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Professional Negligence, 'But For' Causation and Collateral Benefit:

The author considers Tiuta International Ltd v De Villiers Surveyors Ltd [2017] 1 WLR 4627

Andrew Bowen QC
(Scotland) **FCIARB**

Andrew Bowen QC is recommended in the **Legal 500 2017** as a Tier 1 Leading Silk for commercial litigation, described as ''*A concise communicator, who unpicks complex scenarios.*"

Practice Areas:

Professional Regulation and Discipline
Commercial/Company
Property
Professional Negligence
Public Law
Commercial Arbitration (Domestic and International)

Key Contacts:

Teresa Pugh
Practice Director
Tel: 0113 203 5504

Janet Jackson
Senior Practice Manager
(Civil and Commercial)
Tel 0113 203 5503

New Park Court

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Introduction:

In *Swynson Ltd v Lowick Rose llp* [2017] 2 WLR 1161 (and see BLB issue 50), the Supreme Court confirmed that where a claimant had received some benefit attributable to the events which had caused its loss, that benefit had to be taken into account in assessing damages unless it was collateral (ie arose independently of the events causing the loss); in that case the controlling shareholder had paid off a loan made by his company which in turn prevented the company from suing for loss in relation to the loan which arose from the defendant's negligence; the loan repayment was not as a matter of law a collateral benefit. In *Tiuta* the Supreme Court revisited the complex issue of collateral benefit at its interface with 'but for' causation where a loan had been made on the basis of a negligent valuation but the loan had been used to pay off a pre-existing liability.

The Facts:

The defendant DeV, a valuer, had provided valuation services to the claimant T, a mortgage lender, in relation to a residential development in Surrey. In February 2011 DeV advised that the development's market value in its then state was £2.3m and its gross development value on completion was £4.465m: on the basis of that advice T had provided to the developer a facility of up to £2.56m, secured on the development, which had been drawn down by November 2011 when the developer sought an increase in the facility. The development was again valued by DeV; this time it advised that market value was £3.52m and GDV value was £4.9m and, on the basis of that advice, T provided a new facility to advance up to £3m. Rather than simply increasing the existing facility, the new facility was used to redeem the existing indebtedness of £2.56m and then further amounts were drawn down; the first charge was released and a new charge executed. When the new facility expired in January 2012 £2.84m was outstanding which was not repaid; the sale of the development realised £2.1m and T raised an action to recover the £800k loss by claiming that the November 2011 valuations were negligent because the true values were £2.24m for market value and £3.7m for GDV and that, but for the advice, T would not have provided the new facility. T did not allege that the February 2011 advice was negligent. The proceeds of the sale of the development would cover the further amounts drawn down after redemption of the existing indebtedness.

DeV applied for summary judgment on the basis of its defence that any loss attributed to the existing indebtedness was not caused by the second valuation because, had DeV valued non-negligently and the new facility had not been offered, T was still exposed to the existing indebtedness and any negligence in relation to the November 2011 valuation did not cause that loss.

The ‘But For’ Test of Factual Causation:

In *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No.2)* [1997] 1 WLR 1627 at 1631, Lord Nicholls said, in relation to the lender’s relevant measure of loss, “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 of the true value of the property. Where 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…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’.

In *Preferred Mortgages Ltd v Bradford & Bingley Estate Agencies Ltd* [2002] PNLR 35, the claimant lent to a borrower on the basis of the defendant’s negligent overvaluation; the claimant lent a further sum by way of refinancing of the original loan on the basis of a second negligent overvaluation by a different valuer. The Court of Appeal rejected the claimant’s argument that the refinancing was simply an internal book-keeping exercise due to the inability of its computer system to provide second mortgages or amend existing mortgages and dismissed the claimant’s action to recover loss caused by the first overvaluation on the ground that the refinancing transaction had discharged the first loan in full so no loss flowed from that valuation. At [29] Latham LJ said that although there might have been an ‘inchoate liability as a result of the defendant’s negligent over-valuation, that liability ceased once the mortgage was fully redeemed.

