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PROPERTY TEAM NEWSLETTER

Article: The Return of the Green Card – Mortgage Fraud

The property market is, to put it mildly, in an uncertain state. One certainty, however, will be the return to prominence of liability claims against property professionals, such as valuers and solicitors. The mass of claims that arose in the 1990's out of the previous market reverse from 1989 to 1993 customarily alleged either negligence or fraud. Since 1998, those claims have largely tailed off and the explanation for the return of professional liability claims now is fairly straightforward: in a rising market, negligent valuations and even fraudulent ones, and incompetent or dishonest conveyancing practices are simply masked by the increasing value of the security so that the lender as victim does not incur a loss. In contrast, when the market takes a downturn, the actions of the defaulting professionals are exposed.

The collapse of the sub-prime market in the US has already produced an upsurge in the number of mortgage frauds being revealed. A similar trend is likely here. No longer confined to the residential market where the sheer volume of frauds gave rise to huge losses, the buy-to-let market and the commercial lending sector have already produced some substantial litigation. In *Pulvers v Nevil Chan* [2007] EWHC 2406 Ch the fraud was masterminded by a mortgage broker but was only made possible because of the active participation of a conveyancer employed by the solicitors. Acting for the lenders, she had produced the necessary Reports on Title in order to obtain release of the funds. Unusually, rather than wait to be sued by the lender, the solicitors' firm itself took action against the broker and the conveyancer. Freezing orders were obtained against them, leading to a substantial recovery, and having found the conveyancer to be dishonest, the court ordered her to indemnify the firm to the full extent of the loss. The fraud involved 20 separate transactions running into millions of pounds.

In *Cheshire Building Society v Dunlop Haywards* [2008] EWHC 51 Comm the claim was in deceit against the valuers and solicitors. Cheshire obtained summary judgment against the valuer (who had already settled a claim by Nationwide BS for £27m in which the judge had indicated he would have ordered summary judgment absent an overnight settlement) with an interim payment of £10m. The welter of authority which emerged in the 1990's clarifying the common law obligations and fiduciary duties of solicitors owed in respect of lenders money has not to date been substantially supplemented, but there have been more recent refinements to the calculation of quantum following the definitive ruling of the House of Lords in *South Australia Asset Management Company v York Montague Limited* [1997] AC 191 ("SAAMCO"). In *Sempra Metals Limited v Inland Revenue* [2007] UKHL 34, for example, the award of compound, rather than the conventional simple, interest was upheld where a claimant could show that that was the true cost of being deprived of its money.

So as lenders embark on a fresh wave of claims against property professionals seeking to recover their losses from inadequate securities, a new generation of solicitors, with no experience of the warning signs of mortgage fraud must now be invited to dust down that old Green Card left unread in the senior partner's filing cabinet. In 1991, the Law Society issued the card by way of a warning as to property fraud. It was revised in January 1996 and updated in February 1999. The Green Card lists a number of signs that a solicitor should watch out for to enable him to spot a potential property fraud. These include borrowers introduced by a broker or estate agent not known to the solicitor, the remission of the proceeds of sale to someone other than the seller, the misrepresentation of the amount of the purchase price and other unusual transactions. Unusual transactions include the case of a client with a current mortgage on two or more properties, a client using an alias and a client reselling property at a substantial profit for which no explanation has been provided. The Green Card gives advice as to the steps which might be taken to minimise the risk of fraud. These include checks as to the identity and bona fides of the client and firms of solicitors not known to the conveyancer. The Green Card advises that the conveyancer should not witness pre-signed documentation. Furthermore money laundering procedures were not in place in the early 90's and

these should, if properly applied, also head off some attempted frauds that may implicate the honest but unwary and vulnerable solicitor.

