Clash of the titans

Georgina Squire considers the ongoing ramifications of a defining judgment on negligent commercial property valuation

Georgina Squire is head of dispute resolution at Rosling King
@roslingking
www.roslingking.com

Colliers International (UK) plc is currently appealing a Commercial Court judgment that they had negligently overvalued a property in Germany by €32m. Colliers were ordered to pay that amount to Titan Europe 2006-3 plc, the issuer or commercial mortgage-backed security (CMBS) structure in which property was one of a series of assets.

The judgment has been referred to as the 'awakening of a sleeping giant' and has the potential to open the floodgates for similar claims as it is the first successful claim against a valuer by the issuer of a CMBS structure. The case has significant ramifications for the CMBS market, lawyers and advisers, as it gives it a chance to recoup some losses on loans secured on over-valued real estate.

Two counts

The Titan case hinged on two key issues: first, did Colliers negligently overvalue the property; and, second, had Titan suffered a loss so as to entitle it to pursue a claim against Colliers? Mr Justice Blair ruled late last year in favour of Titan on both counts and the impact of the decision continues to unfold.

This is the first time that a UK court has been faced with a claim brought against a negligent property valuer where the loan advanced by the original lender has been securitised. It is also the first claim brought by the issuer.

The judge decided that the issuer had suffered the loss and so was a correct claimant for such a claim. As this precedent has been set, we are now seeing a greater appetite to recover losses suffered during the collapse of the commercial property market across Europe during the recession.

One of the most important consequences of this case for the legal profession is the clarification it has provided regarding time limitations on lender claims against valuers on mortgages.

There has been a perception that these claims may be time-barred as the basic six-year period in contract has expired. That perception is wrong. The six-year period to bring such a claim in tort (*Nykredit v Edward Erdmann*) only starts to run when a loss is suffered.

On a mortgage, one looks at the combined value of all security – including the borrower's covenant and the security property. Even if the property was worth less then the loan at inception of the loan, provided the borrower's covenant remains intact, time will not start to run.

Provided the last payment by the borrower was within the last six years, there should still be time in tort. Even if this has expired, there is still a three-year period under the Limitation Act from when the claimant first should have realised they had a claim.

The strategy was to inform the court as thoroughly as possible of real estate valuation methodology and the many variables that lie within it. By doing that, the judge was armed with all the necessary information and a 'valuation toolkit' which enabled him to reach his own measured conclusion as to valuation, as opposed to simply accepting one expert's calculation over another. It was a strategy that paid off.

Another of the key lessons to emerge from the case is the importance of ensuring that transaction documentation caters for the outcomes of human error. When the commercial property market is hot and the deal flow is high, it is inevitable that professionals make mistakes. The surprising thing is that the transaction documentation on complex CMBS structures like this did not expressly cater for what happens when such a mistake is made. **SJ**

The judgment has been referred to as the 'awakening of a sleeping giant'