influx of valuation claims, primarily involving lenders seeking to recoup losses suffered as a result of the financial crisis, loans being made to sub-prime borrowers and the declining property market. Issues including scope of duty, margins of error, lending criteria and contributory negligence took centre stage. During the middle of the decade, limitation became a key issue. As limitation periods for claims arising out of loans made prior to the financial crisis expired, there was a sharp decline in the number of claims against surveyors.

Below is a whistle-stop chronological tour of certain of the key decisions affecting surveyors over the past 10 years.



Top 10 for the 10s

K/S Lincoln v CB Richard Ellis Hotels Ltd [2010] EWHC 1156 (TCC)

The first case on our journey involves complex valuations of a group of hotels. It provides useful authority on two issues. First, although a valuer could be in breach of duty by falling below the standard of a reasonable valuer in his methodology, the valuer would not be liable in negligence if it could be shown that, notwithstanding the error, the valuation figure produced was within a reasonable bracket.

Second, *K/S Lincoln* provides clear guidance for what a court might consider to be a reasonable bracket or margin of error. Valuation is not an exact science and there is a permissible "bracket" or "range" within which a valuation may fall. In this case, the Court provided careful analysis of the law relating to the bracket and held that, for an ordinary residential property, where there should be an abundance of comparable evidence, the margin will be +/- 5%. The standard margin for other property is 10%, but for any property with exceptional features, the margin could be +/- 15% or even higher.

Scullion v Bank of Scotland Plc (t/a Colleys) [2011] EWCA Civ 693

The Court of Appeal considered the circumstances in which a surveyor will owe a duty of care in tort to parties other than its client; specifically, whether a surveyor will owe a duty to a buy-to-let borrower who relies on a valuation report commissioned by the lender. Fortunately for surveyors and their insurers, the Court considered there to be a distinction between purchasing a property as a buy-to-let investment (ie a commercial venture) and to live in. A borrower will only be able to rely on the valuation if it can prove not only that it relied on the report when deciding whether to purchase the property but also that such reliance could have been foreseen by the valuer and that it was "just, fair and reasonable" to impose a duty of care.

Capita Alternative Fund Services (Guernsey) Ltd and another v Drivers Jonas (A Firm) [2012] EWCA Civ 1417

This was an appeal against a first instance decision against the surveyor to pay damages of £18m for alleged negligent advice on the acquisition and valuation

of a factory outlet centre. Following on from *K/S Lincoln*, this case is an important authority for how the "margin of error" should be applied where the valuation has more than one component. The judge found not only that it would be appropriate to apply a different margin to each aspect of the valuation but also that, for one aspect, the appropriate margin should have been 20%. Where a valuer is preparing a development appraisal for a bare site, there will be a number of variables on which they have to exercise discretion when arriving at a figure, and to which a margin should therefore apply. Cumulatively, those margins can come to a very significant overall bracket.

Blemain Finance Ltd v E.Surv Ltd [2012] EWHC 3654 (TCC) and Webb Resolutions Ltd v E.Surv Ltd [2012] EWHC 3653 (TCC)

As well as providing further guidance on the permitted margin of error in residential valuations and the circumstances in which the margin may be more than the 5% range set down in *K/S Lincoln*, these cases provide helpful guidance on the level of reduction to any damages awarded as a result of a lender's contributory negligence. Lending practices are to be judged by market practices at the time and not with the benefit of hindsight. The Court will be reluctant to penalise a lender whose lending, whilst imprudent, is consistent with common practice. Specifically, lending at a high 'loan to value' ratio ("LTV") and failing to verify a borrower's financial positional were features of sub-prime lending.

Where a lender is negligent, however, reductions to damages may be as high as 50-60%. A reduction of 50% was applied in respect of one of the loans in *Webb* where the borrower was clearly in financial difficulty before the loan was made and where it was made at an LTV of 95%.

Toombs v Bridging Loans [2014] EWHC 4566 (QB)

This claim against a surveyor was struck out for being out of time. The case provides helpful guidance on the approach the Court may take to the question of when and whether a claimant has the requisite knowledge to rely on the three-year extension afforded by s.14A of the Limitation Act 1980. The Court determined that the claimant lender knew that it had suffered a loss (and therefore that time had started to run) as a result of making the loan regardless of the fact that the lender did not know how much loss it had suffered and had not obtained supportive expert evidence for the purpose of assessing the surveyor's liability.

Freemont (Denbigh) Ltd v Knight Frank LLP [2014] EWHC 3347 (Ch)

This was another case in which the Court considered the scope of a valuer's duty. In this case, the Claimant claimed that it had lost the chance to sell a development site to a third party at a particular price because the valuer had advised that the property was worth far more. However, the Claimant had not sought advice from the valuer in order to consider any offers – rather, it had sought a valuation in order to obtain a bond from a lender in connection with its proposed redevelopment of the site. The court held that, irrespective of whether the valuation was "right" or not (and that point was never decided), the Claimant's claim must fail as it did not come within the scope of valuer's duty.

Canada Square Operations Ltd v Kinleigh Folkard Hayward [2015] 9 WLUK 349

The Court provided helpful guidance on how to value a borrower's covenant in order to assess the time at which a cause of action accrues for the purposes of limitation. The cause of action did not accrue on the date the site was sold for a loss or the day after the last repayment was made by the borrower, but, on accountant's evidence, the date on which the difference between the value of the security and the amount outstanding on the loan could not be bridged by the borrower's covenant. In this case, that was the date on which the loan was made.

