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The Court of Appeal redefines the “but-for” causation test for negligence: Losses caused to a lender by a surveyor’s negligent property valuation on a refinancing were wholly recoverable.

In a landmark judgment with wide implications for the lending, refinancing and valuation industries, in *Tiuta International Ltd (In liquidation) v De Villiers Surveyors Ltd* [2016] EWCA Civ 661, the Court of Appeal, by a two to one majority, overturned a first instance decision relating to professional negligence based on what had been considered to be a well-established test of causation. It held that the “but-for” test of causation, correctly applied, should take into account that a refinancing transaction was factually and legally independent of the first advance by the same lender. The lender’s loss was therefore the total amount of the second advance (less the value (if any) of the borrower’s covenant and the true value of the property). The fact that the purpose of the refinancing was to discharge the first loan was irrelevant.

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The Facts

In February 2011, De Villiers were instructed by Tiuta to value a partially completed residential development in Sunningdale. At that date, the property was valued by De Villiers at £3.25 million in its current state and £4.9 million on completion. On the basis of that valuation, Tiuta offered the developer a loan facility of £2.56 million on the security of a first legal charge. In November 2011, the developer approached Tiuta requesting an increase in the facility to £3.088 million on the same security. Tiuta instructed De Villiers to provide a fresh report, and they carried out further valuations of the property in November and December 2011. The December valuation was at £3.5 million in the property’s then current state and £4.9 million on completion.

Tiuta agreed to provide the additional funds requested by the borrower not as a variation of the original agreement but by way of refinancing. In January 2012, a second facility agreement and registered charge were entered into and Tiuta opened a new account with the borrower. The £2.5 million due under the first facility was repaid out of the second advance and the original registered charge released. The borrower drew down the balance of the second advance in further tranches.

On the expiry of the second facility, £2.84 million remained outstanding. The loan was not repaid and Tiuta appointed receivers. The property was expected to realise £2.1 million. Tiuta brought a claim against De Villiers alleging that the December valuation had negligently overstated the value of the property and, in reliance on that valuation, it had granted the second loan facility causing a loss of £890,500. The second advance had been used partly to discharge the February advance so all the monies due to them were advanced in reliance on the second valuation. It was not alleged that the February valuation was negligent. De Villiers applied for summary judgment on the basis that the December valuation had not caused Tiuta’s loss. It said that the majority of Tiuta’s loss related to the original loan and had already been sustained

when it made the original loan, not based on a negligent valuation. De Villiers further argued that, whatever the structure of the transaction, the second advance involved nothing more than an agreement to increase the original amount. This could have been achieved without amending the original security, so that if Tiuta organised its business in a way which involved the repayment in full of the original loan, it could not complain of the consequences.

Legal Analysis

In any negligence claim it is essential to establish on a balance of probabilities that the defendant's negligence caused the claimant's loss. To achieve this, a comparison has to be made between what would have been the claimant's position had the defendant fulfilled his duty of care and the claimant's actual position. This is known as the "but-for" test. (*Nykredit Group Ltd Mortgage Bank plc v Edward Erdman* [1997] UKHL 53).

In the first instance hearing in the High Court, the judge decided in favour of De Villiers and ruled, following *Nykredit*, that the loss attributable to the first advance was not caused by the December negligent valuation and that Tiuta's loss should be limited to £272,700, being the amount that the second facility "topped-up" the original loan.

The majority decision in the Court of Appeal held that in order to determine what loss, if any, had been caused by the overvaluation, it was necessary to identify correctly the nature of the transaction and the part that the valuers played in it. Moore-Bick LJ said that the purpose to which the new loan was to be put is of no interest or relevance in fact, or law, to the valuer asked to value the property on which it is to be secured. In his view, the High Court judgment 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, and the fact that the lender was the same in each case did not affect the analysis. The second loan stands apart from the first and the basic comparison for ascertaining Tiuta's loss (the "but-for") is between the amount of the second loan and the value of the security.

King LJ supported this argument and said that, had De Villiers wished to limit its liability, it could have done so in the terms and conditions when accepting instructions to value the development site. She also said that the creation of an entirely new loan, standing apart from the first, also had collateral consequences, such that Tiuta lost the right to claim against the valuers in relation to the first loan and released the valuers from their potential liability in respect of the first valuation. She said 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.

The Court of Appeal also said that, because the matter had come before them by way of summary judgment, it had been necessary to proceed on the assumptions that the December valuation was negligent and that the effect of the second facility was to discharge the first; and that it would have been better if the appeal could have been determined at trial on the findings of fact rather than a hypothetical basis. It is assumed that the matter will now proceed to trial where the question of whether the second valuation was in fact negligent or not will be determined.

Commercial Implications

This is a win for lenders on a tricky and contentious area of law and the key commercial consequences are that:

- the case sets a new precedent for the principle of causation. It refines the way in which a court will apply the “but for” test when determining the loss that flows from negligence. Lenders can be certain that a negligent valuer may be liable for the entire loss arising out of a refinance, not restricted to the amount by which the refinance exceeds the original loan;
- valuers may seek to amend their terms and conditions to limit their liability – lenders should check their valuer’s terms and conditions carefully to ensure that a valuer is liable for the total value of the relevant facility; and
- consequently, professional indemnity insurers may raise policy premiums for surveyors.