Michaelmas Term
[2017] UKSC 77
On appeal from: [2016] EWCA Civ 661

JUDGMENT

Tiuta International Limited (in liquidation) (Respondent) *v* De Villiers Surveyors Limited (Appellant)

before

Lady Hale, President
Lord Kerr
Lord Sumption
Lord Lloyd-Jones
Lord Briggs

JUDGMENT GIVEN ON

29 November 2017

Heard on 6 November 2017

Appellant
Alexander Hickey QC
Robert Scrivener

(Instructed by Reed Smith LLP)

Respondent
Joanna Smith QC
Edwin Peel
Niranjan Venkatesan
(Instructed by Rosling King LLP)

LORD SUMPTION: (with whom Lady Hale, Lord Kerr, Lord Lloyd-Jones and Lord Briggs agree)

1. The claimant, Tiuta International, was a specialist lender of short-term business finance, until it went into administration on 5 July 2012. These proceedings were brought by Tiuta in support of a claim against the defendant surveyors for negligently valuing a partially completed residential development over which it proposed to take a charge to secure a loan. The present appeal raises a question of principle concerning the quantum of damages. Since it arises out of an application for summary judgment, it has to be determined on facts some of which are admitted but others of which must be assumed for the purposes of the appeal. They are as follows.

2. On 4 April 2011, Tiuta entered into a loan facility agreement with Mr Richard Wawman in the sum of £2,475,000 for a term of nine months from initial drawdown, in connection with a development in Sunningdale by a company called Drummond House Construction and Developments Ltd, with which Mr Wawman was associated. Advances under the facility were to be secured by a legal charge over the development. The facility agreement was made on the basis of a valuation of the development by De Villiers. They had reported that the development was worth £2,300,000 in its current state and that if completed in accordance with all current consents and to a standard commensurate with its location it would be worth about £4,500,000. The initial advance was drawn down on 8 April 2011 as soon as the charge had been executed. Other advances under the facility followed.

3. On 19 December 2011, shortly before the facility was due to expire, Tiuta entered into a second facility agreement with Mr Wawman in the sum of £3,088,252 for a term of six months in connection with the same development. Of this sum, £2,799,252 was for the refinancing of the indebtedness under the first facility and £289,000 was new money advanced for the completion of the development. A fresh charge was taken over the development to secure sums due under the second facility agreement. On 19 January 2012, Tiuta advanced £2,560,268.45, which was paid into Mr Wawman's existing loan account, thereby discharging the whole of the outstanding indebtedness under the first facility. Between that date and 8 June 2012 further sums were drawn down under the second facility amounting to £281,590 and presumably spent on the development. The advances under the second facility were made on the basis of a further valuation of the development by De Villiers. There were three iterations of the further valuation. On 8 November 2011, De Villiers had valued the development in its current state at £3,250,000 and upon completion at £4,900,000. The current state valuation was subsequently revised on 22 December 2011 to £3,400,000 and on 23 December 2011 to £3,500,000. The second facility

agreement expired on 19 July 2012, a few weeks after Tiuta went into administration. None of the indebtedness outstanding under it has been repaid.

4. It is common ground that there can be no liability in damages in respect of the advances made under the first facility. This is because (i) there is no allegation of negligence in the making of the valuation on which the first facility agreement was based; and (ii) 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. This last point is based on the decisions of the Court of Appeal in *Preferred Mortgages Ltd v Bradford & Bingley Estate Agencies Ltd* [2002] EWCA Civ 336 and of this court in *Swynson Ltd v Lowick Rose LLP (in liquidation)* [2017] 2 WLR 1161. It is not challenged on this appeal.

5. The present claim is concerned only with the liabilities arising out of the valuation which De Villiers made for the purposes of the second facility. It is alleged, and for present purposes must be assumed, that the valuations given for the purposes of the second facility were negligent, and that but for that negligence the advances under the second facility would not have been made. In those circumstances, the valuers contend that the most that they can be liable for by way of damages is the new money advanced under the second facility. They cannot, they say, be liable for that part of the loss which arises from the advance made under the second facility and applied in discharge of the indebtedness under the first. If (as has to be assumed) Tiuta would not have made the advances under the second facility but for the valuers' negligence, the advances under the first facility would have remained outstanding and would have remained unpaid. That part of their loss would therefore have been suffered in any event, irrespective of the care, or lack of it, which went into the valuations prepared for the purposes of the second facility. On that ground, the valuers applied for a summary order dismissing that part of the claim which arose out of the refinancing element of the advances under the second facility.

