Wilsons Solicitors

CAAV Autumn Briefing

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Introduction

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Professional Negligence

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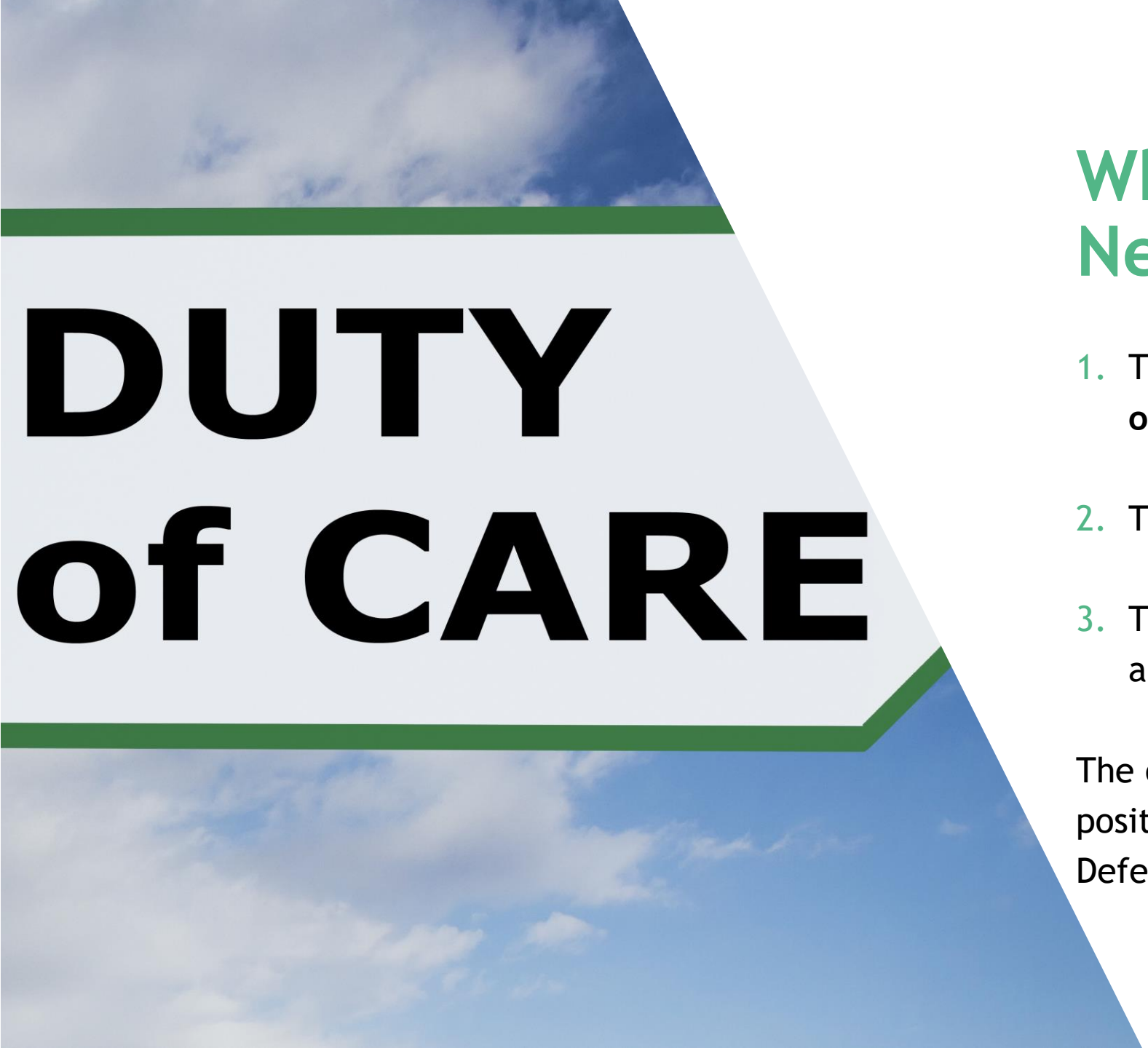


What is a Professional Negligence Claim?

1. The Defendant owed the Claimant a **duty of care**
2. The Defendant **breached** that duty
3. The breach **caused** the Claimant to suffer a **loss**

The objective is to place the Claimant in the position they would have been in but for the Defendant's negligence.

The SAAMCo Principle - the loss must fall within the scope of duty

Adviser of Information

Just a valuation, nothing more, nothing less, do what you like with it.

Adviser of Action

You should go ahead with this transaction.