Titan Europe 2006-3 PLC v Colliers International UK PLC (in liquidation) [2015] EWCA Civ 1083

Another issue with which surveyors had to grapple during this decade was the prospect of facing claims arising from loans that had been securitised. Any reliance wording in their reports and the scope of the consequent duty owed by the surveyor became relevant. The lender had relied on a valuation by Colliers when making a loan that was subsequently securitised. Titan, a special purpose vehicle and claimant in the case, was the issuer of the securities.

"The best things are their analytical skills and ability to come up with defences that I would never dream of."

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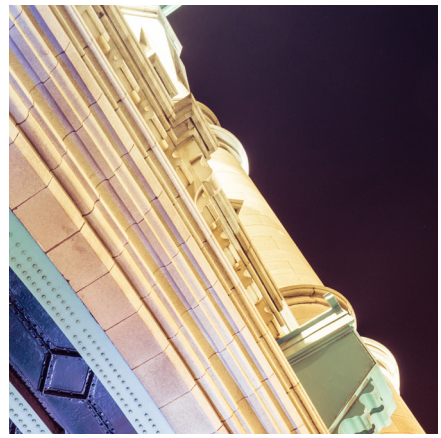

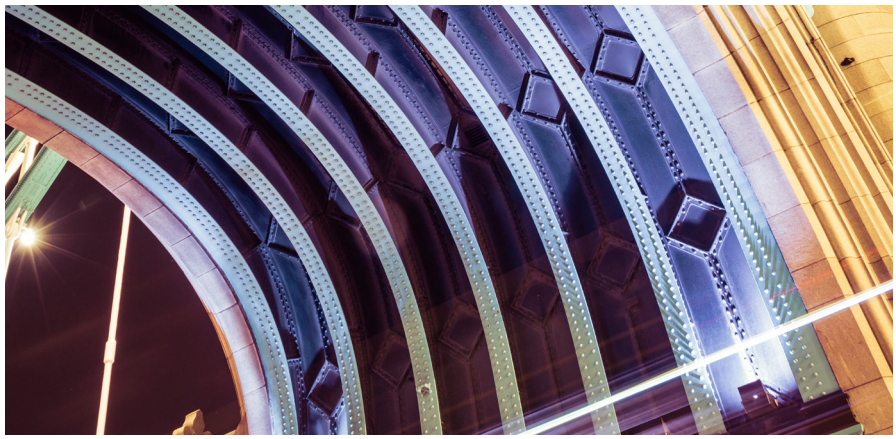

The Court of Appeal considered, obiter, the doctrine of reflective loss. It considered that, had Colliers' valuation been negligent, Titan would have had a cause of action against Colliers and would have suffered a loss the moment it had acquired the loans based on an over-valuation and that Titan was the correct claimant, rather than the individual noteholders.

Tiuta v de Villiers [2017] UKSC 77

This case concerned the scope of the valuer's duty where the valuer had carried out two valuations of the same property at different times. The loan made in reliance on the second valuation redeemed the earlier loan. The Supreme Court held that any loss that the lender may have suffered in respect of the earlier loan was not caused by the later valuation, even if the later valuation was negligently high such that, had it been accurate, the lender would not have made the later loan. Only losses caused by the second loan could be recovered through an action alleging that the second valuation was too high.

Instead, the lender may be able to bring a claim for the loss of a chance of recovering any losses arising from the earlier loan(s), but only if the claimant could also prove that the original valuation was also negligently high.

Manchester Building Society v Grant Thornton LLP [2019] EWCA Civ 40

This claim did not involve a firm of surveyors; however, it is included here for its relevance to quantifying claims against surveyors.

The Court considered the distinction between "advice cases" and "information only cases", namely: those in which the adviser is responsible for guiding the whole decision-making process and, consequently, responsible for all the financial consequences of entering into the transaction (an "advice case"); and those where the adviser has not "assumed responsibility" in such a manner and is deemed to have provided "information" only. In the latter, the adviser will only be liable for the foreseeable financial consequences of the information provided being wrong, so that a claimant can only recover losses which would not have been suffered had the correct information been provided. Importantly in this context, a "valuation" and a "valuation report" are deemed to be information only and damages against a surveyor will be limited accordingly.

As is apparent from this brief review, the 10s were a busy time for claims against surveyors and valuers. Whilst there is a risk that the market will collapse again as a result of Covid-19, and a resulting risk that valuers will face an increase in claims, the principles set out in these cases will help anyone facing a claim to navigate the key issues and to prepare the arguments they need to deploy in their defence.

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Described in the Chambers' Directory as "one of the best litigators in the City because of her rock-solid strategic advice", Alexandra has a wealth of experience in acting for surveyors, both via their insurers and upon direct instructions. She has been involved in advising on and defending a wide variety of claims, arising from all aspects of the typical property consultancy practice, from survey and valuation to property management and receiverships. She acts for a number of the largest UK practices, and also works with the RICS, sitting on their Market Liaison and Residential Cross-Sector Groups. Alexandra is a regular speaker on a wide range of topics affecting surveyors and contributes frequently to the RICS Journal, as well as being involved in drafting the RICS Guidance Note on Risk, Liability and Insurance in Valuation Work and the new RICS Home Survey Standard.

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She has spent time working in the claims team of both an insurance company and a Lloyd's syndicate.

Felicity regularly acts in the defence of claims brought by lenders against valuers of both commercial and residential property.

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