

Beyond night and day: The importance of causation

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In order to succeed in a claim for professional negligence, a claimant must establish that the professional owed him a relevant duty of care, that they breached that duty and that the breach caused the loss he seeks to recover. Claimants often focus on the first two aspects and assume that, if they establish that the professional owed them a duty of care, and breached that duty, causation will follow as night follows day. The recent decision in *Tiuta International Limited (in liquidation) v De Villiers Surveyors Limited* is a salutary lesson in the need for claimants to establish causation as well as the existence and breach of a relevant duty.

The Facts

Tiuta was a lender operating primarily in the bridging loans market. It was approached by a Mr Wawman, who wanted a loan to develop a property in Sunningdale. In February 2011, Tiuta retained De Villiers to provide a valuation of the property. De Villiers valued the property at £2.3m in its current condition, and gave a gross development value (GDV) of £4.465m. Tiuta subsequently lent Mr Wawman in excess of £2m, presumably in part in reliance on De Villiers' valuation.

In November 2011, Mr Wawman sought to re-finance the loan. Tiuta asked De Villiers to provide an updated valuation. De Villiers did so, valuing the property at £3.25m in its current condition and giving a GDV of £4.9m.

In December 2011, Tiuta agreed to provide a new facility to Mr Wawman, which enabled him to repay the original loan and provided additional funds for developing the property. That loan was made in part in reliance

on De Villiers' November 2011 valuation. Mr Wawman subsequently defaulted on the loan. Tiuta brought a claim against De Villiers, seeking to recover the losses it had suffered on the transaction. Tiuta alleged that De Villiers' November 2011 valuation was negligently high and claimed the whole of the losses it said it had suffered as a result of making the loan to Mr Wawman. The amount claimed was just under £900k.

De Villiers denied that loss in the sum claimed had been caused by any negligence in its November 2011 valuation. De Villiers argued that, at the time it provided the November 2011 valuation, Tiuta was already exposed to an unavoidable loss on the loan it had made to Mr Wawman in February 2011. Mr Wawman's indebtedness to Tiuta in November 2011 was approximately £2.65m, which indebtedness exceeded what Tiuta said the property was worth at that time. De Villiers said that, even if it had given the advice which Tiuta said it should have given in November 2011,

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and even if this would have meant that Tiuta refused to grant Mr Wawman the new facility, it would still have suffered the consequences of Mr Wawman's eventual default insofar as these related to the existing indebtedness. On this basis, De Villiers applied for summary judgment to the effect that Tiuta could not recover any losses arising from the existing indebtedness in an action based on De Villiers' alleged negligence in November 2011.

Tiuta opposed De Villiers' application on the ground that the loan in December 2011 was a completely new facility, which had fully discharged the previous loan. It argued that, in these circumstances, the whole of the advance in December 2011 had been made in reliance on the November 2011 valuation. Tiuta relied in support of this argument on the decision in *Preferred Mortgages Limited v Bradford and Bingley Estates Agencies Limited*. In that case, the Court of Appeal had held that, where a loan had been completely redeemed, a lender had no claim arising from the valuation which led to that loan, because the fact the loan has been redeemed means that it has not suffered any loss as a consequence of making the loan in reliance on that valuation. Tiuta argued that, in circumstances where a previous loan had been repaid in full by a new loan, the normal "but for" test of causation should not apply in deciding what losses a claimant could recover, because application of this test could lead to injustice by virtue of a claimant's remedy falling into a "black hole".

The court's decision

His Honour Mr Justice Timothy Fancourt QC, who heard the summary judgment application, rejected Tiuta's arguments and held that, on the case as currently pleaded, any negligence by De Villiers in the November 2011 valuation had not caused the losses claimed by Tiuta. He rejected the argument that the decision in *Preferred Mortgages* altered the normal "but for" test for

establishing causation, which test was set out in decisions such as *Nykredit Mortgage Bank plc v Edward Erdman Group Limited (No. 2)* and *Kuwait Airways Corp v Iraqi Airways Co*.

In determining what loss a claimant had suffered as a result of negligence by a defendant, the comparison to be made was between what the claimant's position would have been, had he not entered into the transaction in reliance on the defendant's advice, and what his position was as a result of entering into the transaction. Applying that test to Tiuta's claim, the judge agreed with De Villiers that Tiuta was exposed to a significant loss in any event as a result of having made the loan to Mr Wawman in February 2011. It would have suffered this loss even if De Villiers had, in November 2011, given the advice Tiuta said it should have. If that advice had been given, Tiuta would not have granted the new facility but would still have been exposed to losses arising from the original loan, the outstanding balance on which was over £2.5m as at December 2011. Given that Mr Wawman had quickly defaulted in repaying the monies lent under the new facility, the judge was satisfied that he would have defaulted in repaying the original loan, had the new facility not been granted.

On the basis of these conclusions, the judge gave summary judgment for De Villiers to the effect that Tiuta could not, on the basis of the allegedly negligent November 2011 valuation, recover losses which were attributable to the existing indebtedness, because they had not been caused by any negligence in relation to the November 2011 valuation.

While the judge gave summary judgment for De Villiers on the issue before him, in answering Tiuta's argument that application of the "but for" test could lead to a "black hole", he did give Tiuta a glimmer of hope. The judge rejected the "black hole" argument because he found that, if De Villiers' February

2011 valuation had been negligent (as to which there was no evidence before the Court), that would not mean that Tiuta was without a remedy for any losses it had suffered as a result of lending money in reliance on that valuation. While Tiuta could not claim any such losses directly in a claim alleging that the February 2011 valuation was negligent, because that loan had been redeemed and the *Preferred Mortgages* decision would therefore apply, it could, when alleging that the November 2011 valuation was negligent, include as one of the heads of loss the value of the claim it would have had concerning the February 2011 valuation, which claim it had lost as a result of the original loan having been redeemed in reliance on the advice given in November 2011. Such a recovery was consistent with application of the “but for” test, on the basis that, if the November 2011 valuation had not been negligent, Tiuta would not have granted the new facility and so would have retained the benefit of any claim it had

against De Villiers arising from the February 2011 valuation. However, that was not the case which Tiuta had pleaded, and so the action failed insofar as it comprised losses which Tiuta would have suffered even if it had not granted the new facility in December 2011.

Conclusion

It is not clear whether Tiuta failed to advance a claim that the February 2011 valuation was negligent because its expert evidence did not support such an allegation, because its legal representatives advised that it did not need to make such an allegation or for some other reason. We will have to wait and see whether Tiuta seeks permission to amend its claim to include as a head of loss the value of the claim it says it would have had relating to the February 2011 valuation. Whilst Tiuta may be back to fight another day, the case clearly demonstrates the need for claimants to satisfy the “but for” test on causation, or their claims will fail.

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