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The **Decision** of the Supreme Court in **Tiuta v. De Villiers**

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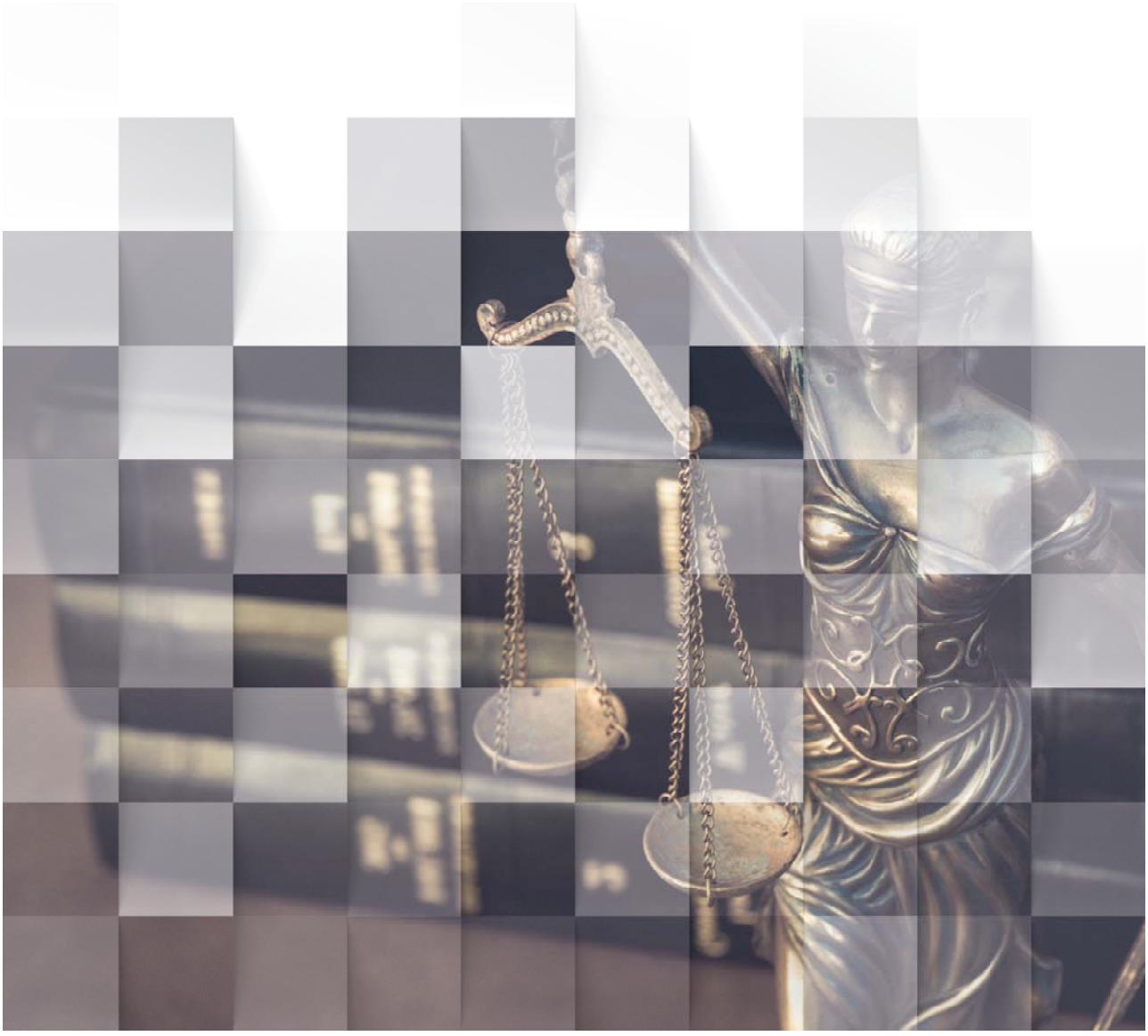

Executive Summary

The Supreme Court has overturned the decision of the Court of Appeal and applied a straightforward application of the 'but for' test for the measure of damages, in the context of surveyor's negligence.