6. In my opinion the result of the facts as I have set them out is perfectly straightforward and turns on ordinary principles of the law of damages. The basic measure of damages is 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. This principle is qualified by a number of others which serve to limit the recoverable losses to those which bear a sufficiently close causal relationship to the wrong, could not have been avoided by reasonable steps in mitigation, were reasonably foreseeable by the wrongdoer and are within the scope of the latter's duty. In the present case, we are concerned only with the basic measure. In a case of negligent valuation where but for the negligence the lender would not have lent, this involves what Lord Nicholls in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627, 1631 called the "basic comparison":

> "It is axiomatic that in assessing loss caused by the defendant's negligence the basic measure is the comparison between (a) what the plaintiff's position would have been if the defendant had fulfilled his duty of care and (b) the plaintiff's actual position. Frequently, but not always, the plaintiff would not have entered into the relevant transaction had the defendant fulfilled his duty of care and advised the plaintiff, for instance, of the true value of the property. When this is so, a professional negligence claim calls for a comparison between the plaintiff's position had he not entered into the transaction in question and his position under the transaction. That is the basic comparison. Thus, typically in the case of a negligent valuation of an intended loan security, the basic comparison called for is between (a) the amount of money lent by the plaintiff, which he would still have had in the absence of the loan transaction, plus interest at a proper rate, and (b) the value of the rights acquired, namely the borrower's covenant and the true value of the overvalued property."

7. 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. On that hypothesis, therefore, the lenders would have been better off in two respects. First, they would not have lost the new money lent under the second facility, but would still have lost the original loans made under the first. Secondly, the loans made under the first facility would not have been discharged with the money advanced under the second facility, so that if the valuation prepared for the first facility had been negligent, the irrecoverable loans made under that facility would in principle have been recoverable as damages. There being no allegation of negligence in relation to the first facility, this last point does not arise. Accordingly, the lender's loss is limited to the new money advanced under the second facility.

8. This is what Timothy Fancourt QC, sitting as a Deputy High Court Judge, held. But the Court of Appeal disagreed. By a majority (Moore-Bick and King LJJ, McCombe LJ dissenting), they allowed the appeal. The leading judgment was delivered by Moore-Bick LJ. He criticised the deputy judge's reasoning on the ground that it failed to take into account the fact that the second facility was structured as a refinancing so that the advance was used to pay off the pre-existing debt, thereby releasing the valuers from "any potential liability in respect of the first valuation." From this, he concluded that the advance under the second facility "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." He explained this as follows:

> "The appellant entered into the second transaction in reliance on the respondent's valuation. If the valuation had not been negligent, the appellant would not have entered into the second transaction, and would have suffered no loss on that transaction as a result. It would have been left with the first loan and the security for it, together with any claim it might have had against the valuer. However, that is of no relevance to the respondent in its capacity as valuer for the purposes of the second loan. The loss which the appellant sustained as a result of entering into the second transaction was the advance of the second loan, less the developer's covenant and the true value of the security. If the value of the property was negligently overstated, the respondent will be liable to the extent that the appellant's loss was caused by its over-valuation."

Moore-Bick LJ went on to say that his conclusion would have been the same even if a different valuer had prepared the original valuation on which the first facility was based. This was because the valuer

> "valued the property itself in the expectation that the appellant would advance funds up to its full reported value in reliance on its valuation. There is nothing unfair in holding the respondent liable in accordance with its own valuation for the purposes of the second transaction."

9. I regret that I cannot agree. It does 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. Lord Nicholls' statement in *Nykredit* assumes, as he points out in the passage that I have quoted, that but for the negligent valuation, he would still have had the money which it induced him to lend. In the present case, Tiuta would not still have had it, because it had already lent it under the first facility. Moore-Bick LJ appears to have thought that this was irrelevant because the effect was to release the valuer from any potential liability in respect of the first facility. I would agree that if the valuers had incurred a liability in respect of the first facility, the lenders' loss in relation to the second facility might at least arguably include the loss attributable to the extinction of that liability which resulted from the refinancing of the existing indebtedness. But 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.