South Australia Asset Management Corp v York Montague Ltd [1997] AC 191

Recent Developments in Professional Negligence

- *Manchester Building Society v Grant Thornton* [2021] UKSC 20 (Supreme Court)
- *Hart v Large* [2021] EWXA Civ 24 (Court of Appeal)

Manchester Building Society v Grant Thornton [2021] UKSC 20 (Supreme Court)

Stage 1 – **Damages** - what has the Claimant lost and are those losses actionable?

Stage 2 – **Scope of Duty -** what are the risks of harm which the law imposes on the Defendant a duty to take care?

Stage 3 – **Breach of the duty** identified in stage 2.

Stage 4 – The "**but for" test** - but for the Defendant's act or omissions would the Claimant's losses have occurred.

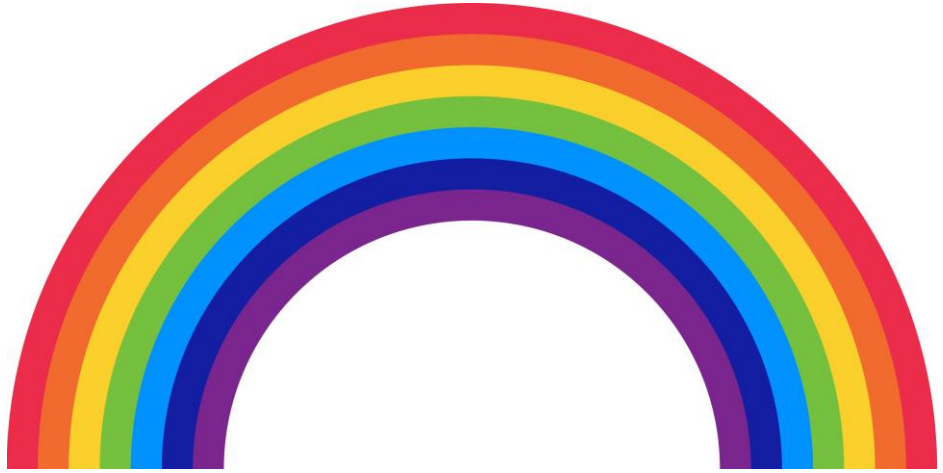
Stage 5 – **Duty Nexus** – Is there a sufficient link between the duty identified at stage 2 and the loss sought by the Claimant? In the majority of cases stage 2 will answer this question.

Stage 6 – **Legal Responsibility** - is any element of the loss irrecoverable e.g. remoteness, breaks in the chain of causation, contributory negligence and mitigation.

Stage 2 – Scope of Duty Definition

- What is the purpose of the duty, assessed objectively, by reference to the reason the advice is sought.

- *'what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk.'* (para 17 of the Judgment)

