QBE EUROPEAN OPERATIONS

PROPERTY MATTERS

March 2017

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Contents

Introduction

Since the January edition, we have launched our dedicated Extreme weather webpage, which offers advice and guidance on how to manage severe weather events, helping you protect your business and employees. The launch was particularly timely with Storm Doris hitting the UK and hopefully provided that pre-event support which can make all the difference.

Fortunately, we have not experienced a repeat of the flooding events following Storms Desmond, Eva and Frank, but the Technical Guides drafted by our Risk Solutions team provide guidance, advice and useful checklists:

- Flood Emergency Response
- Flood Response Planning
- Windstorm Response Planning

Over the last month, the insurance press has been dominated with the news of the reduction to the Discount rate which will have a significant impact for our colleagues in Motor & Liability, as well as further Ministry of Justice reform with regard to whiplash claims. We have also seen some interesting court judgments relevant to the commercial property arena and we take a look at:

- Landlords dilapidations recovery;
- Inducement and breach of fair presentation of risk;
- Use of expert evidence following a significant fire

Next month we plan to review the Enterprise Act, which will come into effect on 4 May 2017. The Act is a significant piece of insurance reform and will introduce a statutory right to claim damages for late payment of a claim. It is already starting to influence certain behaviour and will inevitably present opportunity and risk to insurers.

Landlord's dilapidations recovery

Car Giant Ltd v Mayor & Burgesses of the London Borough of Hammersmith [2017]

Typically, Hammersmith Borough Council held a lease, which included a covenant to yield up the property in good and substantial repair.

Car Giant (CG) was the Council's landlord and brought a claim for dilapidations at the end of the lease which exceeded the cost of the works they had undertaken. CG had carried out some repair work, but much of the work referred to in the schedule of dilapidations had not been undertaken and no explanation had been provided.

Each party relied on an expert valuer, who produced valuations of the diminution in the value of the landlord's reversionary interest (which would operate as a cap on the damages recoverable), by comparing the value of the property in good condition, with its value subject to the actual disrepair.

The court was asked to determine whether CG:

- Could recover the entire remedial costs (incurred and not incurred) on the basis that there was a diminution in value, or whether the cap set out in section 18(1) of the Landlord and Tenant Act 1927 limited the recovery, as the Council argued;
- Was entitled to the costs of the preparation and service of the defects schedule, the claim summary, and a drainage report;
- Was entitled to recover a sum for professional fees.

