

Valuation and Professional Negligence



Key Issues	Page
Overview	1
Background	1
Judgment	2
Conclusions	2

VALUATION AND PROFESSIONAL NEGLIGENCE – DOCKSIDE FACTORY OUTLET SHOPPING CENTRE – CASE REVIEW

Overview

The High Court has handed down judgment in **Capita Alternative Fund Services (Guernsey) Limited (formerly Royal & Sun Alliance Trust (Channel Islands) Limited (1) and Matrix-Securities Limited (2) v Drivers Jonas (a firm)** [2011] EWHC 2336.

In his thorough judgment, Eder J determined that Drivers Jonas ("DJ") negligently overstated the value of a factory outlet retail centre ("FOC"). The Court held that DJ was liable for just over £18m – i.e. the amount that the Claimant overpaid for the property as a result of the negligent valuation. As well as the amount of damages awarded, the case is significant as it is one of the first sizeable professional negligence claims concerning commercial property to have emerged since the recent downturn (albeit, the negligence complained of dates back to 2001).

The case will no doubt cause concern to professional valuation firms. It is also very relevant to investors and funders who may have purchased property in reliance upon professional advice as to valuation. If the value of the investment is not what it was advised to be, investors and funders need to know what remedies are available to them.

Background

The property in respect of which the valuation was given was a site for the development of a FOC in Chatham, Kent. The development was structured to take advantage of Enterprise Zone allowances and investors in the scheme subscribed for units in an EZPUT.

If you would like to know more about the subjects covered in this publication or our services, please contact:

Bryan Johnston +44 (0)20 7006 4707

bryan.johnston@cliffordchance.com

Clifford Chance LLP, 10 Upper Bank Street,
London, E14 5JJ, UK
www.cliffordchance.com

In their valuation report prepared in respect of the scheme and addressed to the Claimant, DJ valued the property at £48.1m without the benefit of EZ allowances and at £63m with the benefit of EZ allowances. DJ had also provided investment advice and negotiated the heads of terms for the purchase of the property.

Judgment

The Court held that DJ was retained by the Claimant to provide valuation and other advice and that DJ owed a duty of care to the Claimant in respect of the advice that it gave. DJ held itself out as being competent to perform the appraisal, assessment and valuation of the undeveloped FOC for EZPUT purposes. The standard of care that DJ was to provide was that expected of an ordinarily competent valuer and commercial investment adviser competent to advise on EZPUTs and FOCs.

DJ breached its duty as it was not competent to advise on the property's valuation, and in particular its projected future rental value. DJ should have declined to act or else instructed a firm with particular expertise in FOCs.

Had DJ acted competently, it would have (amongst other things):

- commissioned a CACI report, which would have been standard practice in order to assess consumer spend from the catchment area of the property;
- recognised the commercial threat posed by Bluewater and the Ashford FOC (including better location and access);
- noted potential limitations on Ashford's tenants leasing units at Dockside;
- accounted for delay in attractions that were to be built next to the development (Dickens World and a cinema);
- noted that the Chatham site itself lacked presence and visibility;
- flagged concerns as regards the two-level nature of the centre and the lack of 'critical mass' square footage;
- referred to planning restrictions in respect of the size of the individual outlet units; and
- acknowledged that the nature of the building itself meant that it had higher maintenance and operating costs.

The Court concluded that had a competent valuation been carried out, it would have valued the property at between £31.9m and £36.7m (without the benefit of EZ allowances). Given that DJ's equivalent valuation was £48.1m, its valuation was well outside the range of competent valuation. In view of this, DJ was clearly in breach of duty to the Claimant and was negligent. Had DJ not been negligent, the Claimant would not have entered the transaction.

The Court held that the Claimant's loss was the difference between what the Claimant would have paid had the valuation been accurate and the price that the Claimant actually paid based on the negligent valuation. This amounted to £18m.

Conclusions

The case will cause significant concern in the valuation community, especially given the extent of DJ's liability. In view of the complexity and detail of the case, it would not be unexpected if permission is sought by DJ to appeal the case.

The case is one of the first big valuation negligence cases concerning commercial property since the downturn. The question then is whether it represents (on its facts) a one-off or whether it is the start of a professional negligence trend. This certainly has been anticipated, however the flood of high-value commercial claims has not (as yet) materialised. This may be due to investors and financial institutions sitting on their assets and watching the market. In the event of increased disposal and restructuring activity, historic valuations provided prior to completion of property acquisitions may well be dusted off and scrutinised. Whilst the impact of over-optimistic valuations is ameliorated in a buoyant market, such valuations will starkly stand out in adverse market conditions.

Whilst there are certain unique facts concerning the Dockside case, the issues that were highlighted by the Court as negligent do not seem so bespoke that the case should be distinguishable on its facts. It is quite likely that further claims will occur where the over-optimistic valuation provided is outside the range of competent valuation.

Points of note that do arise from the case include documenting a clear and express retainer, setting out what expertise the professional is providing and what areas of expertise are beyond the scope of the professional. If the professional assumes responsibility for valuation where it is not sufficiently competent, then it is potentially holding itself out as being competent, which may well lead to a negligence claim if the valuation is wrong. One consequence of the case may be narrower express retainers or the engagement of specialist firms to assist with particular aspects of valuation matters. Valuers may be expected to seek to limit their liability to the extent of their insurance cover. Whilst this will be subject to a test of reasonableness, it is aimed at limiting any exposure beyond the valuer's insurance cover.

The case is further relevant to the insurance market. It is very likely that DJ's PI insurers were defending the case in DJ's name, or else were heavily involved in the matter given that they are likely to be on the hook for the Claimant's loss. In the view of the award made and the potential for further PI claims arising due to market conditions, there may be an upward movement in PI premiums for professional valuation firms.

Valuation professionals who are faced by a claim, or circumstances giving rise to a claim, should immediately notify their insurers and seek legal advice. Investors and financial institutions concerned about the value of assets which they are interested in should also seek legal advice to establish whether or not the valuation was negligently provided. Whether a valuer or investor, it is clear that valuation negligence is once again a key area for property litigation disputes.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ.

www.cliffordchance.com

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571.

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications.