David Bowden Law®

ideas are always in credit

Supreme Court rules lender's loss on 2nd loan was not caused by surveyor's valuation

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

Article by David Bowden

Supreme Court rules lender's loss on 2nd loan was not caused by surveyor's valuation

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

Executive speed read summary

Tiuta initially loaned £2.2m to a borrower for a term of 9 months on the basis of a valuation of a potential property development carried out by the De Villiers. It was common ground that this valuation was not negligent. 9 months later the borrower needed to borrow more. De Villiers provided a 2nd valuation and Tiuta agreed the extra borrowing limited to extra borrowing of £289k. The 2nd loan was structured partially as a re-financing arrangement plus further amounts to be drawn down from time to time. When the term of the 2nd facility expired, £2.84m remained outstanding, of which the sale of the property as security was expected to achieve only £2.1m. Tiuta brought proceedings against De Villiers for its loss, alleging that the 2nd valuation was carried out negligently. On a summary judgement application the judge ruled that the 2nd valuation had not caused the lender any loss. This ruling was overturned in a majority ruling of the Court of Appeal. On final appeal to the Supreme Court, the first instance ruling has been restored. Lord Sumption JSC ruled that far from the lender having suffered a loss it was actually better off because if it had not made the 2nd loan it would still have lost the original loans made under the 1st facility and the loans made under the 1st facility would not have been discharged with the money advanced under the 2nd facility. Lord Sumption ruled a court must apply a 'basic comparison' test which 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. Here the valuer could be liable for more than the difference which his negligence has made, simply because he contemplated that on hypothetical facts different from those which actually obtained, he might have been. He also rejected a submission that the lender had received a collateral benefit because the discharge of the 1st loan with the 2nd did not confer a benefit on the lender and the discharge of the 1st loan was required by the terms of the 2nd facility. Lord Sumption JSC left open for another day what would be the position if valuations had been negligent on both facilities.

Tiuta International Limited (in liquidation) v. De Villiers Surveyors Limited
[2017] UKSC 77 *29 November 2017*
Supreme Court of the United Kingdom (Lady Hale PSC, Lords Kerr, Sumption, Lloyd-Jones and Briggs JJSC)

What are the facts?

In April 2011 Tiuta (a lender) loaned £2.2m to a borrower for a term of 9 months on the basis of a valuation of a potential property development carried out by the De Villiers. By December 2011 the borrower was indebted to Tiuta in the amount of £2.5m. There has been no pleaded allegation that the original valuation was carried out in a negligent manner. In December 2011 the borrower sought to extend the loan and borrow an extra £500,000 from Tiuta. De Villiers provided a 2nd valuation and accordingly Tiuta lender gave the borrower a 2nd loan.

This 2nd loan was structured as a re-financing arrangement - it advanced £2.5m to repay the amount outstanding under the original loan, plus further amounts to be drawn down from time to time. When the term of the 2nd facility expired, £2.84m remained outstanding, of which the sale of the property as security was expected to achieve only £2.1m. Tiuta brought proceedings against De Villiers for its loss, alleging that the 2nd valuation was carried out negligently.

What did the judge at first instance rule on a summary judgment application?

On 20 March 2015 Deputy Judge Timothy Fancourt QC sitting in the Chancery Division of the High Court granted summary judgment to De Villiers in a lender's claim for damages arising from defaults under 2 loans as the losses claimed were attributable to an existing indebtedness under the first loan, and applying the '*but for'* test of causation, were causally unrelated to the allegedly negligent valuation on which the 2nd loan had been advanced - **[2015] EWHC 773 (Ch).**

What happened on 1st appeal to the Court of Appeal?

On 1 July 2016 the Court of Appeal (Moore-Bick, McCombe & King LJJ) dismissed the lender's appeal - **[2016] EWCA Civ 661**. Lady Justice King said that in her view:

> '*the second loan is entirely independent from the first loan and it is in that context that the "but for" test should have been applied. Had the judge done so he would have concluded that, had there not been a negligent valuation, the appellant would not have entertained the second transaction and his loss is the total advance of the second loan less the developer's covenant and the true value of the security*'.

What reasons did Lord Justice McCombe give for dissenting?

McCombe LJ was scathing of the way the case for the lender was presented and he lambasted it as being an '*obviously contorted re-statement of the case'* which he said simply did '*not accord with the known facts*', with the lender not being a '*new lender'* and with him reluctant therefore to embark '*upon such a hypothetical reformulation*' which navigated '*away from the obvious sense'* of the lender's factual case. He then went on to conclude:

> *'It seems to me that the appellant's case requires one to ignore an important element of the factual background, namely that the appellant was already in danger of being unable to recover the amount advanced on the first loan at the time when it chose to make the second. I see no reason to ignore that factual reality in the face of the appellant's express concession that on a normal application of the usual rules of causation this appeal must fail'*.