In this case, which concerned the refinancing of a property development site the Supreme Court concluded that, although a surveyor may be liable for the loss suffered by a lender as a result of a negligent valuation, properly applying the but for test meant that losses suffered by the lender as a result of its particular lending arrangements was beyond the scope of the surveyor's liability.

The judgment of the Supreme Court emphasises that established principles of causation, along with good commercial sense, should not be overlooked, dismissed or modified except in exceptional circumstances.

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The Supreme Court endorses a straightforward application of the 'but for' test in calculating recoverable loss

The decision of the Supreme Court in *Tiuta v. De Villiers* has provided welcome clarification on the measure of damages in the context of surveyor's negligence involving refinancing.[1]

The Supreme Court overturned the decision of the Court of Appeal and applied a straightforward application of the 'but for' test when considering damages in accordance with the House of Lords' decision in *Nykredit*.[2] Accordingly, on the specific facts, the surveyor could only be held liable for the amount of 'top-up' lending advanced to the borrower and not the full amount advanced in respect of the property.

Impact

The financial crisis of 2008, and the subsequent economic stagnation, saw huge numbers of development sites be repossessed by lenders. Unable to make a full recovery from their borrowers, lenders have sought to recoup their losses. The courts have seen, and no doubt will continue to see, litigation commenced against surveyors, solicitors, quantity surveyors and other professionals involved in development projects.

The positive clarification on the application of the but for test may have the effect of limiting professionals' exposure, which no doubt will resonate with them and their insurers.

For lenders, the decision means that consideration should be given to the impact of restructuring. However, the decision provides certainty about the extent of recourse a lender has against its appointed advisors and valuers. In any event, with valid security, a lender's loss should normally be reduced by the sale of the property.

Importantly, the Supreme Court's decision demonstrates that it is only in rare circumstances that the court will deviate from a straightforward application of the but for test.

The facts

Tiuta made available to the developer a loan facility under which it advanced a sum of £2,475,000 (the **First Loan**) in connection with the development of a property site in Sunningdale (the **Property**). The loan was secured by a legal charge over the development. The First Loan was made on the basis of a valuation by De Villiers that gave the Property a market value of £2.3 million and, if completed, about £4.5 million. Other advances were made by the lender to the developer.

In November 2011, De Villiers was instructed to provide a fresh report to Tiuta. On 8 November 2011, De Villiers valued the property at £3.25 million in its then state of development and £4.9 million on completion (the **November 2011 Report**). In further valuations on 22 and 23 December 2011, De Villiers valued the Property at £3.4 million and £3.5 million, respectively.

On 19 December 2011, shortly before the facility was due to expire, Tiuta entered into a second facility agreement with the developer in the sum of £3,088,252 (the **Second Loan**). 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 legal charge was taken over the development to secure sums due under the second facility agreement. A new facility letter was signed and a new legal charge taken over the Property. In January 2012, Tiuta advanced the sums under the Second Loan, discharging the whole of the indebtedness under the First Loan. Between January and June 2012, further sums up to £281,590 were advanced to the developer.

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[1] Tiuta International Limited (in liquidation) v De Villiers Surveyors Limited [2017] UKSC 77.

[2] Nykredit Mortgage Bank plc v Edward Erdman Group Ltd [1997] UKHL 53.

Tiuta went into administration shortly before the Second Loan was due to expire. None of the sums advanced to the developer have been repaid.

First Instance

The hearing before Timothy Fancourt QC (sitting as High Court Deputy Judge) followed a summary judgment application by De Villiers which argued that if the but for test is applied correctly, De Villiers should only be liable for the amount of additional lending advanced to the borrower in reliance on the November 2011 Report. (It is important to note here that there has been no finding of negligence by any court.)

