Surveyors’ Professional Indemnity 2007

If we only knew what lay ahead we would not fret and we would not buy insurance! Unfortunately we cannot see into the future, so we worry and we buy insurance – often reluctantly. We would like to have some idea of how much insurance is going to cost and if it will be available. Seasoned professional surveyors will know, when talking about their PI Insurance, that sometimes the answers to those questions have been uncertain. In the recent past premiums have doubled and cover, both in quantity and breadth, significantly reduced. Will this happen this year? It is very unlikely – there are still a number of insurers willing to write surveyors and generally the market is competitive – but there are some warning signs.

The number of repossessions between January and June 2006 was 8,140 – 76% up on the same period in 2005 (CML). According to a recent report commissioned by the Daily Telegraph houses are at their most over-valued for 15 years. Mortgages as a percentage of income – 23% – are at historically high levels. In addition to this there are other debts, such as credit card debt, to be serviced. The recent interest rate increase will put further pressure on already stretched household budgets. Why is any of this of concern to a PI Underwriter? These are all signs of a possible slump of 1991 – 75,000. There are no signs that interest rates will scale the giddy heights of 15% and, although the market is cooling, there are no immediate signs of a slump.

Another sector that is starting to cause concern is the Buy-to-Let arena. A lot of the evidence is anecdotal at the moment but there are indications that in certain regions the market is saturated. The returns are now becoming dependent on capital growth and with property prices cooling there could be disappointed investors looking to blame someone – we are already seeing sizeable claims emanating from this area.

HIPs and the HCRs will have little impact as the government toned down not just the content of the report but, more importantly to us as PI underwriters, the minimum requirements have been diluted. Those with RICS compliant cover will have nothing to fear.

Underwriters are probably the last people you should ask to speculate on premiums for the next year as we would all want more than is currently being paid – in reality we see little change. Always ask: If it is cheaper, why? What is the claims service like? Have the Insurers and brokers experience in this type of Insurance? Do they have dedicated claims teams?

The need for quality of both Insurer and broker remain paramount – the key is ‘value of money’.

– An Underwriter’s View

The VEAGIS Facility

Willis is proud to have been involved in placing Professional Indemnity Insurance for Surveyors since 1978 when we set up the VEAGIS facility as a joint venture between Willis and the RICS (formerly ISVA). Consolidating our experience and leverage in the insurance market we have brought together four specialist insurers to become members of our panel. These are Norwich Union Insurance; Charrington Insurance; Beazley IDL Solutions and QBE (Insurance) Europe Limited.

The professional indemnity policy the panel will offer will be fully compliant with the RICS minimum terms and conditions, with markets approved as Qualifying Insurers by the RICS. In addition the following services will be available by some or all of the panel insurers:

- FREE Legal and tax helpline
- FREE Employee assistance line
- FREE Risk helpline
- FREE Direct claims handing service
- Business Review and Risk Management service

The facility is not just limited to surveyors. It is also available to firms in the valuing, auctioneering, estate agency and property/project management professions, and this is only available through Willis.
... [in this case] the court held that, despite the Smith principle, no duty of care is owed to a third party who is an experienced businessman as distinct from a home-buyer.

A quarter of a century ago, in Yianni v Edwin Evans & Sons [1981], the High Court first held that an independent chartered surveyor, carrying out a mortgage valuation for a building society could also be held liable (in negligence) to a third party – the purchaser of the house. This decision was later endorsed by the House of Lords in Smith v Eric Bush [1989], where it was held that the surveyor could be liable where the purchaser never even saw the valuation report.

The decision in Smith was in marked contrast to most other negligence actions at around that time. Subsequent commentators have concluded that the decision was borne out of consumer protection, the Lords emphasising that in the case of a modest residential property, it should be ‘reasonably foreseeable’ to the surveyor that the purchaser would expect also to rely on the mortgage valuation report.

A recent decision in the Scottish courts appears to support this theory, if only by distinguishing between the scenario in Smith, and one where the party involved was an individual with business experience dealing with a residential development. In Wilson v DM Hall & Sons [2005], the Claimant was a property developer who owned a sports clubhouse in Edinburgh. In the early 1990s, he decided to demolish it in order to build six flats. Having estimated the total income from the sale of the flats at £276,000, and the development costs at £137,000, he applied for funding from Dunbar Bank.

Dunbar bank instructed the Defendant surveyor to advise on value/feasibility, and in March 1993 the surveyor estimated the sale income to be £255,000, and the development costs at £150,000. The report had the standard clause disclaiming responsibility to anyone other than Dunbar.

In early 1995, the developer needed additional funds, and Dunbar therefore instructed the surveyor to carry out a revised valuation — the surveyor re-valued the development at £306,000, and this time a copy of his report was passed to the developer. When the development was complete, the flats were marketed at £311,000, but they proved impossible to sell. The developer thus defaulted on the loan and Dunbar repossessed the property. The developer commenced proceedings against the surveyor, alleging that the surveyor had negligently over-valued the flats, without which they would have been marketed at a lower price and would have been sold sufficiently quickly to repay the loan.