What authorities are relevant to this case?

These 4 authorities (listed chronologically) are referred to in the judgment of the Lord Sumption JSC:

Nykredit Mortgage Bank plc v. Edward Erdman Group Limited **[1997] UKHL 53** (House of Lords – Lords Goff, Jauncey, Slynn, Nicholls and Hoffmann)

A cause of action in cases involving pure economic loss arose when a claimant first sustained relevant and measurable loss. Here this was around the date of the loan given that the borrower's covenant had been worthless, the borrower had defaulted immediately and the amount lent had at all times exceeded the actual value of the property. The lender had sustained the whole loss by December 1990 and simple interest would be awarded from then until judgment.

Preferred Mortgages Ltd v. Bradford & Bingley Estate Agencies Limited **[2002] EWCA Civ 336** (Court of Appeal – Buxton, Latham and Nourse LJJ)

The claimant advanced £49,500 to the borrower in March 1997 secured by a first legal charge against a property which had been valued by the defendant, but which it subsequently discovered was only worth £45,000 at the date of valuation. In November 1997 the claimant advanced a further sum of £7,955.67 against a valuation from different surveyors which valued the property at £70,000. The valuer was liable only for the adverse consequences, flowing from entering into the transaction, which were attributable to the deficiency in the valuation. Here the transaction in respect of which the defendant had provided the valuation had come to an end in November 1997 in circumstances whereby the lender had suffered no loss as its mortgage was fully redeemed. Once the mortgage was fully redeemed that liability had ceased because the transaction had been satisfactorily completed.

Komercni Bank AS v. Stone & Rolls Ltd and Zvonko Stojevic **[2002] EWHC 2263 (Comm)** (High Court, QBD, Commercial Court, Toulson J)

The bank had proved to the required high standard that the invoices and warrant lists presented to it were false to the defendants' knowledge. By presenting false documents, the defendants by their dishonesty caused the bank to act to its detriment in accepting those documents. The question whether an alleged benefit should or should not be taken into account could not be determined by mere application of the 'but for' test. Where the wrongful conduct consisted of causing the victim to enter into a venture or transaction which he would not otherwise have entered into, and the wrongdoer alleged that the victim had received a subsequent benefit which he would not have received but for entering into the venture or transaction, the question to be asked was whether the receipt of the benefit was not merely a result of the venture or transaction but was part of the complex of obligations and benefits that belonged naturally to the venture or transaction.

Swynson Limited v. Lowick Rose LLP (in liquidation) **[2017] UKSC 32** (Supreme Court - Lord Neuberger PSC, Lords Mance, Clarke, Sumption and Hodge JJSC)

The general rule was that loss which had been avoided was not recoverable as damages, although expense incurred in avoiding it might be recoverable as costs of mitigation. To that there was an exception for collateral payments which the law treated as not making good a claimant's loss. It was difficult to identify a single principle underlying every case. Nevertheless, broadly speaking, collateral benefits were those whose receipt had arisen independently of the circumstances given rise to the loss. The question whether such a transaction ought to be ignored ought to depend on its intrinsic nature and character rather than on the identity of the source of the payment. The principle of transferred loss was a limited exception to the general rule that a claimant could recover only loss which he himself had suffered. It applied where the known object of a transaction was to benefit a third party or a class of persons to which a third party belonged, and the anticipated effect of a breach of duty would be to cause loss to that third party. It had previously been recognised only in cases where a third party suffered loss as the intended transferee of the property affected by the breach.

What was the issue which the Supreme Court had to resolve on this appeal?
How the *'but for'* test for causation is to be applied as between an allegedly negligent valuer and lender in a re-financing situation.

What ruling did the Supreme Court give?
Lord Sumption JSC gave the unanimous judgement and he started by observing that it was '*common ground*' that there could be no liability in damages in respect of the advances made under the 1st facility because:

- there is no allegation of negligence in the making of the valuation on which the first facility agreement was based, and
- even if there had been, the advances made under that facility were discharged out of the advances under the second facility, leaving the lender with no recoverable loss.

Sumption JSC said this 2nd point was based on the decisions in *Preferred Mortgages* and *Lowick Rose* which he said had not been '*challenged on this appeal*'.

Lord Sumption cautioned that this case was a summary judgement one based on either '*alleged*' or '*assumed*' facts. Notwithstanding this, he ruled that in his opinion the result of the facts '*is perfectly straightforward and turns on ordinary principles of the law of damages'* with the basic measure of damages being that '*which is required to restore the claimant as nearly as possible to the position that he would have been in if he had not sustained the wrong'*. Lord Sumption stressed that the court was only concerned with this '*basic measure'* which Lord Nicholls in *Nykredit* labeled a '*basic comparison'*.