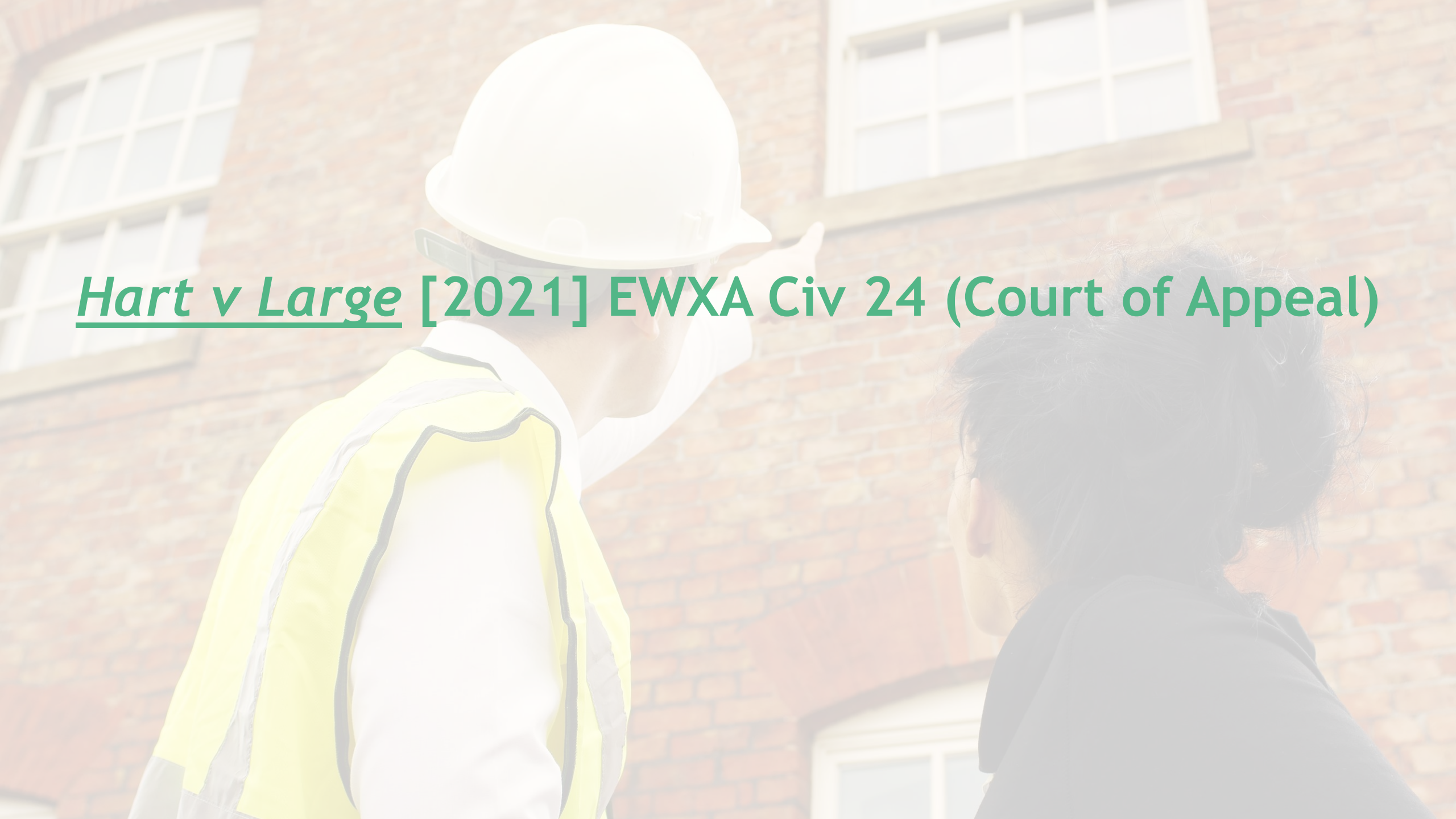


Information **Advice**

SAAMCo	V	MBS
It's either information or advice		In reality there is a **spectrum; information can** involve giving advice. Look instead at the **purpose** of the advice and **risk(s)** it was intended to guard against.

MBS takeaways

- Terms of business and engagement and retainer letters.
- Clearly set out the:
  - scope and purpose of the advice; and
  - identify the risks that the professional was instructed to guard against.
- Revisit these documents.



Hart v Large [2021] EWXA Civ 24 (Court of Appeal)

Critical findings

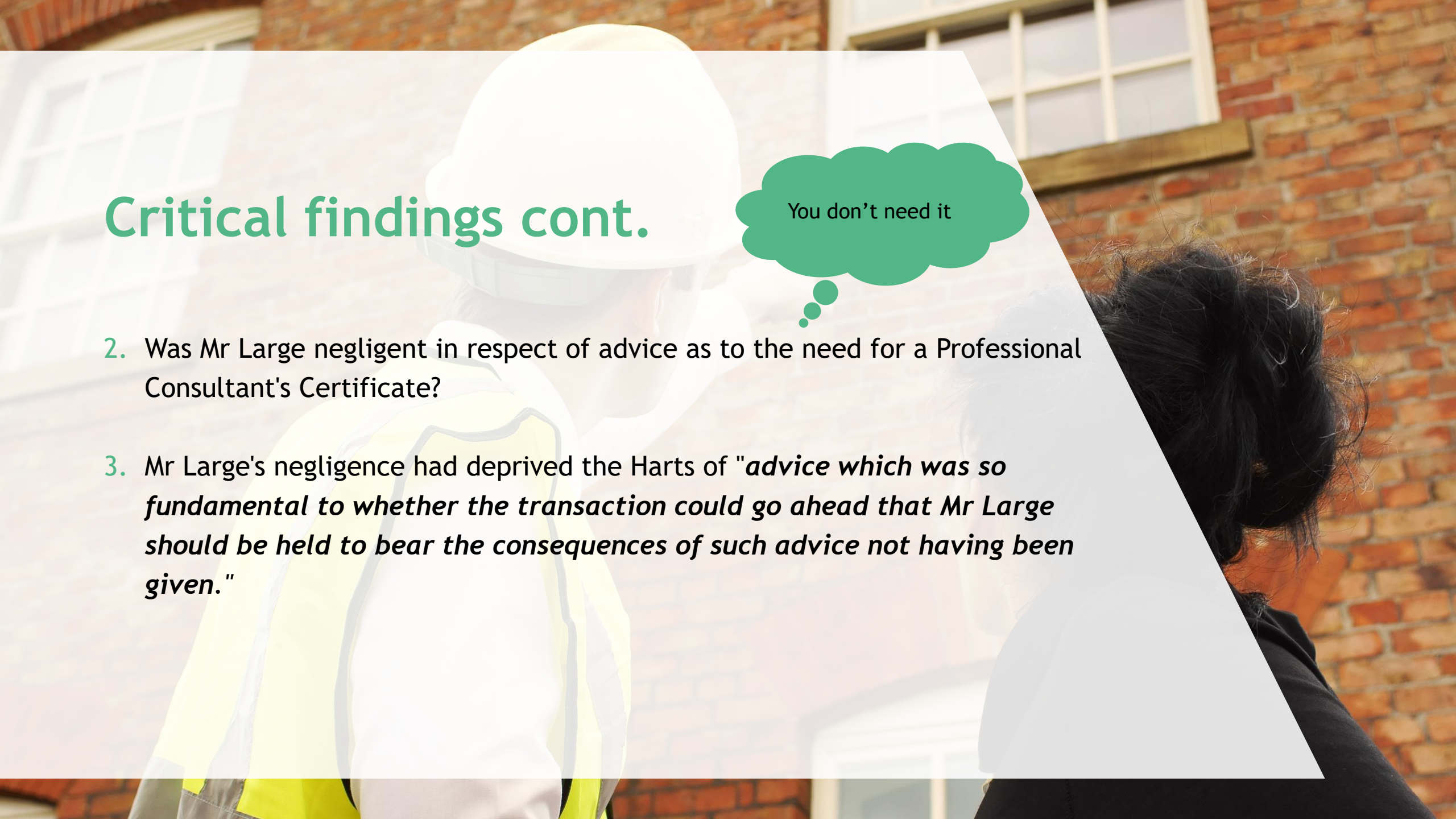
DPC should be present….yup it is present.

