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Surveyor Found Liable for £18.05m in Professional Negligence Action

Capita Alternative Fund Services (Guernsey) Ltd & Anor v Drivers Jonas (A Firm) [2011] EWHC 2336 (Comm) (09 September 2011)

This was, in the opening words of the 122-page judgment, a substantial claim for professional negligence. On any view, it was a bad result for the Defendant surveyors, who have been found liable for damages of £18.05 million. However, in one fundamental respect, the result should be greeted with some relief by professional indemnity insurers. In short, it could have been a lot worse.

The claim arose out of a failed investment in a factory outlet shopping centre ("FOC") which was to be developed at Chatham Historic Dockyard, Medway, Kent ("Dockside"). In April 2001, the first claimant (Capita) paid £62,850,000 to acquire and develop Dockside as an FOC. This sum was raised from investors, for whom Capita acted as trustee. The investments attracted a tax credit as a result of the project being within an Enterprise Zone.

The building works were then carried out, and the centre was opened to the public in 2003. By that time, it was approximately 60% let. In the event, it proved to be extremely difficult to let units at Dockside and for tenants to trade there successfully. The trading figures were well below those which had been forecast by the Defendants in 2001. The current market value of the development has recently been assessed at only £7,200,000.

The Claimants say that they retained the Defendants to advise them in relation to the acquisition of Dockside and that the Defendants provided positive advice about Dockside's commercial prospects. The judge accepted the Claimants' contentions that the Defendants' advice substantially overstated the commercial prospects and the value of Dockside and that the Defendants' approach to assessing these matters was fundamentally flawed.

For example, the Defendants failed to carry out an adequate assessment of the centre's likely ability to attract consumer spend; this, in the submission of the Claimants, meant that it was impossible to predict likely levels of turnover rent (i.e. rent based on turnover of the shops) that the centre would achieve. In the event, the rental levels were held to have been significantly overstated by the Defendants.

The Defendants valued Dockside in the sum of £62,850,000 (with the benefit of Enterprise Zone tax allowances), which was the amount that Capita paid. The judge concluded that the equivalent value that would have been advised by a competent valuer would have been £44,800,000.

This was not a simple valuation case. It was said by the Claimants that the Defendants introduced the transaction with a view to it being structured as an Enterprise Zone investment scheme, purported to conduct due diligence on the potential acquisition, undertook negotiation of the commercial terms of the transaction and, in addition to advising on value, provided advice to the Claimants on the commercial viability of Dockside as a factory outlet shopping centre.

In the seminal valuers' negligence case of *Banque Bruxelles Lambert S.A. v Eagle Star Insurance Co Ltd* (the *BBL* case) in 1997, Lord Hoffman distinguished between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. In the latter case, the adviser, if the advice is negligent, may be liable for all the foreseeable consequences of that course of action. In the former case, the adviser will be liable for the foreseeable consequences of the advice being wrong. Following this approach in a case of a negligent overvaluation, the damages would not exceed the difference between the valuer's negligent valuation and what it should have been.

It may not always be easy to draw a line between the two types of duty. In some situations, as in the brokers' negligence case of *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* in 2002, it may be considered artificial to argue that, in providing certain information, the person doing so was not in reality advising on what course to take.

The Claimants in the present case submitted that the Defendants were not simply providing a valuation or even providing advice and information as regards rent and yields as component parts of that valuation; rather they were advising on the commercial viability of Dockside and providing commercial investment advice. On that basis alone, they said, Capita should be entitled to recover all of its loss of entering into the project. They also said that, in any event, it is plain that the Defendants agreed to provide and did provide advice on whether or not Capita should proceed with the acquisition.

Capita assessed its losses on the project at £63,870,003, based on the cost of acquisition and funding costs less profits made and the current market value of Dockside. Capita accepted that credit should be given for the tax relief obtained by the individual investors in Dockside (for whom the damages would be held on trust), making the total claim **£42,322,509**.

The judge recognised the force of the Claimants' submissions for being entitled to damages assessed on the "total loss" basis. However, he did not accept them. In particular, he referred Lord Hoffman's statement in the *BBL* case that **the rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy.** The judge also said that, while the Defendants agreed to and did provide commercial investment advice, in particular advice as to the commercial viability and prospects of Dockside, the purpose of such commercial advice was to provide a valuation. The judge did not accept that the two exercises – of providing a valuation and giving commercial investment advice – were distinct. In the end, the Defendants' duty was to take reasonable care to ensure that the valuation was accurate.

Applying the *BBL* principle, therefore, the judge held that the Defendants were liable for the difference between the amount by which the purchase price paid by Capita (£62.85m) exceeded the valuation that the Defendants should have provided (£44.8m) i.e. **£18,050,000**.

The result would have been even better (or even less bad) for the Defendants had the judge acceded to their argument that, on this basis too, the tax credits obtained by the investors should be taken into account. The judge confessed that he did not find this issue easy to resolve. Perhaps surprisingly, the point was only addressed very briefly in the parties' submissions, and no authority was referred to.

In the event, the judge rejected this argument, or at least the particular way in which the Defendants submitted that the tax credits be taken into account; he did, though, suggest another possible approach, but this had not been the submission advanced by the Defendants.

There are a few points on the issue of negligence that are perhaps worth noting for the obvious lessons that they contain.

The judge held that the Defendants did not have the experience or expertise to advise on this project competently. The individuals who actively worked on the project and were responsible for the advice given did not have any FOC experience between them. The Defendants were in breach of duty in taking the project on.

The Defendants claimed that they had a "robust panel process" in respect of all valuations. However, there were no minutes or other contemporaneous record of any meeting of the Valuation Panel or of any decision which they might have taken, and such evidence as there was suggested that the Defendants' own guidance notes as to the composition of the panel had not been followed.

The judge accepted that the valuation of this project was far from easy, for which he had some sympathy with the Defendants. An important part of the task involved valuing the likely rental stream and appropriate yield at the end of year 7, which the judge described as particularly problematic and could conceivably be said to be no more than “crystal ball gazing”. However, the Defendants had not shrunk from the task; they had not suggested that it was impossible or too difficult to do. Instead they had carried out their work and provided advice and valuation figures that the judge found to be deeply flawed.

The judge rejected the relevance of the claimants’ and investors’ awareness of the speculative nature of the project and of the risks involved. As the judge put it: *Acceptance of risk is quite different from acceptance of negligence.*

There are concerns that the economic downturn may give rise to claims arising out of alleged overvaluations during the boom years, as happened in the 1990s. However, this case could not be seen as being part of any such trend. If the events in the case were affected by a downturn, it would have been the downturn at the beginning of the century, but it does not look as though this was in fact the case. The judge rejected the suggestion that Dockside was “conceived in a boom and born in a bust”.

However, if such claims are expected to materialise, one can take some comfort from the fact that in this case the principle in the *BBL* case was applied.

If you have any queries regarding this case, please contact Sheena Sood on 020 7420 8711 or at s.sood@beale-law.com or Paul Redfern on 0117 311 7470 or at p.redfern@beale-law.com.

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