First Instance and Court of Appeal Decisions:

T’s position before the first instance judge ([2015] P.N.L.R. 23) was that the existing indebtedness had been redeemed so that the monies advanced under the new facility was a completely new loan. Although no claim had been brought in relation to the February 2011 valuation because the existing indebtedness had been fully redeemed and (following *Preferred Mortgages*) there was no cause of action, the lost claim in relation to the earlier valuation might be relevant in determining the loss caused by the later valuation. T also argued that the decision in *Preferred Mortgages* meant that the ‘but for’ test of causation should not be applied because the new loan was a ‘fresh start’ and that to apply that test would leave it without a remedy. DeV’s position remained that the November 2011 valuation did not cause the loss attributable to the existing indebtedness which was therefore irrecoverable.

The judge accepted DeV’s argument; he also considered that a claim in relation to the February 2011 valuation did not ‘disappear into a black hole’ since in a no-negligence situation

T would still have had the benefit of that claim in diminution of its losses attributable to the existing indebtedness [22].

In the Court of Appeal ([2016] P.N.L.R. 34) both Moore-Bick and King LJJ allowed the appeal on the ground that the second loan was entirely independent from the first loan so that, had the judge applied the 'but for' test, he would have concluded that, had there not been a negligent valuation, T would not have made the new facility so that its loss was the total advance less the developer's covenant and the true value of the security [40]. McCombe LJ dissented, holding that the 'but for' test was fatal to T's case. T had argued that the claim might be pleaded differently, namely that the new facility should be treated as a new loan otherwise it would suffer prejudice by the loss of a right of action in respect of the existing indebtedness which it would have retained if it had not made the new facility. He noted that the reformulated case appeared to be based, not on causation, but on a warranty that the property was worth the value which DeV had placed on it and ignored an important element of the factual background that T was already in danger of being unable to recover the existing indebtedness when it made the new facility [32].

<u>Supreme Court:</u>

Lord Sumption JSC, giving the Court's judgment allowing the appeal, said in characteristic style that the issue was 'perfectly straightforward and turns on the ordinary principles of the law of damages' [6]. The basic measure of damages for a negligent valuation where, but for the negligence, the lender would not have lent was Lord Nicholls' 'basic comparison'. Had T not granted the new facility it would not have lost the moneys advanced under the new facility but would still have lost the existing indebtedness; in addition (although this was not alleged) the existing indebtedness would not have been discharged so if the first valuation had been negligent the existing indebtedness would have been recoverable as damages.

Lord Sumption disagreed with the conclusion of the majority in the Court of Appeal that the loss sustained as a result of the new facility was the full amount of that facility less the developer's covenant and the true value of the development; he said that the court could not ignore the fact that T would not have had the amount of the existing indebtedness. He noted again that if the first valuation had been negligent then T's loss in relation to the new facility 'might at least arguably' include the loss attributable to the extinction of that liability which resulted from the refinancing of the existing indebtedness [9]. He also rejected Moore-Bick LJ's view that DeV would have contemplated that it might be liable for the full amount of the advances under the facility; Lord Sumption said that T's reasonable contemplation was not relevant to the 'basic comparison' which was a 'purely factual inquiry' [10].

Before the Supreme Court T introduced an argument that the discharge of the existing indebtedness was a collateral benefit which it was not obliged to take into account in computing loss. Lord Sumption rejected that argument, holding that the discharge of the existing indebtedness out of the advance made under the new facility was 'plainly not a collateral benefit' in the sense outlined in *Swynson Ltd* because it did not confer a benefit on T so no question arose of taking it into account or leaving it out of account. The basic comparison involved looking at the whole of the transaction caused by the negligent valuation: the repayment of the existing indebtedness from the new facility meant that only the new money advanced increased T's exposure. Even if the discharge of the existing indebtedness had extinguished a liability under the first valuation, the benefit arising from the discharge was not collateral because it was a condition of the new facility. '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.' [13].

Conclusion:

T's argument of a collateral benefit was rightly rejected as being fundamentally flawed. What was less clear was why T's advisers, having indicated to the Court of Appeal that the claim could be re-stated to rely on loss of a right of action in respect of the first advance, did not allege that the first valuation had been negligent when both current value and GDV figures exceeded the non-negligent valuations. The Supreme Court confirmed that the decision in *Preferred Mortgages* did not preclude a claim for loss of opportunity but the clear lesson to lenders is to structure loans so that potential claims against valuers are preserved.