

Valuers' negligence in the Supreme Court

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The *Tiuta International* decision

1. In *Tiuta International Limited (in liquidation) v De Villiers Surveyors Limited* [2017] UKSC 77 the Supreme Court has again had to consider causation and loss, in the context of a professional negligence claim against a valuer. The claim arose from valuations of a residential development. The development was used as security for loans.
2. The decision discusses “but for” causation and quantum of damage, both of which regularly need to be considered in professional negligence claims. The unusual facts in this case test the application of well-known causation principles. But the Supreme Court’s disagreement with the Court of Appeal demonstrates that applying first principles may not lead to an intuitive result.

3PB's Analysis

3. **The facts.** The claimant lender, Tiuta, entered into a loan facility agreement with a third party, by which it agreed to advance £2,475,000. The advance was secured against a development being undertaken by the borrower, which had been valued by the defendant valuer, De Villiers. Its report confirmed that the development was adequate security for the advance. Tiuta relied on the valuation report in making the loan.
4. Just before the first loan was due to expire, the borrower entered into a second loan facility that was also secured by executing a fresh charge against the development. Tiuta agreed to advance £2,799,252 to refinance and replace the first loan, along with a further £289,000 of new lending. The first loan and charge were fully redeemed using part of the second advance. De Villiers prepared a second valuation report, on which Tiuta relied in making the second loan.

5. Tiuta later went into administration. None of the indebtedness under the second loan was repaid. Tiuta suffered a shortfall when it enforced its security. Tiuta contended that the second valuation was negligently prepared. No allegations of negligence were made in respect of the first valuation.
6. **The claim.** The defendant valuer argued that, even if the second loan valuation had been negligent, its maximum liability could be that element of *further* lending (in excess of that used to discharge the first loan) made under the second advance. Without the alleged negligence the borrower would still have made the first loan (which it had been unable to recover).
7. This argument was made on the basis that negligence was not alleged in respect of the first loan; and, in any event, by discharging the first loan with monies from the second, any loss suffered by the lender consequent upon that negligence would have been eradicated.¹
8. **Analysis.** The decision is a useful illustration of the basic measure of damages in valuers’ negligence claims. The Supreme Court resolved the appeal by applying straightforward principles of factual causation.
9. In assessing loss caused by a valuer’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.*”² Not infrequently, and as in this case, the lender would not have entered into the transaction but for the valuer’s negligence. The basic comparison then requires an evaluation of (a) the amount of money lent by the claimant, which he would still have had in the absence of

¹ *Preferred Mortgages Ltd v Bradford & Bingley Estate Agencies Ltd* [2002] EWCA Civ 336; *Swynson Ltd v Lowick Rose LLP (in liquidation)* [2017] 2 WLR 1161 (SC).

² *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627, 1631



the loan transaction, plus interest at a proper rate; against which is credited (b) the value of the rights acquired, namely the borrower's covenant and the true value of the overvalued property (see at [6]).

10. By comparing Tiuta's position if De Villiers had fulfilled its duties, with Tiuta's actual position, it was clear that the properly recoverable loss was limited to the *new, further* funding made under the second loan. The award of damages seeks to put the claimant in the position it would have been in, had the second negligent valuation not occurred; but for that negligence, Tiuta would not have made the second loan, but it would still have made the first loan.
11. There was some speculation before the judgment was handed down that the "but for" principle may be modified or not applied in these circumstances because it would give an unjust result. The Court of Appeal had been influenced by the fact that the valuer may not have known the purpose of the second loan, and might have anticipated liability for the full amount of the loan under the basic measure. But that was irrelevant because, unlike other legal principles relevant to the extent of the valuer's liability, factual causation is usually a purely factual enquiry. Consequently *"while the reasonable contemplation of the valuer might be relevant in determining what responsibility he assumed or what loss might be regarded as foreseeable, it cannot be relevant to Lord Nicholls' "basic comparison" (at [10]).*
12. The decision also addresses the general principle that where a claimant has received some benefit attributable to the events which caused his loss, that benefit must be taken into account in assessing damages, unless it is a collateral benefit. The argument on behalf of Tiuta was that, if the second loan was a collateral benefit to Tiuta, it should be disregarded in relation to the calculation of the loss; so the loss should be the entire loan. Lord Sumption was, however, very clear that *"the discharge of the existing indebtedness out of the advance made under the second facility was plainly not a collateral benefit in this sense" (at [13]).* As a result this rule did not allow the calculation of loss to disregard the second loan,

and so the whole loan could not be recovered as damages in this case.

Impact of the Decision

13. This decision arises out of a summary judgment application and is somewhat confined to its particular facts, especially the lending terms and the specific allegations that were made. Lord Sumption refers to the assessment of loss in this case as a *"purely factual enquiry"* (at [10]); legal filters, such as the scope of the duty or remoteness, did not need to be considered. The outcome may have been very different if it were alleged that the first valuation had been negligent as well.
14. As it stands, this confined decision serves as a useful reminder of basic principles and as a helpful example of the application of factual causation in difficult circumstances.

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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