Tiuta International Ltd (in liquidation) v De Villiers Surveyors

July 2016

The Court of Appeal recently overturned a first instance decision in an application for summary judgment in the matter of *Tiuta International Ltd (in liquidation) v De Villiers Surveyors Ltd* [2016] EWCA Civ 661.

The case concerned a valuation prepared by De Villiers in December 2011, of a partially completed residential development. De Villiers valued the property at £3.5m in its current state and £4.9m on completion. However, this was not the only valuation that De Villiers had prepared relating to the property. De Villiers had also valued the property for Tiuta in February 2011, at that time valuing the property at £3.25m in its current state and £4.9m on completion. Following that valuation, Tiuta advanced the sum of c. £2.5m to the borrower, and placed a legal charge over the development as security for the loan.

Following De Villiers valuation in December 2011, Tiuta agreed to lend further funds to the borrower. In doing so, instead of simply amending the original loan to extend it, the original loan was repaid with funds lent in the new loan, the original charge was released and a new charge was registered at the Land Registry. It was thus structured as an entirely new loan.

When the term of the second loan expired, the amount of £2.84m remained unpaid. The loan was not repaid and Tiuta appointed receivers. The property was sold for just over £2.1m, and Tiuta brought a claim against De Villiers alleging that the December 2011 valuation had been negligent. Tiuta made no reference to the original February 2011 valuation in its claim.

The High Court Decision

De Villiers brought a summary judgment application before the High Court. For the purposes of the application it was assumed that De Villiers' November 2011 valuation was negligent.

The High Court considered the "but for" causation test and the decision in *Preferred Mortgages Ltd v Bradford & Bingley Estate Agencies Ltd* [2002] ECWA Civ 336. In *Preferred Mortgages*, the Court held that a lender's claim against a valuer for negligent valuation was extinguished once the loan made, based on the alleged negligent valuation, had been redeemed. Tiuta had argued that the decision in *Preferred Mortgages* would leave them without a remedy and that, consequently, causation should not be decided on the basis of the

Any comments or queries?

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usual "but for" test. De Villiers argued that Tiuta had already sustained the majority of its alleged loss when it made the original loan and that the alleged negligent December 2011 valuation had only caused Tiuta to make a much smaller top-up loan. It also argued that in circumstances where Tiuta had not impugned the original valuation, it was not entitled to disregard the "but for" test in causation in order to recover the entirety of its loss simply because it had chosen to structure the loan as a new loan, rather than an amendment to the original loan.

The High Court agreed with De Villiers and dismissed Tiuta's argument.

The Court of Appeal's Decision

In a majority of two to one, the Court of Appeal agreed with the High Court that the "but for" test applied; however, it considered that the test had not been applied correctly. Moore-Bick LJ stated:

"When a lender is considering making a fresh loan, part of which is to be used to re-pay an existing loan, the purpose to which the new loan will be put is of no interest or relevance... to the person who is asked to value the property on which it is to be secured. The valuer is liable for the adverse consequences flowing from the lender's entering into the transaction insofar as they are attributable to any negligent deficiency in the valuation. In my view, the judge's application of the "but for" test failed to take into account the fact that the transaction was structured in such a way that the second loan was used to pay off the first. That would have been clear enough if it had involved a lender other than the appellant, but the fact that the lender was the same in each case does not in my view affect the analysis. The loan made under the second transaction was the means by which the borrower was enabled to pay off the first and it was the fact that the second loan was used to repay the first in full that released the respondent from any potential liability in respect of the first valuation. The second loan therefore stands apart from the first and the basic comparison for ascertaining the appellant's loss is between the amount of that second loan and the value of the security". (paragraph 17)

Lady Justice King added: "Lord Justice McCombe regards it as inherently unfair if the respondents are "saddled" with the liability referable to the first loan as a consequence of the way the bank chose to structure the second transaction. In my view, the other side of that coin is that it could be said to be inherently unfair that, where both parties are commercial organisations, a negligent valuer could use an attack on the legitimate working practices and systems of the appellant as a means of escaping part of the consequences of his or her negligence. In the same way as it is ... for the appellant to organise its business affairs, so too was it for the respondents to organise theirs, namely to provide a valuation in respect of the property as a whole in accordance with their instructions; having done so they did not seek to place any limitation on their potential exposure ..." (paragraph 38)

The Court of Appeal allowed the appeal and concluded that, assuming De Villiers' December 2011 valuation was negligent, it would be liable for the entirety of the loss flowing from the loan made, based on that valuation.

Comment

This is not a valuer-friendly decision. Valuers are rarely told by their instructing lender what amount of loan the lender is considering making, far less how the lender intends to structure the loan. However, the message from the courts is clear: the onus is on the valuer to limit its liability. Valuers should therefore consider including a clause in its standard terms, limiting its liability in circumstances where its valuation may be relied upon to extinguish an existing loan and make an entirely new loan.

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