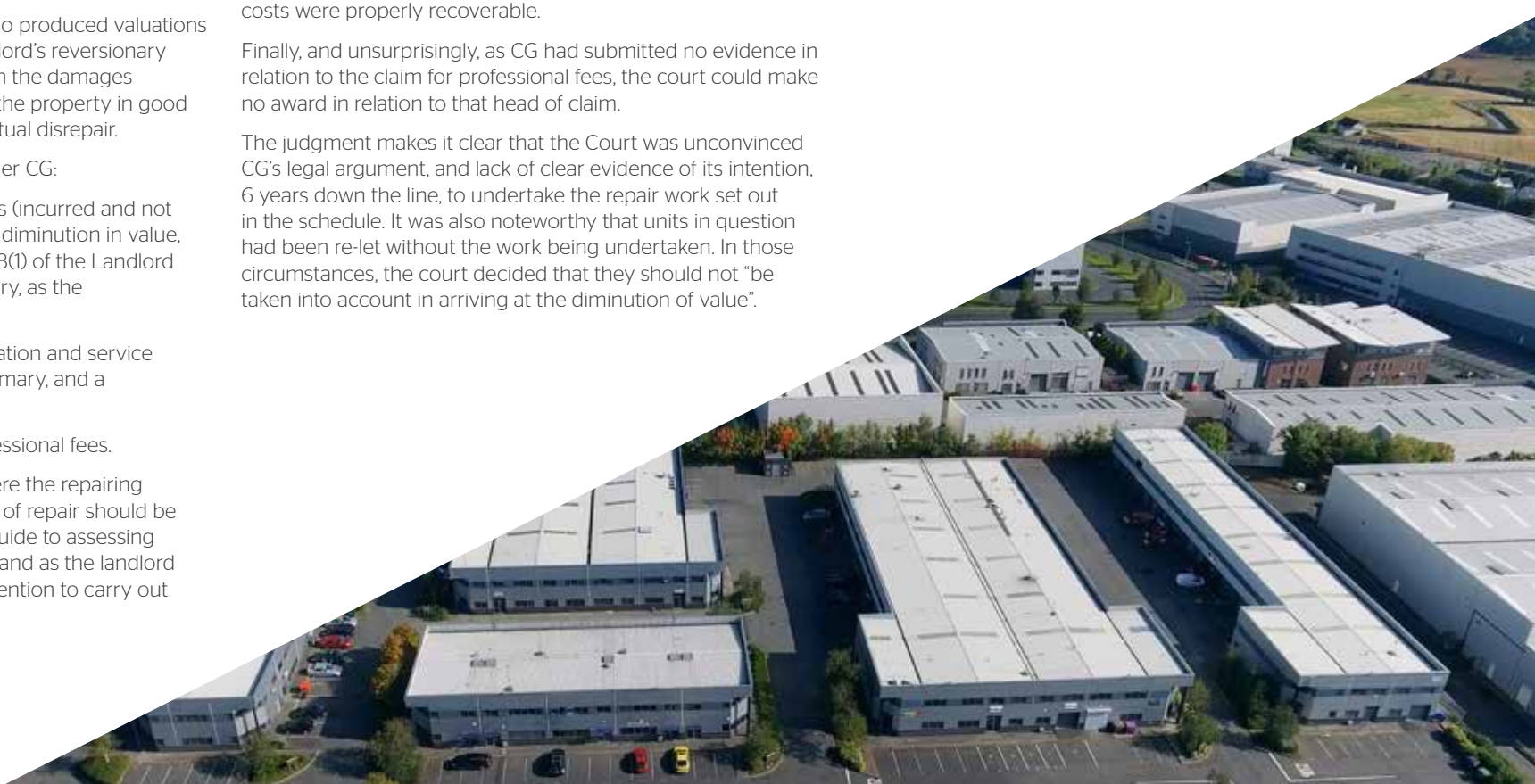
On the first point, the court said that where the repairing covenants have been breached, the cost of repair should be the starting point or at least a very real guide to assessing the damage to the reversion. As a result, and as the landlord had not put forward evidence of their intention to carry out the remaining works, or evidence that their reversion had diminished by an amount equivalent to those additional costs, the court was unable to take into account those further costs in calculating the diminution in value.

On the second point, it was held that the costs claimed for the preparation of the defects schedule, claim summary and drainage report were not adequately backed up by evidence. The only evidence the court had was the cost of the preparation of the schedule of defects, therefore only those costs were properly recoverable.

Finally, and unsurprisingly, as CG had submitted no evidence in relation to the claim for professional fees, the court could make no award in relation to that head of claim.

The judgment makes it clear that the Court was unconvinced CG's legal argument, and lack of clear evidence of its intention, 6 years down the line, to undertake the repair work set out in the schedule. It was also noteworthy that units in question had been re-let without the work being undertaken. In those circumstances, the court decided that they should not "be taken into account in arriving at the diminution of value".

In conclusion, the advice for landlords is to refrain from serving schedules of dilapidations, without a genuine intention to carry out all the work listed. In addition, they should monitor progress of any negotiations for dilapidations and be sure to factor in any change in circumstances that affect any remedial programme and document any changes with clear supporting evidence.



Inducement and Breach of Fair Presentation of Risk

AXA v ARIG [2017].

On 28 February 2017, the Court of Appeal handed down judgment and confirmed that Axa was not entitled to avoid a first loss reinsurance of ARIG, covering energy construction losses. Whilst ARIG had failed to disclose certain statistics pertaining to the reinsurance, and thereby breaching its duty to make a fair presentation of the risk, the Axa underwriter was not induced to write the risk on the terms which he did because of ARIG's breach of duty. As a result, the test for avoidance under the Marine Insurance Act 1906 – which was applicable to this risk – was not met.

