TIUTA – Hyperbole Or Armageddon?

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Tiuta International v De Villiers Surveyors [2016] EWCA Civ 661

Facts

The claim involved two valuations of a residential development. In February 2011 De Villiers valued the security at £2.3m in its then condition, rising to £4.465m on completion. Over the coming months Tiuta lent £2.56m to the developer. By late 2011 the developer needed to release further finance. In December 2011, De Villiers provided updated valuations at £3.5m current value, or £4.9m once completed, as a result of which Tiuta increased its funding to £2.84m. The developer defaulted and receivers were appointed, but the price achieved on forced sale was inadequate to extinguish the debt. Tiuta accused the surveyors of negligently overvaluing the security in December 2011, albeit no allegations were made about the February 2011 report.

Tiuta looked to recover its overall transaction loss, put at £890,000 (£2.84m plus funding and realisation costs, less the sale proceeds). In response, De Villiers argued that as Tiuta had already lent £2.56m before the criticised December 2011 valuation, its liability (if any) should not exceed the additional funding made available in reliance on that valuation, i.e. £280,000, and invited the court to resolve the issue summarily.

First Instance

In March 2015 the surveyors were successful, on the basis that losses attributable to the pre-existing indebtedness had not been caused by the December 2011 valuation. In essence, the Judge found that the "but for" test excluded all losses that would have been incurred even if the December 2011 valuation had resulted in no further lending.

Court of Appeal

Tiuta appealed, asserting that the lending which followed the December 2011 valuation was an entirely new facility, creating a new charge with its own distinct terms and associated costs. It was argued that the application of the "but for" test created an injustice, preventing Tiuta from bringing any claim it may have had arising from the first valuation (the original facility having been redeemed, with no loss sustained in reliance upon it), and unfairly restricting the full extent of the valuer's liability.

On 1 July 2016 the appeal was upheld. In the lead Judgment, Moore-Bick LJ said that the starting point required determination of the precise nature of the transaction and the part the surveyor played in it. Tiuta maintained that the transaction was the granting of a new facility that resulted in £2.84m being drawn down prior to default. Further, accepting Tiuta's claim that the original facility had been completely redeemed, the Court accepted that it was bound by its previous authority (*Preferred Mortgages v Bradford & Bingley Estate Agencies (2002)* see **Footnote** below).

As a consequence, where Tiuta entered into an entirely new facility (rather than merely extending an existing one) in reliance on De Villiers' December 2011 valuation, it should be able to pursue a claim for the totality of the losses that flowed from that valuation. The Judge felt that it was completely irrelevant that part of the new facility had been used to discharge an existing debt owed to Tiuta.

McCombe LJ disagreed in what was a majority decision. He felt that the usual "but for" test should prevail and should exclude all losses that would have arisen in any event. He went as far as to say that the contrary view risked creating an inherent unfairness, in allowing the lender to saddle the surveyor with liability for "*advances made long before the allegedly negligent valuation was provided and in respect of which it already stood to make a loss*".

Analysis

It is not altogether surprising that the majority of the Court felt that the lender should be able to sue for the totality of losses attributable to an entirely new facility made in reliance on valuation advice. This decision appears to do no more than adopt the earlier, binding authority of *Preferred Mortgages*, to the facts of the case and then apply existing rules of causation.

What of the 'inherent unfairness' which concerned McCombe LJ? Are the floodgates about to open as a number of commentators, from the lending side of the fence it must be said, are seeking to suggest?

- In our view there is unlikely to be any unfairness; after all a surveyor who values property for secured lending purposes will know his lender client is likely to lend against the security and that, if the valuation is wrong, losses are likely to be sustained. It is difficult to see why a surveyor should not be liable for the full extent of the foreseeable losses that flow directly from reliance on negligent valuation advice.

- It is also the case that this decision will apply only to those cases where pre-existing indebtedness is completely extinguished, even though the underlying purpose is little more than an extension of the level of that indebtedness. If the original lending and charge remain intact, the Tiuta decision will simply have no relevance.

It is fair to say that it impossible to know how every lender has treated, or will in the future treat, further advance and/or facility extension requests. However, in our experience, most financial institutions secure borrowings by 'all-monies' charges, such that further advances and facility extensions are dealt with as exactly that and not as completely new lending for the cumulative level of ongoing indebtedness. Moreover, removing charges registered at HMLR only to simultaneously replace them with new ones is not only cumbersome but can also create unintended priority consequences if timings go awry.

So the practice of Tiuta in this case is more likely to be the exception rather than the rule. For that reason, we do not expect the market will experience any surge in claims at all as a result of this decision.

Nor is there any obvious means by which valuation surveyors might legitimately immunise themselves from similar circumstances arising in the future; beyond simply getting the valuation right. Looking to somehow exclude liability for pre-existing indebtedness is unlikely to fly (commercially or legally), but it would do no harm ascertaining their client's precise intentions, if only to properly understand the potential risks and, thus, ensure that the reward is appropriately matched.

And Finally

For the purposes of this interlocutory spat, it was assumed not only that the December 2011 valuation was negligent but that Tiuta had redeemed its existing loan, extinguished its existing charge, opened a new loan account and created a new charge. If, when this matter reaches a full trial, Tiuta cannot prove the latter issue it will, of course, be back to square one.

Footnote

In the 2002 Court of Appeal case of *Preferred Mortgages v Bradford & Bingley Estate Agencies*, a professional negligence claim against a firm of surveyors accused of overvaluation was dismissed because the lender's loan and supporting legal charge, which had been made in reliance on the valuation, had subsequently been fully redeemed. Even though the redemption had been achieved using Preferred's own money; it had chosen to treat a modest further advance as a full remortgage; that made no difference. Put simply, there could be no continuing liability as the 'transaction' entered into in reliance on the valuation had not created any loss.

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