Despite the surveyor’s disclaimer of liability to anyone other than Dunbar, the Court had to decide whether the developer’s claim fell within the Smith principle, i.e. was it reasonably foreseeable to the surveyor that not only Dunbar — but also the developer — would rely on his report.
The Court found for the surveyor, concluding that “…in the present case, the pursuer presented himself as a businessman of some experience, a property developer, undertaking a commercial development for profit – and he was assisted in that by reputable professionals…. Accordingly the surveyor instructed by the bank to ascertain whether the property was suitable security for a loan would not reasonably expect the developer to base his sale price and marketing on the bank’s valuation report”. The judge also added that there was insufficient evidence of any established practice whereby banks ordinarily passed reports to developers in these circumstances.

So, perhaps unusually for the law, it appears settled that a surveyor’s liability in negligence to third parties in such circumstances will depend very much on the nature of the transaction and the parties involved – and also that for mortgage valuations in connection with the purchase of modest (as distinct, perhaps, from grandiose) residential accommodation, a disclaimer will not be upheld.

Continuing with defaulting borrowers, a common complaint is that the lender has failed to realise a reasonable market price for properties which have been repossessed. In Francis v Barclays Bank [2004], the borrower had no direct right of action against the professionals advising the lender, and therefore pursued the lender, who in turn pursued its professional adviser. Francis also shows that the lender’s duty of care (and thus the adviser’s duty, particularly having regard to the adviser’s field of expertise), will extend not only to value, but to matters which may affect value, and can also be a continuing duty.

In 1991, a development company in which the Claimant was involved sold part of some land it owned, using the remainder as security for a loan from Barclays, who took an unlimited personal guarantee from the Claimant’s husband, and a charge over their home. In 1992, the company failed, and Barclays appointed Kirkby and Diamond Chartered Surveyors (Part 20 Defendants in this action), who had specific expertise in planning and development, as LPA receivers of the mortgaged land. Barclays also had Mr Francis declared bankrupt, and sought possession of the house.

In 1995, with Barclays’ consent, Kirkby and Diamond sold the land to a development company for £50,000, with the provision for a further ‘claw-back’ payment if – within the next 10 years – the land was developed for, or sold with planning permission for development of, anything other than a nursing home. In those circumstances, Barclays would benefit from 50% of any profit.

Only a year later, in 1996, the developer approached Mr Diamond (Kirkby and Diamond no longer being appointed as official receivers) with a proposal to vary the claw-back arrangement suggesting an immediate payment to Barclays of £25,000, and a cap on any future payment of £75,000. Kirkby and Diamond advised the Bank that a residential development of the site within the remaining 9 years of the claw-back was “highly unlikely”. The Bank thus instructed the surveyors to commence negotiations, and a deal was concluded for an initial payment of £35,000, and a cap on any future payment of £80,000.

However, unknown to Mr Diamond, the developer had been lobbying the local planning authority to alter the local plan so that the land in question would be included within an area earmarked...
for residential development. Shortly afterwards, the developer succeeded with its desire, conditional upon a Section 106 agreement to build a new village and pavilion to serve a local recreation ground. The developer duly sold on the site – with the benefit of planning permission – for £2.2m, Barclays receiving a mere £80,000.

The Court had to decide whether Mr Diamond had been negligent in advising Barclays to agree to a variation in the claw-back. Mr Diamond argued that once he received the proposal from the developer, he had checked with the planning department who had confirmed that no recent changes had been made to the local plan. However, it emerged that he had neglected to ask whether there were any possible future changes to the local plan. Had he done so, the Court held that he would have discovered there was a strong possibility that the land in question would be included in an area appropriate for residential development. Accordingly, Barclays would not have agreed to vary the claw-back.

Although Mr Diamond argued that had Barclays not agreed to vary the claw-back, the developer would simply have waited for the remaining circa 8 years of the claw-back, the Court rejected this on the basis that the chances of a development happening within the currency of the claw-back were two to one. Damages were assessed against Mr Diamond at two thirds of the difference between the £80,000 Barclays received, and the amount they would have received.

This case demonstrates that a lender’s duty to a borrower extends to beyond simply advising how much a repossessed property is worth, albeit that in this case, the claw-back was intrinsic to the value of the repossessed property. Also of note is that once that transaction had been concluded, and the land had been acquired by the developer from the LPA receivers, there was a continuing duty – having regard to the claw-back agreement – on the lender (and therefore in turn on Mr Diamond, particularly having regard to his purported planning expertise) to ensure that the best possible market price was realised for the repossessed land.

...[in this case] there was a continuing duty on the lender [and therefore their advisers] to ensure that the best possible market price was realised for the repossessed land.
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- **Commitment/Results** – We are driven by results, and seek to provide the results that our clients need and demand.
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- **Confidentiality** – We recognise the importance of keeping clients’ business confidential and our team is experienced in safeguarding clients’ information.
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Meet the Team

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Terry has worked in the Insurance industry for 25 years. He has held a senior underwriting position within a large UK insurer and now heads up one of the placing teams within the Financial Executive and Professional Risks Division of Willis – FINEX. For the last 13 years he has specialised in Professional Indemnity Insurance and managed a scheme for surveyors and related trades.

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Howard Phillips began a career in insurance at AXA in 1984, and joined Willis in 1999 placing Surveyors Professional Indemnity Insurance under the VEAGIS scheme. He has been involved in the insurance industry for 23 years both as an underwriter and broker, and has been a member of the Associated Chartered Insurance Institute since 1990.

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