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# CAUSATION AND VALUERS

27 June 2017

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BEN QUINEY QC

Crown Office Chambers

# Issues

- The basic rules.
- *Tiuta International Ltd v De Villiers Surveyors Ltd* [2016] P.N.L.R. 34.
- Inconsistencies?
- A general principle?



# Introduction

- The context: valuers' negligence in refinancing cases.
- The problem: what happens when Loan A is refinanced by Loan B? does any cause of action relating to Loan A become extinguished? Does the liability travel over to Loan B?
- The core issue: fairness in battles of substance and form in causation.

# The Basic Rule



- *“When, then, does the lender first sustain measurable, relevant loss?”*
- *The first step in answering this question is to identify the relevant measure of loss.*
- *It is axiomatic that in assessing loss caused by the defendant’s negligence the basic measure is the comparison 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.*
- *Frequently, but not always, the plaintiff would not have entered into the relevant transaction had the defendant fulfilled his duty of care and advised the plaintiff, for instance, of the true value of the property.*
- *When this is so, a professional negligence claim calls for a comparison between the plaintiff’s position had he not entered into the transaction in question and his position under the transaction. That is the basic comparison”*
  - Lord Nicholls in *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No.2)* [1997] 1 W.L.R. 1627 at 1631D-E

# The Scope of Duty

- *“... a defendant valuer is not liable for all the consequences which flow from the lender entering into the transaction.*
  - *He is not even liable for all the foreseeable consequences. He is not liable for consequences which would have arisen even if the advice had been correct.*
  - *He is not liable for these because they are the consequences of risks the lender would have taken upon himself if the valuation advice had been sound. As such they are not within the scope of the duty owed to the lender by the valuer.*
  - *For what, then, is the valuer liable? The valuer is liable for the adverse consequences, flowing from entering into the transaction, which are attributable to the deficiency in the valuation.”*
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- Lord Nicholls in *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No.2)* [1997] 1 W.L.R. 1627 at 1631F-H

# The But-For Test

- *“The need to have in mind the purpose of the relevant cause of action is not confined to the second, evaluative stage of the twofold inquiry. It may also arise at the earlier stage of the “but for” test, to which I now return.*
- *This guideline principle is concerned to identify and exclude losses lacking a causal connection with the wrongful conduct.*
- *Expressed in its simplest form, the principle poses the question whether the plaintiff would have suffered the loss without (“but for”) the defendant’s wrongdoing. If he would not, the wrongful conduct was a cause of the loss. If the loss would have arisen even without the defendant’s wrongdoing, normally it does not give rise to legal liability.*
- *Of course, even if the plaintiff’s loss passes this exclusionary threshold test, it by no means follows that the defendant should be legally responsible for the loss.*
- *This threshold “but for” test is based on the presence or absence of one particular type of causal connection: whether the wrongful conduct was a necessary condition of the occurrence of the harm or loss.”*
  - Lord Nicholls in *Kuwait Airways Corp v Iraq Airways Co (No.6)* [2002] 2 A.C. 883 paras. 72&73

# Tiuta - Facts

- Feb 2011: first valuation of £3.25m as is and £4.9m as finished.
- First Loan: £2.56m
- Nov 2011: second valuation of £3.25m and £4.9m.
- Dec 2011: third valuation of £3.5m and £4.9m.
- Jan 2012: second loan – a draw down and first loan paid off.
- Expiry: £2.84m outstanding, and £2.14m realised on sale.
  
- Claim:
  - The December advice was negligent.
  - This caused the second loan.
  - The refinancing was one of form not substance.
  - The Claimant was entitled to the full shortfall.



# Tiuta – Chancery Division



- Summary judgment application.
- Timothy Fancourt QC decided [2015] P.N.L.R. 23:
  - Even if the defendants had not been negligent and the claimants had made no further advance and the claimants would still have been exposed to the extent of £2.56 million.
  - Therefore on the “but for” test the December 2011 valuation did not cause that indebtedness as it was already incurred and then extinguished by the refinancing.
  - Presumably any further indebtedness beyond the £2.56m was recoverable.

# Tiuta – Court of Appeal

- Appeal Allowed: Moore-Bick & King LLJ; McCombe LJ dissenting.
- Majority view: Decided that the “but for” test did not have the effect contended for and that the first loan was folded into the second, and so the advance formed part of the total loss.
- Minority view: first and second loans were distinct transactions and the December valuation could only cause that incurred after it was provided.
- Declined to address a deeper question of whether the but for test was appropriate at all.
- Unanimous in querying whether this was suitable for summary determination.

# Preferred Mortgages Ltd

- *Preferred Mortgages Ltd v Bradford & Bingley Estate Agencies Ltd* [2002] EWCA Civ 336.
- Facts:
  - The claimant had advanced £49,500 to the borrower on the security of a property that had been negligently over-valued by the defendant.
  - It later advanced an additional sum on the security of the same property following a second negligent over-valuation by a different surveyor.
  - It did so by refinancing the first loan, i.e. by advancing the borrower an amount sufficient to pay off the first loan and provide the additional funds he required.
- Decision:
  - The claimant brought proceedings against the defendant seeking to recover a loss caused by the first over-valuation
  - The claim was dismissed on the grounds that the refinancing transaction had discharged the first loan in full and that therefore no loss flowed from that valuation. That decision was upheld on appeal.

# SAAMCO

- Does the CA's decision fit with *South Australian Asset Management Company v York Montague* [1997] A.C. 191?
- “...a person under the duty to take reasonable care to provide information on which someone else will decide on a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties . It is therefore inappropriate either as an implied term of the contract or as a tortious duty arising from the relationship between them.”
  - Lord Hoffmann at 214C-E

# Appeal

- Permission to appeal to Supreme Court granted.
- *Preferred Mortgages* was cited with approval in *Lowick Rose LLP v Swynson Ltd* [2017] 2 WLR 1161 at para. 50 by Lord Mance.
- Is *Tiuta* wrong?
- Are these simply cases differing on the facts?
- Is there a deeper tension in the judgments?

# Form vs. Substance



- In *Tiuta* and in *Lowick Rose* the issues of fairness, form and substance regularly appealed to.
- Is this either right or appropriate.
- Is there a real distinction between form and substance?
- Does *Tiuta* and *Lowick Rose* show use a deeper principle?
- Can *Tiuta* be taken beyond valuers' negligence?

# An Alternative Analysis

- *Allied Maples Group Ltd. v Simmons & Simmons* [1995] 1 W.L.R. 1602 and loss of a chance; i.e.:
  1. What would the claimant have done? Can the Claimant prove on the balance of probabilities that he would have acted differently if properly advised?.
  2. Is there a real or substantial chance as opposed to a speculative one that the third party would act in a particular way in this scenario?
  3. If yes, then the court will assess the chance of the third party so acting.
  4. If no, then the claimant will fail on causation and any award of damage will be nominal.