The general points of interest were:

1. The court accepted that in considering the issue of inducement it was appropriate to consider not only what the underwriter's response to the non-disclosed statistics would have been but, also, how the statistics are likely to have been presented, what explanation would have accompanied them and how the underwriter would have responded in those circumstances. The impact of the statistics cannot be viewed in isolation.
2. The (re)insurer has to prove that its underwriter was induced to write the risk on the terms which it did by the breach of duty. To satisfy this burden, the Court would need to conduct an objective exercise to establish what a fair presentation would require to be disclosed, as well as considering any additional matters the insured or broker would have "urged upon the insurer as reasons for writing the business".

These issues will continue to be important, and perhaps more so, under the new regime of proportionate remedies set out in the Insurance Act 2015. Under the terms of the Act, an underwriter will not only have to demonstrate that he or she would not have written the risk on the terms which they did, had a fair presentation been made, they will also have to prove whether they would have declined the risk altogether or whether they would have accepted it on different terms either as a premium or otherwise.

If the (re)insurer would have accepted the risk on different terms, they will have to prove what those terms would have been. This is likely to require a close scrutiny of how the risk should properly have been presented, what comments and explanations would have been offered by broker during the placing process and what the response of the underwriter would have been than has been required under the Marine Insurance Act regime.

Inducement will continue to be a requirement in order to establish a remedy for breach of the duty of fair presentation under the Act. The Court of Appeal's observations will continue to be relevant when courts are faced with similar arguments on inducement under the new regime.

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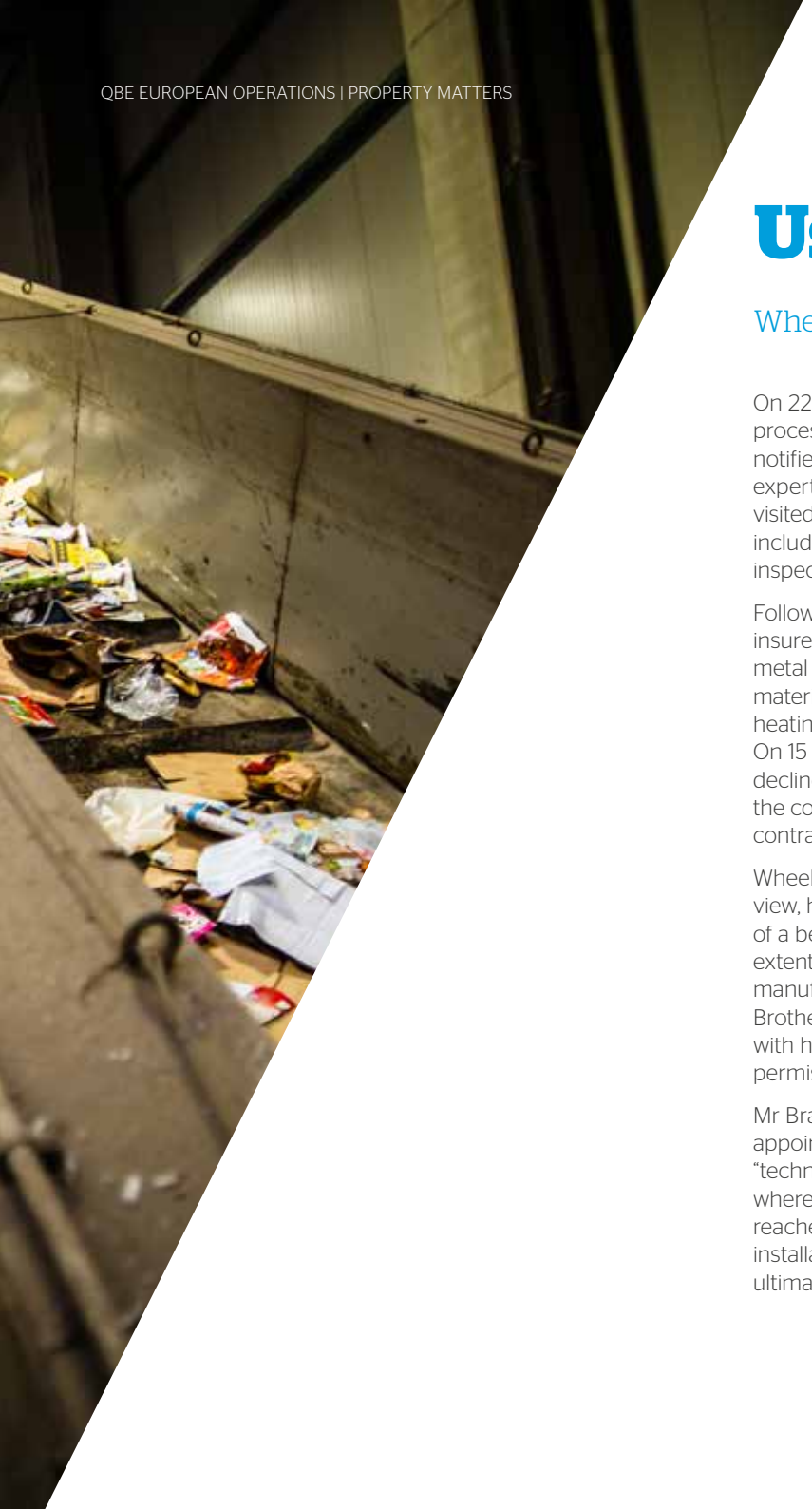