10. Moore-Bick LJ's view appears to have been that none of this mattered because the valuer would have contemplated that he might be liable for the full amount of the advances under the second facility, so that it was a windfall for him that part of the advances was used to repay a pre-existing debt rather than to fund the development. A similar argument was advanced before us. The difficulty about it is that while 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 Lord Nicholls' "basic comparison". That 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. This is a purely factual inquiry. There are, as I have pointed out, legal filters which may result in the valuer being liable for less than the difference. For example, part of it may be too remote or is not within the scope of the relevant duty. But 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. There are many cases in which the internal arrangements of a claimant mean that his financial loss is smaller than it might have been. That may be fortunate for the defendant, but it cannot make him liable for more than the claimant's actual financial loss.

11. Ms Joanna Smith QC, who appeared for the lenders, was realistic enough to perceive these difficulties, and adopted a rather different approach. She submitted 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, which they were not obliged to take into account in computing their loss. The argument is that if the discharge of the outstanding indebtedness under the first facility is disregarded, damages can be assessed as if the whole of the loan under the second facility was an additional advance. Since that additional advance would not have been made or lost but for the negligent valuations of November and December 2011 the whole of it is recoverable as damages.

12. I am not persuaded that this was what the Court of Appeal had in mind, but her point is none the worse for that. The real objection to it is more fundamental. This court has recently had to deal with collateral benefits in a context not far removed from the present one. 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. In *Swynson Ltd v Lowick Rose LLP (in liquidation)* [2017] 2 WLR 1161, para 11, it was held that as a general rule "collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss." Leaving aside purely benevolent benefits, the paradigm cases are benefits under distinct agreements for which the claimant has given consideration independent of the relevant legal relationship with the defendant, for example insurance receipts or disability benefits under contributory

pension schemes. These are not necessarily the only circumstances in which a benefit arising from a breach of duty will be treated as collateral, for there may be analogous cases which do not exactly fit into the traditional categories. But they are a valuable guide to the kind of benefits that may properly be left out of account on this basis.

13. The discharge of the existing indebtedness out of the advance made under the second facility was plainly not a collateral benefit in this sense. In the first place, 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. Lord Nicholls' "basic comparison" requires one to look at the whole of the transaction which was caused by the negligent valuation. In this case, that means that one must have regard to the fact that the refinancing element of the second facility both (i) increased the lender's exposure and ultimate loss under the second facility by £2,560,268.45, and (ii) reduced its loss under the first facility by the same amount. Its net effect on the lender's exposure and ultimate loss was therefore neutral. Only the new money advanced under the second facility made a difference. It is true that the refinancing element might not have been neutral if the discharge of the indebtedness under the first facility had also extinguished a liability of the valuers under the first facility. But on the assumptions that we must make on this appeal there was no such liability. Secondly, even on the footing that there was such a liability, the benefit arising from the discharge of the indebtedness under the first facility was not collateral because it was required by the terms of the second facility. The lenders did not intend to advance the whole of the second facility in addition to the whole of the first, something which would have involved lending a total amount substantially in excess of any of the successive valuations. They never intended to lend more than £289,000 of new money. The concept of collateral benefits is concerned with collateral matters. It cannot be deployed so as to deem the very transaction which gave rise to the loss to be other than it was.

14. This is why the decision of Toulson J in *Komercni Banka AS v Stone and Rolls Ltd* [2003] 1 Lloyd's Rep 383, which was pressed on us as an analogy, was ultimately unhelpful. Toulson J was concerned with a complex series of frauds against a bank under which part of the proceeds of one fraud found its way back to the bank via a third party to serve as pump priming for distinct, further frauds. He declined to reduce the damages by the amount of these circular payments, because they were not an intrinsic part of the relevant venture or transaction but were simply "the result of [the fraudster's] independent choice how to use the opportunity created by his fraud" (para 171). I doubt whether much is to be gained by analogies with other cases decided on their own peculiar facts, but *Komercni Banka* does not even offer a relevant analogy.

15. For these reasons, which correspond to those given by the Deputy Judge and by McCombe LJ in his dissenting judgment, I would allow the appeal. The reasons

are of course sensitive to the facts, including those facts which are disputed and have been assumed for the purposes of this appeal. In particular, different considerations might arise were it to be alleged that the valuers were negligent in relation to both facilities. The Deputy Judge's order was carefully drawn so as to address the point of principle while leaving these matters open. Subject to any submissions that may be made about the exact form of relief, I would restore his order.