1. Was Mr Large negligent in failing to identify the significant damp problems?

- *"the lower ground floor room **would also have damp-proofing provision** of the internal main walls which are built against the higher ground beneath the house. None of the damp-proofing can be seen."*

- *"the timber framed wall areas are **likely to be designed with suitable waterproofing membrane**, insulation and vapour control within the structure, but these are concealed; however, there are no apparent reasons to suspect any defects or deficiencies."*

Critical findings cont.



2. Was Mr Large negligent in respect of advice as to the need for a Professional Consultant's Certificate?

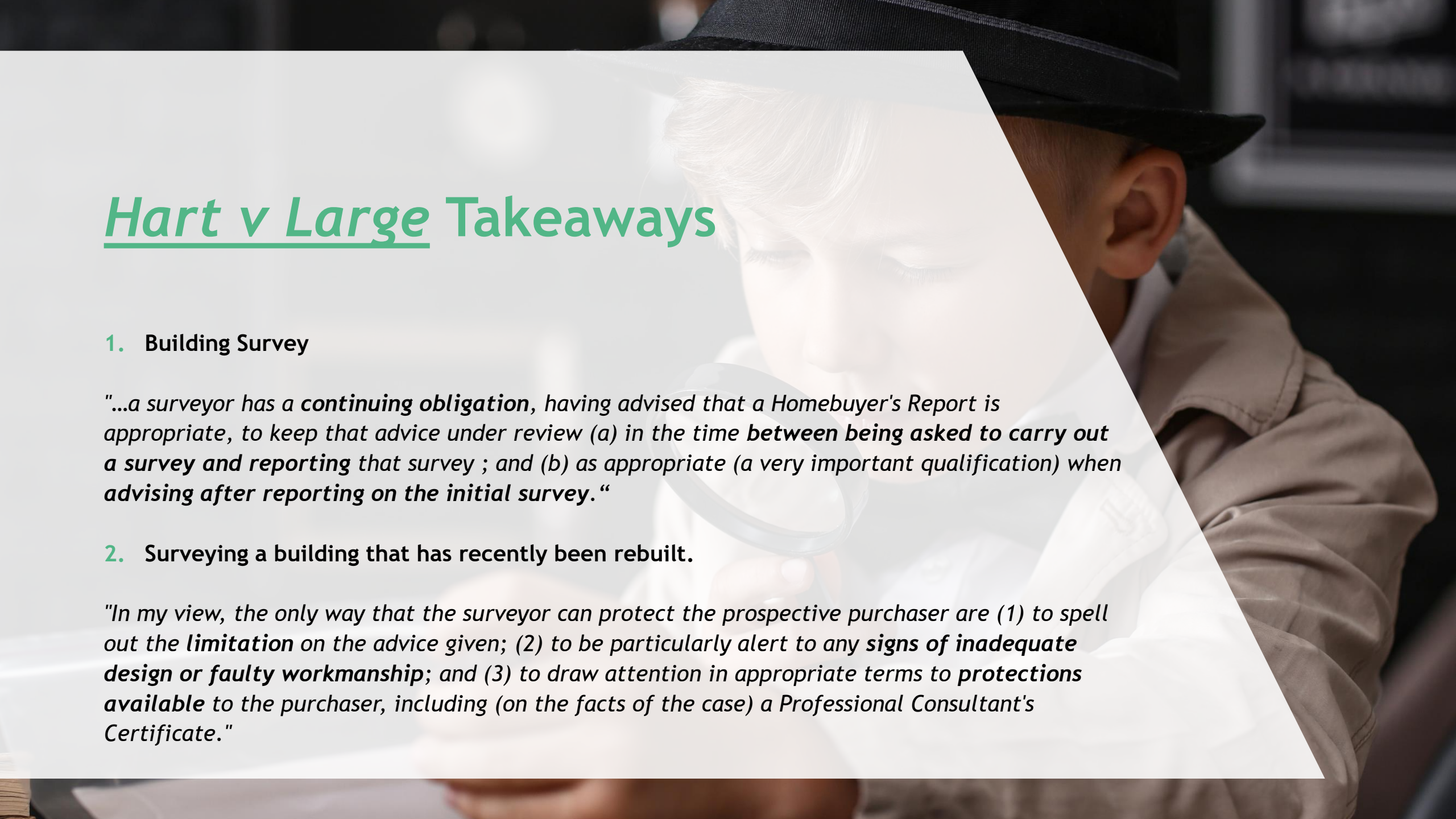
3. Mr Large's negligence had deprived the Harts of "***advice which was so fundamental to whether the transaction could go ahead that Mr Large should be held to bear the consequences of such advice not having been given.***"