Use of Expert Evidence

Wheeldon Brothers Waste v Millenium Insurance (2017)

On 22 June 2014, there was fire at Wheeldon Brothers' waste processing plant in Ramsbottom. Millenium Insurance was notified the same day and instructed Mr Braund, a forensic expert employed by Hawkins. The following day, Mr Braund visited the site and carried out the usual post-fire investigations, including interviewing witnesses, taking photographs and inspecting the area of the fire.

Following his investigations, Mr Braund reported back to the insurers that the cause of the fire was frictional heating, or hot metal fragments, or hot sparks, which ignited combustible material under the conveyor. He thought the cause of the heating/fragments/sparks was a bearing on the conveyor. On 15 August 2014, relying on Mr Braund's report, Millenium declined policy liability, on the grounds that the presence of the combustible material and/or the state of the conveyor was contrary to a number of the terms of the policy.

Wheeldon Brothers were concerned that, in Mr Braund's view, heating/fragments/sparks had been caused by a failure of a bearing on the conveyor. They were interested to the extent to which it might have a claim against the third party manufacturers of the conveyor. In January 2015, Wheeldon Brothers approached Mr Braund to see if he could assist with helping the proposed recovery against third parties and permission was given by Millenium.

Mr Braund instructions expressly said that it was not a letter appointing him under the Civil Procedure Rules, but was as a "technical advisor only". The instructions asked him to deal with where, how and why the fire started. Mr Braund unsurprisingly reached the same conclusions and that there was a design, installation or manufacturing defect in the conveyor which ultimately led to the fire.

Wheeldon Brothers commenced legal proceedings against Millenium and sought to argue that Mr Braund could not act as Millenium's formal expert. The judge disagreed and said:

- Mr Braund is in the best possible position to assist the court on many of the background issues surrounding the fire. He attended immediately after the fire and he carried out all the usual and extensive investigations typical of fire experts in this situation.
- The court was likely to have to consider the issue of causation on the basis of the evidence adduced at trial and it would be contrary to the interests of justice for the court's inquiry into causation to be carried out without the assistance of the fire expert who undertook the contemporaneous investigation.
- There is no overlap or conflict between what Mr Braund was instructed to do by Wheeldon Brothers and what he was instructed to do by Millenium. The latter was and remains solely interested in the cause of the fire, as opposed to any claim against a third party.
- An expert has an overriding duty to the court and that duty trumps everything else.
- The question of confidential information was clear-cut. There was no evidence that confidential information was passed to Mr Braund in the first place.

The judge was in no doubt that what happened in this case was inadvertent. Although, with hindsight, it would have been better if Wheeldon Brothers had not asked to use Mr Braund, it is plain that, when the request was made and accepted, both sides were acting in good faith. The judge concluded that there was no proper basis to deprive Millenium from relying on the expert evidence of Mr Braund.

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