29 November 2017

PRESS SUMMARY

Tiuta International Limited (in liquidation) (Respondent) v De Villiers Surveyors Limited (Appellant) [2017] UKSC 77
On appeal from [2016] EWCA Civ 661

JUSTICES: Lady Hale (President), Lord Kerr, Lord Sumption, Lord Lloyd-Jones, Lord Briggs

BACKGROUND TO THE APPEAL

The appellant company, De Villiers, is a surveyor. The respondent, Tiuta International, was a lender of short-term business finance until it went into administration in July 2012. This appeal arises out of De Villiers' application for summary judgment on part of a claim which Tiuta brought against De Villiers. As a result, the following facts have been either admitted or assumed to be correct.

In April 2011 Tiuta entered into a nine-month loan facility agreement ("the First Facility") with a Mr Wawman in connection with a residential property development. Advances under the First Facility were to be secured by a charge over the development. The First Facility was agreed on the basis of De Villiers' valuation of the development. Tiuta advanced various sums under the First Facility.

In December 2011, shortly before the expiry of the First Facility, Tiuta entered into a second loan facility agreement ("the Second Facility") with Mr Wawman in the sum of £3,088,252 in connection with the same development. Of that sum, £2,799,252 was to be used to discharge the outstanding indebtedness under the First Facility; the remaining £289,000 was "new money", advanced to fund the development. The sums advanced under the Second Facility were secured by a further charge over the development.

In January 2012 Tiuta advanced £2,799,252 to Mr Wawman's existing loan account, thereby discharging his outstanding indebtedness under the First Facility in full. Tiuta then advanced further sums as new money for the development. The advances under the Second Facility were made on the basis of De Villiers' further valuation of the development in November 2012, which it revised twice in December 2012. None of the sums advanced under the Second Facility have been repaid.

It is assumed for the purposes of the appeal that the valuations given for the purposes of the Second Facility were negligent, as Tiuta alleges. It is also assumed that, but for that negligence, Tiuta would not have advanced the sums under the Second Facility. Tiuta does not allege negligence in respect of the First Valuation, under which all the advanced sums were repaid in full.

De Villiers' application for summary judgment argued that Tiuta would have suffered some loss in any event because, but for the allegedly negligent undervaluation in respect of the Second Facility, no sums would have been advanced under the Second Facility. As a result, sums owed to Tiuta under the First Facility would have remained unpaid. The Deputy High Court Judge accepted that argument and held that Tiuta's loss was limited to the new money advanced under the Second Facility. The Court of Appeal disagreed and allowed Tiuta's appeal.

JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Sumption gives the judgment with which Lady Hale, Lord Kerr, Lord Lloyd-Jones and Lord Briggs agree.

REASONS FOR THE JUDGMENT

The basic measure of damages is the sum which restores the claimant as closely as possible to the position that he would have been in if he had not been wronged. That principle is qualified by various rules which limit recoverable losses. Where a claimant lends money, and but for a negligent valuation would not have done so, the basic measure of damages is the difference between: (a) the position the claimant would have been in, had the defendant not been negligent and (b) the claimant's actual position. This is the "basic comparison" discussed by Lord Nicholls in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627. The basic comparison is typically between: (a) the amount of money lent by the claimant, plus interest on that money and (b) the value of the rights acquired under the loan agreement plus the true value of the overvalued property **[6]**.

It is assumed in this appeal that Tiuta would not have entered into the Second Facility, had De Villiers not negligently undervalued the security property. Tiuta would have still entered into the First Facility, but would not have lost the new money advanced under the Second Facility. Whereas the Deputy High Court Judge held that Tiuta's losses were limited to that new money, the majority of the Court of Appeal held that the judge failed to take into account that the Second Facility was structured so as to pay off the indebtedness under the First Facility. The majority consequently held that the basic measure of Tiuta's loss was: (a) the sums advanced under the Second Facility, less (b) the value of Tiuta's rights under the Second Facility plus the true value of the security **[7-8]**.

The Supreme Court disagrees with that approach. The fact that the advance under the Second Facility was used to pay off indebtedness under the First Facility does not require the Court to ignore the fact that Tiuta would have lost the sums which had been outstanding under the First Facility in any event. The basic comparison envisaged in *Nykredit* assumes that, but for the negligent valuation, the claimant would still have had the money which the negligent valuation caused him to lend. In this case Tiuta would not have had that money, because it had already lent it under the First Facility **[9]**.

It is irrelevant, for the purposes of the basic comparison discussed in *Nykredit*, that the valuer might have contemplated being liable for the full amount of the advances under the Second Facility. The foreseeability of loss is not relevant to the basic comparison. Various legal filters may result in the valuer being liable for less than the difference calculated under the basic comparison. However, the valuer cannot be liable for more than the difference which his negligence has made simply because he contemplated that he might be liable in circumstances other than those which actually came about **[10]**.

Tiuta argued that the use of the advance under the Second Facility to discharge the indebtedness under the First Facility was a collateral benefit to Tiuta, which need not be taken into account when calculating Tiuta's loss **[11]**. The Supreme Court rejects that argument. Generally, where a claimant has received some benefit attributable to the events which caused his loss, it must be taken into account in assessing damages unless the benefit is collateral. Collateral benefits are generally "those whose receipt arose independently of the circumstances giving rise to the loss" **[12]**. The discharge of the existing indebtedness was not a collateral benefit. First, the refinancing part of the Second Facility was neutral in its effect, rather than beneficial: it both increased Titua's exposure and reduced its loss under the First Facility by the same amount. Secondly, the terms of the Second Facility required the indebtedness under the First Facility to be discharged, so that outcome was not collateral to the Second Facility **[13]**.

The appeal is therefore allowed. These reasons are sensitive to these facts, including those which have been assumed for the purposes of the appeal. Subject to any submissions that may be made about the exact form of relief, the order of the Deputy High Court Judge will be restored **[15]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html