Who is to bear the risk of unidentified defects?

Hart	Large	Court of Appeal
SAAMCO Difference in value between the Property with the defects as reported and its value with **all the defects that in fact existed** **Mr Large is liable for all defects even the ones he was not expected to report on**	**Watt v Morrows** Difference in value between the Property with the defects as reported and its value with **only the defects that Mr Large failed to report on in the Homebuyer report.** **Mr Large is only liable for defects he should have reported on.**	**SAAMCo hybrid?** Mr Large was providing both "**information**" and "**advice**". This was not a mere information case, and it is not really a hybrid, but in fact it is **much closer to an advice case because Mr Large failed to advise the Harts to obtain a PCC.**

Decision

The Claimants were awarded £750,000 (diminution in value) plus £15,000 (£7,500 each) for distress and inconvenience.



Hart v Large Takeaways

1. **Building Survey**

*"…a surveyor has a **continuing obligation**, having advised that a Homebuyer's Report is appropriate, to keep that advice under review (a) in the time **between being asked to carry out a survey and reporting** that survey ; and (b) as appropriate (a very important qualification) when **advising after reporting on the initial survey**."*

2. **Surveying a building that has recently been rebuilt.**

*"In my view, the only way that the surveyor can protect the prospective purchaser are (1) to spell out the **limitation** on the advice given; (2) to be particularly alert to any **signs of inadequate design or faulty workmanship**; and (3) to draw attention in appropriate terms to **protections available** to the purchaser, including (on the facts of the case) a Professional Consultant's Certificate."*