Developing this, Lord Sumption JSC said that '*if the valuers had not been negligent in reporting the value of the property for the purpose of the second facility, the lenders would not have entered into the second facility, but they would still have entered into the first*'. He stressed that the lenders would be better off in 2 respects:

- they would not have lost the new money lent under the 2nd facility (but would still have lost the original loans made under the 1st facility), and
- the loans made under the 1st facility would not have been discharged with the money advanced under the 2nd facility so that if the valuation prepared for the 1st facility had been negligent the irrecoverable loans made under that facility would in principle have been recoverable as damages.

For this reason he ruled that '*the lender's loss is limited to the new money advanced under the second facility*' noting that this is what the 1st instance judge had ruled.

As to what the majority had ruled in the Court of Appeal, Lord Sumption JSC ruled that he could not agree with them because it did '*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*'. *Nykredit* was based on an **assumption** that '*but for the negligent valuation, he would still have had the money which it induced him to lend*' but he said this was not the case here because '*Tiuta would not still have had it, because it had already lent it under the first facility*'. To hammer this point home he added that '*the premise on which this matter comes before the court is that there was no potential liability in respect of the first facility because that was entered into on the basis of another valuation which is not said to have been negligent*'.

Going on, Lord Sumption JSC ruled that the difficulty with the majority view in the Court of Appeal was whilst '*the reasonable contemplation of the valuer might be relevant in determining what responsibility he assumed or what loss might be regarded as foreseeable, it cannot be relevant to'* the '*basic comparison'* test which '*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*' which he said was a '*purely factual inquiry'*. He ruled that '*the valuer cannot be liable for more than the difference which his negligence has made, simply because he contemplated that on hypothetical facts different from those which actually obtained, he might have been'.*

Lord Sumption JSC rejected an ambitious submission made by the lender in oral argument that '*the court should disregard the fact that the advance under the second facility was applied in discharge of the outstanding indebtedness under the first, because that application of the funds was a collateral benefit to the lender'*. As to this submission, Lord Sumption ruled that the Supreme Court had '*recently had to deal with collateral benefits in a context not far removed from the present one*' and that the '*general rule is that where the claimant has received some benefit attributable to the events which caused his loss, it*

must be taken into account in assessing damages, unless it is collateral'. Lord Sumption summarized the outcome of the complex ruling in *Lowick Rose* as being that '*as a general rule "*collateral benefits*" are those whose receipt arose independently of the circumstances giving rise to the loss*.' He added that these were '*not necessarily the only circumstances in which a benefit arising from a breach of duty will be treated as collateral'* but nevertheless they remain a '*valuable guide to the kind of benefits that may properly be left out of account on this basis*'.

Applying this, Lord Sumption ruled that the '*discharge of the existing indebtedness out of the advance made under the 2nd facility was plainly not a collateral benefit in this sense'* because:

- it did not confer a benefit on the lenders and so no question arises of either taking it into account or leaving it out of account, and
- even if there were such a liability, the benefit arising from the discharge of the indebtedness under the 1st facility was not collateral because it was **required** by the terms of the 2nd facility.

He added that the lender '*never intended to lend more than £289,000 of new money*' so that the '*concept of collateral benefits is concerned with collateral matters*' and that it could not be '*deployed so as to deem the very transaction which gave rise to the loss to be other than it was*'.

In addition Lord Sumption JSC said the court had to have regard to the fact that the refinancing element of the 2nd facility:

- **increased** the lender's exposure and ultimate loss under the second facility by over £2,5million, and
- **reduced** its loss under the 1st facility by the same amount so that its 'net effect on the lender's exposure and ultimate loss' was therefore '*neutra*l' because only the '*new money advanced under the 2nd facility made a difference'*

Lord Sumption rejected an attempt to introduce the ruling in *Komercni Bank* which was a complex fraud case. He brushed this ruling aside saying simply that he doubted '*whether much is to be gained by analogies with other cases decided on their own peculiar facts*' and that *Komercni Bank* did '*not even offer a relevant analogy*'.

Concluding Lord Sumption JSC said he agreed with the 1st instance judge and Lord Justice McCombe that the valuation had not caused the lender any loss.

What issues did the Supreme Court leave open to be decided on another day?
Lord Sumption JSC finished his ruling by saying his reasons were '*sensitive to the facts, including those facts which are disputed and have been assumed for the purposes of this appeal'*. He cautioned that '*different considerations might arise were it to be alleged that the valuers were negligent in relation to both facilities'* noting that the 1st instance judge's order was '*carefully drawn so as to address the point of principle while leaving these matters open*'.

29 November 2017

David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.