

***Tiuta v De Villiers* ([2017] UKSC 77) - taking care with the “basic comparison”**

Sometimes a decision offers a reminder by straightforward application of an established principle. Such is the unanimous Supreme Court judgment on 29 November in *Tiuta v De Villiers* ([2017] UKSC 77) in a claim for loss following undervaluation.

Summary

This is hardly a new topic, but the issue here concerned recovery where (a) a first loan was based on a proper valuation and (b) a further - and *assumed* negligent - valuation resulted in a second loan which operated as refinancing, such that the first loan was repaid.

Facts

In April 2011 Tiuta lent money secured on a property development and based on De Villiers’ valuations of £2.3m current and £4.5 m when developed. Similarly, in December 2011 Tiuta provided further funding which refinanced the amount outstanding under the first facility and made more money available.

The whole debt under the first facility was thus discharged and a further £281,590 was advanced. Later, with none of the funding provided under the second facility repaid, Tiuta alleged that De Villiers had been negligent in their second valuation.

The first facility

It was agreed that there could be no recovery here because (a) Tiuta did not claim that the first valuation was negligent, and moreover (b) the second facility had discharged the liability under the first, so there was no recoverable loss. That was based on unchallenged Court of Appeal and Supreme Court authority.

The second facility

De Villiers said that the well established “basic comparison” here contrasts a claimant’s actual position with what it would have been if he had not entered into the relevant transaction. Tiuta claimed that, but for the further valuation, they would not have provided the second facility, so the court must examine the position that Tiuta would then have been in.

Tiuta would still of course have agreed to the first facility, regardless of any negligence that gave rise to the second. They lost the additional money under the second facility, but would anyway have lost that advanced under the first. So their loss was limited to the new money advanced under the second facility. Assuming but in no way conceding negligence and causation, De Villiers sought summary judgment on that and the Judge agreed.

Reversing this, the Court of Appeal ruled that, because part of the second facility had been used to discharge the debt under the first, all had to be taken together. So that part was recoverable in an action under the second facility. Tiuta could recover the additional funding *plus* that which had enabled the borrower to discharge his indebtedness under the first facility, none of which would have been lent if the later valuation had been a proper one.

But the Supreme Court held that that was not a valid application of the basic comparison. Even though the second facility provided funds that were used to pay off the first, so it might appear to create an aggregate

loss, the court must allow for the fact that the lender *had already lent and lost* the amount under the first facility. The basic comparison assumes that, but for the alleged negligent valuation, the lender would still have had the money that it caused him to lend. But here he would not have, as he had already lent it following the first valuation.

Commentary

Further funding after revaluation is a very common thing.

Each transaction or series depends on its own facts and the relevant terms and extent of any negligence will be crucial, but the following can be distilled as outline guidance:

1. If Loan 2 discharges Loan 1, even if Loan 1 came about through negligence there is probably no recoverable loss under it;
2. where Loan 2 is not structured that way there may be recovery under both, on proof of causative negligence; however
3. with no negligence as regards Loan 1, recovery is confined to any additional monies provided under Loan 2, because the lender has already lent and lost Loan 1.

The Supreme Court nevertheless contemplated, but did not outline, circumstances where there could *arguably* be a claim for losses due to Loan 1 - provided negligence had caused it - *even though* it had been discharged by Loan 2. But it is not clear what the Court had in mind, and lender and borrower alike should anyway take care in all cases, and will often need specific advice as to further funding consequent on revaluation.

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