Thank you

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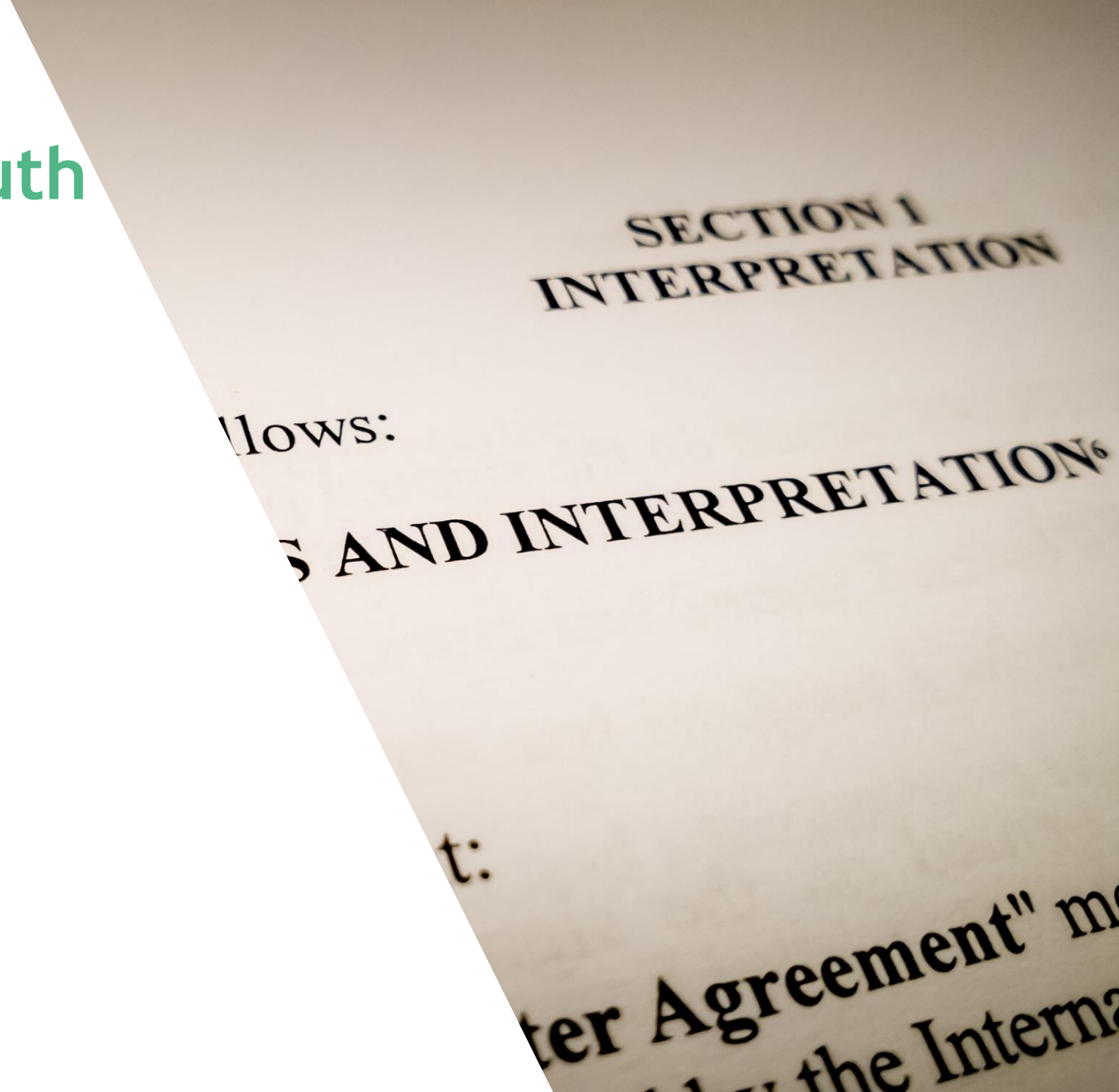
Rees v Earl of Plymouth Round One

Court of Appeal 2020

The judgment of Lord Justice Lewison

Interpretation of the contract



Rees v Earl of Plymouth
Round One Part 1 - Interpretation of the Contract

"(1) An exception or reservation will, if possible, be construed in such a manner as to preserve its validity.

(2) Therefore the court will, where it is possible to do so, construe an exception or reservation as restrictively as is required to avoid a derogation from grant or a conflict with the covenant for quiet enjoyment.

In the words of Neuberger J in *Platt v London Underground Ltd* (supra): "An express term should, if possible, be construed so as to be consistent with what Hart J called "the irreducible minimum", implicit in the grant itself."

Rees v Earl of Plymouth
Round One Part 1 - Interpretation of the Contract

(3) There is no further rule that a reservation is to be construed restrictively against a landlord.

Rees v Earl of Plymouth
Round One Part 1 - Interpretation of the Contract

(4) However, the application of the standard principles of construction, including the requirement to have regard to all of the provisions of the instrument and to the principal purpose and subject matter of the instrument, will tend to lead the court to expect that substantial qualifications of the rights to exclusive possession and quiet enjoyment of the demised premises will appear clearly from the lease. Further, apparently broad and unqualified words in reservations may, on closer examination, be found to have a more restricted meaning when read in their immediate or wider textual context.

Rees v Earl of Plymouth
Round One Part 1 - Interpretation of the Contract

(6) The contra *proferentem* rule operates only if the exception or reservation is ambiguous, in the sense that the court is unable to decide on its meaning by the use of the materials usually available for interpretation.

Rees v Earl of Plymouth
Round One Part 1 - Interpretation of the Contract

This was not endorsed so remains open to argument

(8) Once the court is forced to have recourse to the rule, the correct position is that the reservation operates as a re-grant by the tenant and therefore the reservation falls to be construed against the tenant, who is considered to be the *proferens*."

