

Dispute Resolution
Case Law Update
Rosling King LLP



The Facts

The borrower and proposed developer, Derwent Vale York Limited (“**Derwent**”), was a special purpose vehicle set up for the purposes of developing property in York. Derwent approached the Claimants (the “**Bank**”) for funding in May 2007. The Bank instructed the Watts Group plc (“**Watts**”) to act on its behalf in checking the costings supplied by Derwent and approving requests for drawings from the facility the Bank was to provide.

Watts was instructed to prepare an Initial Appraisal Report (the “**IAR**”), an IAR was sent to the Bank on or around 8 April 2008, which provided a total construction cost. The first drawdown was made on 18 April 2008, Watts subsequently produced monthly reports for the Bank. In May 2009 Watts advised the Bank that, although practical completion would be delayed until August 2009, there was at that stage, no anticipated shortfall in the costs of construction. However, Derwent was placed into creditors’ voluntary liquidation and building work ceased. A detailed report was commissioned by the Bank which identified a number of defects in the construction works. The Bank sought repayment of the loan but this was not received and, as a result, the Bank sought damages from Watts for its alleged negligence.

The Arguments

The Bank submitted that the IAR was negligent alleging, amongst other things, that the construction cost provided by Watts was negligent and that, if it had been properly prepared, the Bank would not have permitted the drawdown of the loan to Derwent. Watts denied negligence and raised further issues as to reliance, causation and loss. Watts also stated that the Bank’s negligent decision to lend to Derwent in the first place was the real cause of the loss.

Decision

The Court dismissed the claim holding that the law in this area was clear and established, namely, that:

- (i) Watts owed to the Bank, either by way of an implied term of their appointment or at common law, a duty to take reasonable care in fulfilling their obligations. That duty would be expressed, in this case, as the degree of skill and care to be expected of an ordinary monitoring surveyor of reasonable competence and experience;
- (ii) the scope of the duty would be limited, because a valuer was not liable for every foreseeable loss that their client might suffer if the client entered into an agreement to lend money as a result of a negligent valuation; and
- (iii) a valuer is not liable for losses that would have been suffered by the lender in any event, even if the valuation had been correct.

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The Court also made some general observations on the expert evidence in this case. In particular regarding the independence of the Bank's expert. The Court criticised the expert's independence stating that it was clear that the Bank was his principal client, providing the majority of his work and fees. The expert's close relationship with the Bank was made clear by, amongst other things, his unrealistic approach to the allegations of the claim. As a result, the Court rejected the Bank's expert's evidence.

The Court held that, on the facts, Watts was not negligent. As to causation, the Court held that in line with *South Australia Asset Management Corp v York Montague Limited* [1996] UKHL 10 ("**SAAMCo**") and *BPE Solicitors v Hughes-Holland* [2017] UKSC 21 ("**BPE**"), this case was in the 'information' category. Further, it would only have been the information as to the construction costs which could ever have given rise to a claim. The problem for the Bank was that no loss had been identified as arising from the allegation that Watts' information in relation to the construction costs was erroneous. In addition, it was difficult to see how any specific loss could flow from the information about the estimated construction cost, because the Bank had obtained a guarantee in respect of cost overruns, so had sought to cover themselves on that very issue. If the guarantee was worthless, it was the Bank's responsibility, not Watts'. For those reasons, on the application of both SAAMCo and BPE, no loss has been identified by the Bank as being recoverable in law from Watts.

Further, there was no doubt that the entirety of the Bank's pleaded loss was caused by the Bank's botched consideration of the loan application and the fundamentally flawed decision to lend to Derwent. The loan was only made to Derwent because of the Bank's failings, which meant that the Bank took on an unacceptable and unnecessary risk which ultimately caused it a loss.

Commentary

This case affirms the application of the BPE decision, in that a professional was not liable for every foreseeable loss that a lender might suffer as a result of negligence, even though on the facts of this case, Watts was, in any event, not negligent. In particular, a valuer and/or monitoring surveyor will only be liable for information being wrong, not the consequences of a lender acting on it. However, all cases will likely turn on their own facts.

Further, this decision highlights the importance of ensuring experts are wholly independent and aware that their duty is to the Court. The consequence of repeatedly instructing the same expert is made clear in this case, especially given the outright rejection of the Bank's expert's evidence.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.