

Dispute Resolution
Case Law Update
Rosling King LLP



Background

In February 2011, De Villiers Surveyors Limited (the “**Valuer**”) were instructed by Tiuta International Limited (the “**Lender**”), to value a partly completed residential development (the “**Property**”). The Valuer valued the Property at £2.3 million and gave a future development valuation of £4.5 million on completion (the “**Original Valuation**”). On the basis of this valuation, the Lender advanced £2.475 million (the “**Original Facility**”) to Mr Wawman (the “**Developer**”) secured by way of first legal charge over the Property.

By December 2011, the Developer had approached the Lender seeking an increase in the facility. The Valuer provided a second valuation of the Property at £3.25 million with a future development valuation of £4.9 million on completion of proposed works (the “**Second Valuation**”). Accordingly, the Lender agreed a second loan to the Developer, structured as a re-financing arrangement. In a new agreement, the Lender agreed an advance of £3,088,252, with £2,799,252 being agreed for the refinancing, and the balance of £289,000 being ‘new money’ to assist with completion of the development (the “**Second Facility**”).

When the term of the Second Facility expired, over £2.84 million remained outstanding against which the sale of the Property was expected to achieve only £2.1 million. The Lender brought proceedings against the Valuer for its loss, alleging that the Second Valuation was negligent. There was no pleaded allegation that the Original Valuation was negligent.

The Valuer made an application for Summary Judgment in respect of part of the claim, on the issue of recoverable loss/measure of damage. The Valuer argued that, on the basis that the Lender had already advanced monies under the Original Facility by the time the Second Valuation was provided, any negligence by the Valuer, if proven, could only lead to a recovery of the loss caused by the additional lending, that is, the ‘new money’, and not any loss attributable to the refinance element of the loan, since the Lender would have lost that sum in any event. The Court of Appeal disagreed and the Valuer appealed to the Supreme Court.

The Supreme Court Judgment

The Supreme Court, ruled in favour of the Valuer. The Judgment applies the principles laid down in *Nykredit Mortgage Bank PLC v Edward Erdman Limited*, to the very specific facts of this case.

The panel of Lady Hale, Lord Lloyd-Jones, Lord Sumption, Lord Kerr and Lord Briggs handed down a short Judgment rejecting the Lenders submission that the use of the advance under the Second Facility to discharge the indebtedness under the First Facility was a collateral benefit which need not be taken into account when calculating the loss. This was, the panel said, because; firstly, the refinancing was neutral rather than beneficial, and secondly, on the facts, the terms of the Second Facility required the indebtedness under the First Facility to be discharged, so the outcome was not collateral to the Second Facility.

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When a claimant lender lends, and but for a negligent valuation, would not have done so, the basic measure of damage is the difference between the position they would have been in, had the defendant not been negligent, and the claimant's actual position. When considering this basic comparison, The Supreme Court felt that the fact that the Valuer may have contemplated being liable for the full amount of the advance under the Second Facility was irrelevant. The foreseeability of loss was not relevant to the basic comparison. What was relevant, however, was the fact that, given no allegations of negligence had been made in relation to the Original Valuation and the Lender was tied in to the Original Facility, the Lender would, as a matter of fact, have lost the sums which had been outstanding under the First Facility in any event. Consequently only the 'new money' could be recovered.

Commentary

On a lender to same lender refinance, where there is no allegation of negligence on the valuation given in respect of the first loan, the lender's loss in a negligence claim pertaining to the valuation on the second loan may be limited to the element of the advance over and above the element used for repayment of the first loan, if it appears that the sums owed under the first facility would have been lost in any event. The Supreme Court recognised however that the position could be different on different facts and, in particular, if there was negligence in respect of the first valuation.

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