

Beware of the back firing (hired) gun

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In the recent decision of *Bank of Ireland v Watts Group PLC*, Mr Justice Coulson considered the duty of care that a quantity surveyor (Watts) owed when providing a report to a bank (BOI) to be used as part of its lending decision. A developer had borrowed £1.4m from BOI to fund a development project, but subsequently entered liquidation and building work ceased. The property was sold, crystallising a loss of approximately £750,000. BOI brought a claim against the defendant surveyors, arguing that Watts' initial report was negligent and, but for that negligence, it would not have made the loan. Watts' defence was that BOI's decision to lend was itself negligent (as BOI lent more than its own lending guidelines permitted) and this was the cause of the loss.

In one of Mr Justice Coulson's last decisions before joining the Court of Appeal, he rejected the negligence claim brought by BOI.

Watts had been appointed to consider detailed costs estimates on the proposed development (the conversion of city centre flats into apartments) prepared by the developer, whose main shareholder was a key customer of BOI.

It was accepted by the parties that Watts owed a duty of care to take reasonable care in carrying out its obligations, either by way of an implied contractual term or pursuant to common law. The extent of that duty was the degree of skill and care of an ordinary monitoring surveyor of reasonable competence and experience. To assist the Court, the parties were permitted to adduce expert evidence.

Mr Justice Coulson was critical of BOI's expert witness and concluded that the expert:

- was not an independent witness nor his evidence reliable. BOI was essentially the expert's principal client and provided the vast majority of his work since the financial crash in 2008, with the expert regularly providing expert opinion
- evidence as to alleged negligence by monitoring surveyors;
- had adopted an unrealistic approach to the claim advanced. Watts was paid only a modest fee of £1,500 for producing the report. This suggested that the Watts was only expected to provide a limited service of checking the borrower's calculations and proposals and it was not reasonable to expect it to carry out its own detailed calculations;
- had adopted a thoroughly unreasonable approach to experts' without prejudice meetings and oral evidence, in failing to make any concessions on his position;
- had attempted to mislead the Court by quoting RICS guidance out of context, contrary to the expert's duty to the Court. He had deliberately omitting surrounding words of the guidance that showed that it was not relevant to the facts of the case; and
- had not applied the correct test i.e. his evidence was what he would have done rather than considering what a reasonably competent monitoring surveyor would have done.

Mr Justice Coulson noted that the expert had incurred fees of £24,000 preparing his first report, and similar costs had been incurred by BOI's solicitors also connected to this report. He rejected the expert's evidence and concluded that the issues raised against Watts were predicated on an unreasonable expectation on the part of BOI.

The Court held that Watts had not fallen below requisite standard a reasonable monitoring surveyor. This was on the basis that:

- Watts had not failed to advise that the proposed development differed from the planning permission as Watts had not been provided with the relevant documents (i.e. floor plans showing changes) prior to issuing its initial report;
- Expert evidence had not identified any part of the timescale for the development that was obviously over-optimistic that Watts had failed to identify;
- Watts' expert evidence suggested that the developer's cash-flow analysis was reasonable;
- Watts could not be expected to carry out the entire calculation himself. Watts' role was to assess the reasonableness of the figures provided by the borrower.
- The Court held that BOI would have provided the funding in any event so the claim failed as a matter of causation:- the cause of the loss being the decision to lend not the was not the report

The Court also held that, even if BOI had been successful in proving that Watts had negligently fallen below the standard expected of a reasonably competent monitoring surveyor, the claim would have failed on causation and the irrecoverability

of the loss. Even if the loss had been recoverable, the Court held that damages would have been reduced by 75% on grounds of contributory negligence.

The true cause of BOI's loss was its flawed decision to lend. However, based on *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 (SAAMCO) and *Gabriel v Little* [2017] UKSC 21, [2017] 2 W.L.R. 1029, Watts had been appointed to provide information on costs estimates of the proposed development (which formed just part of the material that BOI relied upon). As such, Watts would only have liability in law for the consequences of the cost estimated being wrong (not for the financial consequences of BOI making the loan).

To add insult to injury, at the subsequent costs hearing, it was discovered that BOI had rejected settlement offers (including two made under Part 36 of the CPR). Mr Justice Coulson refused to award indemnity costs against BOI as the relevant offers did not give rise to an automatic entitlement. He ordered however that: (i) costs incurred as a result of BOI's expert's conduct be assessed on an indemnity basis and (ii) BOI make an interim payment on account of costs at 85% of Watts' approved costs budget.

Had BOI had obtained early expert evidence from an expert willing to consider whether they would have reached the same view had they been appointed by Watt, the claim may not have been pursued. This also raises a possible weakness in instructing a "professional expert" (i.e. someone who has not been in practice for a number of years) as they may not be fully up to date with current practice.

The most recent update on to the practice directions to the CPR has introduced a change in the rules as to concurrent evidence from experts which give trial judges more about the way in which expert evidence is heard. This could result in the courts exercising their powers to order parties to use single joint experts on more multi-track cases, particularly when there should not be a substantial range of expert opinion, such as quantum or the scope of a duty of care.

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