Rees v Earl of Plymouth
Round One Part 2 – What right of entry?

The judgment of Lord Justice Lewison

What right of entry?

62. Once again, the court approached the question of what was permitted by a right of entry as a question of fact and degree.

Rees v Earl of Plymouth
Round One Part 2 - What right of entry?

The right of entry is not a right to enter for entry's sake. It is a right to enter for a particular purpose. So if a purpose is a reasonable purpose for which the landlords wish to enter the land, the proper interpretation of the right must surely enable them to do what is reasonably necessary to achieve that purpose. "Reasonably necessary" is not the same as "convenient" or "desirable".

Rees v Earl of Plymouth High Court Nov. 2020 Round Two - Case B

The judgment of His Honour Justice Jarman QC

Case B – how much land can the landlord take?

Rees v Earl of Plymouth
High Court November 2020
Round Two - Case B

The question before the Court

"Under Case B of Schedule 3 to the Agricultural Holdings Act 1986 , must the relevant land be required for the relevant use on the expiry of the notice to quit, or within a relatively short time thereafter (as the Claimant contends); or (as the Defendant contended, and the Arbitrator determined) is it sufficient for the landlord to establish that he will require the land for the relevant use at some point in the future."

Rees v Earl of Plymouth
High Court November 2020
Round Two - Case B

"The notice to quit is given on the ground that the land is required for a use, other than agriculture…for which permission has been granted on an application made under the enactments relating to town and country planning… and that fact is stated in the notice."

Rees v Earl of Plymouth
High Court November 2020
Round Two - Case B

6. The key part of Case B in the present appeal is the phrase "is required." It was ultimately not in dispute before me that that means that the land must be so required at the end of the period stated in the notice or within a relatively short time thereafter, rather than in the more distant future or at some as yet unascertained time

Rees v Earl of Plymouth
High Court November 2020
Round Two - Case B

This is an appeal under the Arbitration Act 1996 and not a detailed analysis of the facts

Question - did the arbitrator apply the correct test?

Rees v Earl of Plymouth
High Court November 2020
Round Two - Case B

The arbitrator said

Whilst I accept that some of the land contained within this Notice to Quit will not be developed for a number of years and note the 20 year time limit on the planning consent, I take on board the advice given by Mr Blohm QC and note the evidence given by Mr Lawley and W Rees as to how they need availability and access to this land for earth moving and storage, together with the need for carrying out infrastructure works in respect of gas, water and roads etc.

Rees v Earl of Plymouth
High Court November 2020
Round Two - Case B

The test which I have to put on this are, does the Landlord require the land which I answer yes, does he genuinely intend the develop the land to which I answer yes, does he genuinely intend to develop the land to which I answer yes and is there a reasonable prospect of the land being developed to which I answer yes.

Rees v Earl of Plymouth
High Court November 2020
Round Two - Case B

7.2.4 Therefore I consider that the Landlord has a present and genuine requirement for this land in accordance with the planning consent to the extent that he satisfies the requirements of Case B and confirm that the Notice to Quite is valid and uphold it.".

Rees v Earl of Plymouth
High Court November 2020
Round Two - Case B

The judge's conclusion

16. In my judgment, on a fair reading of the award, it has not been shown that the arbitrator did err in law in the ways submitted by Mr Peters. Indeed, on the facts as found by him the stated question of law as phrased does not arise. Accordingly, there is no basis for remitting the matter to the arbitrator in respect of the first question of law.

What do we take away from this case?

1. Evidence is critical. You need to identify exactly what evidence you want the arbitrator to have so that the Arbitrator has the correct information and does not need to make assumptions however reasonable those assumptions are.

2. Appealing Arbitrator's decision remain very difficult

Thomas v HMRC Upper Tribunal 2020 Peter McCrea FRICS

Evidence – what is good evidence?

Thomas v HMRC
Upper Tribunal 2020
Peter McCrea FRICS

"Where the nature of the development is such that there are no (or limited) transactions to use for the comparative method, the residual method provides an alternative valuation approach. However, even limited analysis of comparable sales can provide a useful check as to the reasonableness of a residual valuation."

Thomas v HMRC
Upper Tribunal 2020
Peter McCrea FRICS

"The residual method requires the input of a large amount of data, which is rarely absolute or precise, coupled with making a large number of assumptions. Small changes in any of the inputs can cumulatively lead to a large change in the land value. Some of these inputs can be assessed with reasonable objectivity, but others present great difficulty. For example, the profit margin, or return required, varies dependent upon whether the client is a developer, a contractor, an owner occupier, an investor or a lender, as well as with the passage of time and the risks associated with the development."

