The leeway of care

Legal notes Stuart Pemble considers two recent cases which clarify how the courts will allow valuers leeway before deciding that they have been negligent

In two decisions handed down at the end of last year, Coulson J has provided clear guidance for surveyors who stand accused of negligently valuing property. Both involved valuations by E.Surv Ltd, the largest residential surveyor in the UK.

The first, *Webb Resolutions Ltd* v *E.Surv Ltd* [2012] EWHC 3653 (TCC) (see too p90), concerned two separate valuations (a flat in Birmingham and a house in Whitstable, Kent) carried out by E.Surv on behalf of GMAC-RFC Ltd (now Paratus AMC Ltd). The valuations took place before the credit crunch, when GMAC-RFC specialised in centralised and sub-prime lending. GMAC-RFC had assigned its rights in both claims to Webb Resolutions.

The second, *Blemain Finance Ltd* v *E.Surv Ltd* [2012] EWHC 3654 (TCC), was in relation to the second mortgage of a distinctive and expensive modern house in Putney Heath, London. The legal teams and some of the expert witnesses in both cases were the same and it was agreed that both judgments would be handed down together, with the judgment in *Webb* being referred to in *Blemain* to avoid the judge having to repeat things.

In both cases, the borrowers had defaulted on their loans and the properties had been repossessed and sold at a loss. Coulson J had to decide how much of that loss was payable by E.Surv to the claimants by way of damages.

Issues in both cases

The judge had to grapple with three of the most common issues that arise in cases of alleged valuer negligence:

- Should the court consider whether there were defects in the valuer's methodology – the way in which the valuation was carried out – or simply concentrate on the correctness or otherwise of the result?:

> "How relevant is it that the valuer made a number of errors in going about his valuation if, in the final analysis (and perhaps more through luck than judgment), his valuation was reasonable?" [22]

- Not all mistakes by professionals give rise to a claim for breach of contract or in negligence. In valuation cases, there is a permissible margin of error – sometimes (as in Guy Fetherstonhaugh QC's article opposite) referred to as a bracket. Coulson J's findings on this issue are arguably the most important points arising from both judgments.

Key points

- The permissible margin of error for valuer negligence can vary from between +/- 5% for standard residential homes to +/- 10% for one-off properties.
- A margin of +/- 15% can be used in exceptional circumstances.
- Risky lending practices that are the norm at a particular time are unlikely to be enough to justify a finding of contributory negligence by the lender.

- What can be categorised as contributory negligence sufficient to reduce the damages otherwise payable to the claimant?

Coulson J also reasserted the well-established position that damages were limited by the *SAAMCO* cap – the difference between the negligent valuation and what it should have been – without any account being taken of any fall in the property market (and therefore the value of the property in question) since the valuation was carried out.

The principle was established by the House of Lords in *South Australia Asset Management Corp* v *York Montague Ltd* [1996] 2 EGLR 93, which decided that valuers should only be liable for the consequences of their valuation being wrong and not (because the valuation was only one of the causes of the decision to lend) all of the losses that flow from what turned out to be a bad lending decision.

Methodology or result?

Coulson J was satisfied that, after some debate in recent cases, the law was clear:

> "the right approach is to focus on the result, that is to say the negligent valuation itself". [23]

The methodology argument was of interest because the valuers had not covered themselves in glory. In *Webb*, the valuer of the Birmingham flat did not actually inspect it and, in all three valuations, the judge held that the valuers were trying to reach a valuation that matched the figure needed by the borrower rather than decide on the proper value.

Permissible margin of error

Because each of the decided cases rested in part on its own facts and sometimes on the agreed evidence of expert witnesses, Coulson J acknowledged that it was potentially "unwise to fix the... margin for error... solely by reference to earlier authorities" [26]. However, he reiterated his own opinion from *K/S Lincoln* v *CB Richard Ellis Hotels Ltd* [2010] EWHC 1156 (TCC) that there were some guidelines to be drawn:

- For a standard residential property, the margin or error could be +/- 5%;
- For a one-off property, the margin of error could be as low as +/- 10%;
- For a property with exceptional features, the margin could be +/- 15% or higher.

Although, as a matter of strict interpretation, these are only first instance decisions and not binding, they are the product of a detailed review of all of the authorities on more than one occasion by a High Court judge and will almost certainly be highly persuasive in future valuation negligence cases.

In *Webb*, the judge held that the appropriate margin was 5% for both properties; in *Blemain*, he decided the margin was 10% given its distinctive architectural nature. All three valuations were outside of the relevant margins and Coulson J awarded damages (before interest) limited by the *SAAMCO* cap to £22,842 (for the Birmingham flat) and £51,219.24 (for the Whitstable house) in *Webb* and £301,194.89 (for the Putney house) in *Blemain*.

Contributory negligence

Both cases involved allegations of contributory negligence by the lender. The judge rejected arguments linked to the commonplace (albeit highly risky) practices adopted by the lending market prior to the credit crunch. As such, lending money to the sub-prime market, relying on self-certification or seemingly very high loan-to-value ratios were not, of themselves, sufficient to justify a finding of contributory negligence. Nor were the strictures imposed on valuers by GMAC-RFC in *Webb* (a tick-box report that meant no written qualifications could be introduced by the valuers) sufficient to reduce the damages payable by E.Surv.

However, E.Surv did persuade Coulson J that there had been contributory negligence by GMAC-RV in relation to the Whitstable property. Damages were reduced by 50% (to £25,609.92) because: the loan to value ratio of 95% was higher than the (already risky) normal practice in the market at the time; the borrower provided no supporting evidence of income on the loan; and GMAC-RV knew (or should have known) that the loan was necessary to consolidate the borrower's significant existing debts.

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