Stephen Lennard

Did you see..... ? Recent cases you may have missed

Real Property

Contracts for Sale; Deposits; Standard Conditions of Sale; s.49(2) Law of Property Act 1925

Chief Ajibola Anthony Aribisala v St James; Homes (Grovensor Dock) Ltd [2008] EWHC 456 (Ch)

The claimant sought repayment of a deposit paid in relation to two properties and the Defendant counterclaimed for damages as a result of the claimant's failure to complete. The claimant argued that the court should exercise its discretion under s.49(2) to order repayment on the basis that they represented a significant proportion of his assets, he was unfamiliar with English conveyancing; had made attempts to obtain additional funding to enable him to complete and the Defendant had made a profit from the breach by reselling the properties at a higher price. The Defendant argued that it was owed compensation under clause 7.5 of the Standard Conditions of Sale because it had incurred expense in furnishing the properties after the claimant's breach and its rights to compensation survived the termination of the contract.

Held: In exercising its discretion under s.49(2) the court had to consider how close the buyer had come to performing the contract, the alternatives that had been proposed to the seller and how advantageous such alternatives would have been compared to the contract. While the economic impact on the seller was a relevant factor for the court to consider, the fact that the seller could not prove any loss was not, alone, a sufficient reason to order the return of the deposit, and the case of *Tennaro Ltd v Majorarch Ltd* [2003] EWHC 2601 (Ch) was not authority for the proposition that an increase in market value could on its own, amount to a sufficiently exceptional circumstance to justify the return of the deposit. Further the other factors relied on by the claimant did not take his case out of the ordinary. Therefore, the claim would be dismissed. The counterclaim would also be dismissed because clause 7.5 read with the Standard Conditions of Sale did not allow a claim for contractual compensation to survive termination of the contract.

Landlord and Tenant

Right to Light; Consent in Lease, s.3 Prescription Act 1832

RHJ Ltd v (1) FT Patten (Holdings) Ltd (2) FT Patten Properties (Liverpool) Ltd [2008] EWCA Civ 151

The appellant lessee appealed against the finding that a clause in its lease prevented the operation of s.3 of the Prescription Act and thereby precluded him from acquiring a right to light by prescription. The judge had held that an agreement or consent for the purpose of s.3 did not have to refer expressly to light (which the relevant clause did not). The appellant argued on appeal that such an agreement did have to make it clear that it was to render the enjoyment of light permissive or consensual.

Held: In dismissing the appeal the court stated that the phrase 'expressly made or given for that purpose' in s.3 was satisfied by an express provision in the lease, which when construed according to normal principles, rendered the enjoyment of light permissive or consensual or capable of being interfered with by the adjoining owner. It was accordingly inconsistent with the right having been acquired by prescription, and there was no requirement for there to be any express reference to light in the lease.

Landlord and Tenant

Disability Discrimination Act 1995; Mental Capacity

S (Appellant) v Jacqueline Floyd (Respondent) & Equality & Human Rights Commission (intervener) [2008] EWCA Civ 201

The appellant appealed against a possession order made against him, claiming that an adjournment should have been granted to investigate his mental capacity and/or on the basis of exceptional circumstances and/or the need for an investigation into whether he had a defence to the proceedings under the Disability Discrimination Act 1995 ("DDA").

Held: The appeal would be dismissed. There was insufficient evidence before the judge that would have allowed her to exercise her discretion to adjourn the proceedings on the grounds of mental incapacity, the matter having only been raised as a concern by the Defendant's representative with no supporting material and the Defendant having shown himself as having a very good understanding of the issues in the case. The DDA did not make it unlawful to evict a disabled person by lawful process and given that the Defendant admitted to being more than 8 weeks in arrears and on his own case had ceased payment of the rent because of what he considered to be unjustified attempts by the Claimant to increase it, it was unarguable

that the DDA provided a defence to the claim. The cases of *Manchester CC v Romano* [2004] EWCA Civ 834 and *Malcolm v Lewisham LBC* [2007] EWCA Civ 763 were distinguished.

Case summaries Alice Marshment

The members of the Hardwicke Property Team have specialised skills and experience in all aspects of the law relating to Real Property, Landlord & Tenant, Housing and other property-related subjects.

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