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Professional Liability Update

A point of principle: the Supreme Court clarifies the "but for" test

Tiuta International Limited (in liquidation) (Respondent) v De Villiers Surveyors Limited (Appellant) [2017] UKSC 77

1. In a tightly drawn 15 paragraph judgment, delivered last week, Lord Sumption overturned the decision of Moore Bick LJ in the Court of Appeal, and restored the first instance decision of Timothy Fancourt QC, sitting as a Deputy High Court judge. The judgment gives valuable guidance on the correct application of the "but for" test in professional negligence claims by lenders against valuers where there has been re-financing of the original lending transaction. It has decided a point of principle concerning the quantum of damages.

The facts

2. The facts of the case are straightforward: The Claimant ("Tiuta") was a lender which instructed the Defendant valuer ("De Villiers") to value a partly completed residential development ("the Property"). In April 2011, Tiuta entered into a loan facility agreement, secured by way of a charge over the Property ("the April loan"). The facility agreement was made on the basis of a valuation of the Property by De Villiers. In December 2011, Tiuta entered into a second facility agreement regarding the Property, again on the basis of a revised valuation by De Villiers ("the December loan"). Of that facility, some £2,799,252 was for the refinancing of the indebtedness under the first facility, and £289,000 was new money. The monies paid out under the December loan entirely discharged the remaining debt under the April loan. Of the new money, £281,590 was also paid out. The December loan period expired without repayment in July 2012, a few weeks after Tiuta went into administration. None of the indebtedness outstanding under it has been repaid.

3. It was common ground that there could be no liability in damages in respect of the advances made under the April loan, because there was no allegation of negligence made in respect of that valuation – and – even if there had been, the advances made under that facility had been entirely discharged by the December loan, leaving no recoverable loss (following *Preferred Mortgages Ltd v Bradford & Bingley* [2002] EWCA Civ 336.

The dispute

4. The Supreme Court was confronted with the same argument that had been presented at first instance. Was Tiuta able to recover the **whole of the amount** advanced under the December loan? Or were they limited **only to the new money** which had been advanced additionally to the refinancing element?

5. Timothy Fancourt QC correctly applied the well-established "but for" test as elucidated by Lord Nicholls in *Nykredit*

Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (no.2) [1997] 1 WLR 1627 at 1613D-E and carried out the comparison "*... between (a) what the plaintiff's position would have been in the defendant had fulfilled his duty of care and (b) the plaintiff's actual position" (the "basic comparison*").

6. De Villiers' submissions were that it was liable only for the new money component. The remainder was used to refinance the April loan, made after a non-negligent valuation. The money would have been lent by Tiuta irrespective of any negligence. It would never have been repaid, even if the December loan had not been made. It was irrecoverable as a matter of fact.

7. In response, Tiuta argued that the terms of the December loan were different, and that there had been a different facility fee paid, and that because the whole of the December loan was advanced in reliance on the negligent valuation, the whole amount would be recoverable.

8. Tiuta's position on the "but for" test was that it would be unfair to apply it to these facts, when the losses occasioned by the refinancing part of the December loan would "fall into a black hole". They cited *Preferred Mortgages* in support, especially those arguments advanced in that case that the "true nature" of the transactions – rather "the reality" of the situation – was that the re-financing was all new money.

9. Timothy Fancourt QC dismissed those arguments. There was nothing in Preferred Mortgages which supported Tiuta's contention that causation should be decided on different or special facts. The "but for" test applied: only the new money was recoverable.

The Court of Appeal

10. The Court of Appeal took a different view. Lord Justice Moore-Bick and Lady Justice King found that the "but for" test did apply, but with the result that Tiuta ought to be able to recover the whole of the December loan monies. That was because the December loan had been specifically designed to allow the April loan to be discharged and therefore "*stands apart from the first and the basic comparison for ascertaining the appellant's losses between the amount of that second loan and the value of the security"[17].* On the assumption that the December valuation had not been negligent, Tiuta would not have entered into the December loan and would therefore have suffered no loss on that transaction. Therefore the whole of the loss occasioned by that transaction was recoverable.

11. By contrast, Lord Justice McCombe considered that the "but for" test being applied by the majority did not take into account the reality of the factual matrix: i.e. by ignoring the already existing exposure of Tiuta by way of the April loan that would have existed even if the December loan had never been made. His forceful dissenting judgment echoed the reasoning of the first instance judge.

The Supreme Court

12. Lord Sumption's leading judgment is blunt in its rejection of Moore Bick LJ's reasoning:

    "It does not follow from the fact that the advance under the second facility was applied in discharge of the advances under the first, that the court is obliged to ignore the fact that the lender would have lost the advances under the first

facility in any event. Lord Nicholls' statement in Nykredit assumes...that but for the negligent valuation, he would still have had the money which it induced him to lend. In the present case, Tiuta would not still have had it, because it had already lent it under the first facility. Moore-Bick LJ appears to have thought that this was irrelevant..." [9]

13. The argument that De Villiers might have foreseen that they would be liable for the full amount of the valuation was unimportant. The crucial element was the application of the "basic comparison" exercise: *"that involves asking by how much the lender would have been better off if he had not lent the money which he was negligently induced to lend. This is purely factual inquiry."[10]*

14 A further argument was made that the court should disregard the fact that the December loan was intended and had indeed been used to discharge the April loan entirely, because that application of funds was a collateral benefit to the lender which they would be obliged to take into account when computing their loss. If the discharge of the April loan is disregarded, damages can be assessed as if the whole of the December loan was an additional advance, and the whole of it would be recoverable. Lord Sumption took this argument seriously, but applied the recent decision of *Swynson Ltd v Lowick Rose LLP (in liquidation) [2017] 2 WLR 1161*, [11], which set out that as a general rule *"collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss"*. The discharge of the existing indebtedness was plainly not a collateral benefit in this sense. The "basic comparison" required a court to look at the whole of the transaction which was caused by the negligent valuation, not to imagine that Tiuta might have advanced both the amount of the April loan and then the amount of the December loan additionally. They never intended to lend more than £289,000 of new money.

15. The appeal was allowed.

Discussion

16. The Court of Appeal's decision had appeared odd to many practitioners. As the judgment points out, Moore Bick LJ appeared to apply form over substance by ignoring the reality of the factual matrix. Had that decision stood, it would have required lenders who were refinancing deals and "topping up" the amount to design entirely new loan agreements which carefully delineated the scope of any duty or attempted to limit any potential new liabilities. From the moment that permission was granted for an appeal to the Supreme Court, it seemed to many practitioners advising lenders in these matters that they ought not to be hasty in implementing the changes that the Court of Appeal mandated.

17. There are many practical lessons to be taken here, but more important is the principle that the "but for" test involves a basic comparison of the facts of the case, and cannot be applied in some academically appealing but ultimately erroneous way. It is of little surprise that Timothy Fancourt QC's permanent elevation to the High Court has just been announced.

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