Tiuta, on the other hand, sought to argue that the correct application of the but for test meant that De Villiers would be liable for the full amount advanced under the Second Loan. Further, the decision in *Preferred Mortgages* meant that the lender was precluded from suing on the First Loan as it had been redeemed.[3] Tiuta's argument was that this would leave the lender without a remedy in respect of the First Loan and created an unfair or unjust result.

The Deputy Judge found for De Villiers, on the ground that a straightforward application of the but for test meant that, if the November 2011 Report was negligent, De Villiers was only liable for the additional top-up lending made when the First Loan was redeemed.[4]

The Court of Appeal

The Court of Appeal was divided in its opinion, with Lord Justice Moore-Bick and Lady Justice King favouring the submissions of Tiuta.[5] Lord Justice McCombe agreed with the Deputy Judge that, if the report was not negligent, then Tiuta would not have redeemed the First Loan, along with its security; and, accordingly, would have suffered no loss to that extent.

The majority in the Court of Appeal held that it was irrelevant that the lender who redeemed the loan and the current lender were the same, despite the fact that Tiuta would have suffered the loss of the First Loan in any event because the borrower was unable to repay.

De Villiers appealed to the Supreme Court.

The Supreme Court

In its succinct unanimous decision the Court held that the proper measure of damages is the sum which restores the claimant to the position it would have been in 'but for' the negligent actions of the defendant.

On these specific facts, the decision strongly affirms Lord Nicholls' 'basic comparison' in *Nykredit Mortgage Bank plc v Edwards Erdman Group Ltd (No. 2)*. Lord Nicholls held that the comparison is typically 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."[6]

In the context of a loan transaction, as in *Tiuta v De Villiers*, Lord Nicholls held that the basic comparison was:

- "(a) the amount of money lent by the plaintiff, which he still would have had in the absence of the loan transaction in question, plus interest at the proper rate; and
- (b) the value of the rights acquired, namely the borrower's covenant and the true value of the overvalued property."[7]

Accordingly, in *Nykredit* the Court had to consider whether, but for the negligent valuation, the lender would still have had the money which the negligent valuation caused him to lend. Lord Sumption concluded in the present case that "Tiuta would not still have had it, because it had already lent it under the first facility" (paragraph 9).

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[3] Preferred Mortgages Ltd v Bradford & Bingley Estate Agencies Ltd [2002] EWCA Civ 336.

[4] [2015] EWHC 773 (Ch).

[5] [2016] EWCA Civ 661.

[6] Nykredit Mortgage Bank plc v. Edward Erdman Group Ltd [1997] UKHL 53, 1631D-F.

[7] Ibid.

Accordingly, any loss suffered could only be the amount of the Second Loan lent in excess of the redeemed First Loan.

Lord Sumption went on to observe that "whilst 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'" (paragraph 10).

Tiuta also advanced a novel argument that its decision to discharge the First Loan was a collateral benefit and should not be taken into account when assessing its loss. In dismissing this argument, the Court considered that: (i) the refinancing was neutral and both increased and decreased the lender's exposure; and (ii) the terms of the Second Loan required the First Loan to be discharged so it could not properly be considered collateral.

Conclusion

As made clear in the Supreme Court judgment, each case is likely to turn on its own specific facts. However, in development projects which frequently have staged financing and may well have continuity in the professionals engaged, the Court has appropriately limited the potential exposure to the lender's structure of the financing, which is beyond the professionals' instructions, control or expertise. Although a valuer will be liable for the loss suffered by a lender as a result of a negligent valuation, losses suffered as a result of the lender's peculiar lending arrangements might generally be beyond the scope of the valuer's liability.

Perhaps the most significant point made by the Supreme Court is that established principles of causation, along with good commercial sense, should not be overlooked, dismissed or modified except in exceptional circumstances.

Reed Smith was instructed by De Villiers and De Villiers' professional indemnity insurers. Alex Hickey QC and Robert Scrivener were instructed by Reed Smith.

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