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Background

Thurston UK Limited ('Borrower') applied for a loan of £1.8 million to buy an entertainment centre in Great Yarmouth and make subsequent alterations to two neighbouring entertainment centres they already owned ('Three Centres'). The Three Centres were valued by two different valuation reports. The first report valued the two centres known as the 'Circus' and the 'Golden Nugget' ('CGN') and the second report valued the third centre known as the Flamingo Centre ('FLA'). Collectively the Three Centres were valued at £4.2 million. Shortly after Barclays completed the loan, the Borrower got into financial difficulties and went into administration. As a result, on 16 March 2011 the Three Centres were sold for £1.35 million, leaving Barclays with a significant shortfall. Barclays contended that the Three Centres should have been valued at just over £3 million with the CGN valued at £2.1 million and the FLA valued at £1million.

Decision before the Court

In deciding the case, the Court considered four main issues:-

1. What was the correct basis for the valuation?

Barclays submitted that the appropriate way would have been to use the earnings before interest, tax, depreciation and amortisation method (EBITDA). Barclays stated that there was sufficient evidence available to Christies at the time to enable the EBITDA method to be used, and that there was no evidence that any other methodologies were in material use at the time. As such, there was no evidence to support a more robust valuation on another basis. Barclays further contended that no reasonably competent valuer in the position of Christies would have adopted the approach that Christies used, the Turnover Multiplier Approach, citing a number of reasons including the guidance in place by the Royal Institute of Chartered Surveyors.

The Judge accepted Barclay's submissions and found that Christies were negligent in not adopting the EBITDA approach. However the Judge did not accept that Christies had realised they were able to use the EBITDA approach, and then deliberately choose not to. The Court also asserted that there was no evidence they had intentionally tried to mislead Barclays.

2. Did Barclays rely on the valuation in making the Loan?

The Defendant submitted that Barclays had not relied on the content of Christies' reports and in any event reliance on these reports was not reasonable in the context of the proposed lending decision. They pointed to the assumptions made in the valuation reports and the terms and conditions of Christies' acceptance of instructions, concluding that the loan would have been advanced regardless. The Judge rejected these arguments and held that Barclays relied on the reports when making the Loan.

3. If Barclays had relied on the reports, what was the extent of their loss?

It was decided that using the EBITDA method the value of the CGN would have been about £2.3 million and the FLA would have been worth £1.2 million, with together the value being just over £3.5million. Christies had valued the CGN at and FLA at £4.2 million. This represented an overvaluation of over 15% at around £700,000. Subject to further discussion on the minutiae, it was decided that Barclay's full transaction loss (including cost of funding) was just over £1 million.

4. Did the Bank contribute to the loss by its own negligence?

One of the primary issues discussed was a previous loan to the Borrower, who had used a previous mortgage in 2003 for the purpose of buying a property in Spain, as opposed to the purpose it was intended for, investment in the business. It was decided, on the basis of the test established in *Webb Resolutions Ltd v E.Surv Ltd [2012]* that a reasonably competent bank would have fully investigated the 2003 mortgage. This mortgage was held as evidence of dishonestly and, had the Bank been aware of it, the loan (or a large part of it) would not have been made. The Judge decided that the appropriate deduction on the damages was 40%.

Commentary

This case is another victory for lenders. The Court's finding that Barclays had relied on the reports and suffered loss as a result supports the overall rights of a lender to recover losses incurred from negligent valuations. Further, the Court's reliance on the test in *Webb Resolutions Ltd v E.Surv Ltd* in determining contributory negligence is, in principle, reassuring to lenders, even though the application of the test to the particular facts of this case resulted in a reduction to the Barclays' losses.

For further information, please contact Georgina Squire or the Partner with whom you usually deal.