Thomas v HMRC
Upper Tribunal 2020
Peter McCrea FRICS

38. I am not persuaded by the very basic residual method adopted by either valuer. As the RICS paper confirms, the end result depends heavily on the assumptions made and choices of input. Ms Gaydon's four valuations, all made with plausible but untested assumptions, produced a land value varying from £602,550 to £1,115,902.

Thomas v HMRC
Upper Tribunal 2020
Peter McCrea FRICS

Mr Poiner's approach, which might be neutrally described as short, made bald assumptions as to a number of factors, which when adjusted have a significant effect on the end value. Changing his assumed contingency from 3% to 5% for instance, reduces the resulting land value to just under £300,000 – a drop of nearly 40%.

Thomas v HMRC
Upper Tribunal 2020
Peter McCrea FRICS

39. The residual method might have been of assistance to me had the various inputs been the subject of more research and analysis, which could only really have come from a properly worked up scheme, based on a detailed assumed planning permission, with input from engineers as to site levels, and the costs of drainage and retaining walls, among many other factors. As it is, I place very little weight on the residual valuations.

Thomas v HMRC
Upper Tribunal 2020
Peter McCrea FRICS

50. Having considered all the evidence, and having inspected the appeal site and relevant comparables, in my view the value of the appeal site at the valuation date was £80,000 per gross acre, which for 8.08 acres is £646,400, say £645,000.

Kirby v Baker & Metson October 2020

The devil is in the detail

Case B - A really geeky lawyer's case.

Kirby v Baker & Metson October 2020

Case B - relevant extract

The notice to quit is given on the ground that the land is required for a use, other than for agriculture—

b) for which permission under those enactments is granted by a general development order by reason only of the fact that the use is authorised by—

(ii) an order approved by both Houses of Parliament

How do the House of Parliament make orders?

Affirmative procedure and Negative procedure

The judge’s conclusion?

55. This language specifies two things: permission given by a general development order, and authorisation by an order approved by both Houses of Parliament. I think it is clear, and I accept Ms Taskis' submission in this respect, that the reader would consider them to be separate.


ANYONE WHO HAS NEVER
MADE A MISTAKE HAS
NEVER TRIED ANYTHING
NEW

Succession Application
Adams v Jones

Primary legislation requires an application to be made within 3 months beginning with the day after the date of death of the tenant. There is no power to extend that time limit

Succession Application
Adams v Jones

The applicant wrongly assumed the landlord was Mr Dan Adams

The landlord was Adams DSB Limited.

Mr Adams was the sole director at the time and was a substantial shareholder.

Succession Application
Adams v Jones

There is no requirement under the Act to correctly identify the landlord.

There is a requirement to bring the application to the attention of the landlord.

This requirement is interpreted as requiring notice to be given after the application has been made.

Succession Application
Adams v Jones

The naming of the landlord is subject to the procedural rules

Rule 40(2) required the applicant, before making the application, to deliver a notice in writing of their intention to do so to "all interested parties".

Rule 47 anticipates inevitable irregularities and allows the Tribunal to cure or waive any irregularity

Succession Application
Adams v Jones

After the 3 month period the company's solicitor stated that the application was defective

After the 3 month period the company's solicitor stated that the application was defective

The ALT determined that no prejudice or confusion had been caused in naming Mr Adams as the respondent as it had come to the company's attention.

Succession Application
Adams v Jones

The Tribunal gave examples of where the applicant might not know the identity of the landlord but warned applicants that a failure to provide evidence of what steps were taken to identify the landlord or any credible steps for their inability to do so would risk the application being struck out as an abuse of process or as likely to obstruct the fair disposal of the proceedings under Rule 34

You have been warned.

Limbrick v The National Trust August 2021 ALT before Nigel Thomas

A cautionary tale

Limbrick v The National Trust
August 2021
ALT before Nigel Thomas

A retirement notice that went wrong

Father wished to retire. Notice served. Landlord agrees to son taking tenancy.

Consent Order filed

BUT

Limbrick v The National Trust
August 2021
ALT before Nigel Thomas

The consent order was defective

Father wanted to be joined into the proceedings and withdraw the notice

Consent Order was set aside and father joined the proceedings.

The real fight begins.

Why is this important?

Know your client – there was clearly underlying tension that resulted in a bitter and substantial partnership dispute that is now the subject of arbitration proceedings.

See also a number of various estoppel cases where family members have fallen out.

Look out for the warning signs within the family.

Take care and identify who is your client

Know when to make detailed notes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Thank you

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