## No extension to the Valuer's Duty of Care – The Case of *Scullion v Bank of Scotland*

In a landmark result for surveyors, a buy-to-let investor has withdrawn his challenge to the Court of Appeal's decision that a surveyor who provides advice on value to a lender does not owe the borrower a duty of care. The claimant's decision to withdraw his appeal closes off the risk of an avalanche of claims from people who came into the buy-to-let market during the last property boom and who have lost money as a result of the subsequent crash.

### The facts

Mr Scullion applied for a mortgage of £283k in order to purchase a buy-to-let property in Cobham, Surrey. He stated in his application that the purchase price of the property was £353k. The defendant, Colleys, was engaged to provide a valuation to the lender. This valuation estimated that the market value of the property was £353k, with an achievable rental income of £2k per month. As the mortgage repayments totalled just £1,440, Mr Scullion's investment appeared to be viable and he decided to proceed.

Following completion, Mr Scullion was unable to let the flat for anything more than £1,100. Since this was insufficient to cover the mortgage, he decided to sell the property, but realised only £250k through the sale. Mr Scullion brought a claim for damages against Colleys, alleging that it had negligently overvalued the property and its rental yield. Colleys denied liability, arguing that: (1) it did not owe Mr Scullion a duty of care; and (2) any duty had been discharged by a disclaimer in the mortgage application.

### The decision at first instance

In the original trial, the court found that Colleys had overvalued the property and had also been negligent in advising on the achievable rental income. The judge went on to characterise the low-value buy-to-let investment undertaken by Mr Scullion as being similar to a residential purchase and he found that Colleys should have known that Mr Scullion would have placed reliance on its report. In the circumstance, the judge applied the ratio in the case of *Smith v Bush*, in which the House of Lords had held that a valuer owes a duty of care to a borrower purchasing a modest residential property, for their own use.

The judge went on to find that, although Mr Scullion had not suffered any loss as a result of Colleys overvaluing the property, because he had paid less than the 'true' value, nevertheless he was entitled to recover his losses attributable to Colleys' negligent advice concerning the true rental value of the property, including his extra financing costs incurred to cover the difference between the mortgage payments and the rental income. The judge made an award of just over £72k, plus interest and costs.

Colleys sought to overturn both of these findings on appeal. On the first issue, it argued that the judge had wrongly applied *Smith v Bush*, which case it submitted should only apply to modest residential purchases, and not commercial transactions. On the issue of quantum, it argued that the judge had wrongly applied the test of what losses flowed from the negligent advice on rental income, effectively treating Colleys as having warranted that Mr Scullion would make £2k per month for the whole period for which he owned the property.

**The appeal on liability**

The Court of Appeal agreed that a valuer should not be assumed to owe a duty to a borrower who is seeking funds for a buy-to-let transaction. In the leading judgment, the Master of the Rolls, Lord Neuberger, reviewed the case law on the issue and found that the decision in *Smith v Bush* should not apply to this case.

The judge held that, in order to succeed with his claim, Mr Scullion would have to prove not only that he relied on Colleys' report when deciding whether to purchase the property, but also that Colleys could have foreseen that he would rely on the report, and that it was "*just, fair and reasonable*" to impose on Colleys a duty of care to him. For four reasons, Mr Scullion was unable to satisfy this test:

- The transaction underlying the claim was effectively a commercial one, which, whilst not being a decisive factor, coloured the judge's views on the claim. He observed that people who buy properties to let are likely to be richer, more commercially astute and therefore more likely to obtain their own survey or valuation than an ordinary residential purchaser.

- What evidence there was of the buy-to-let market suggested that the majority of people operating in it had multiple properties, which made them very different to the type of borrower involved in the *Smith v Bush* case.

- In a buy-to-let transaction, where the borrower's chief concern would be whether the rent would be sufficient to cover the mortgage, it would be reasonable to expect the borrower to do their own due diligence on likely rental income, rather than simply relying on the valuation report prepared for the lender.

- Finally, the lender would only really be interested in the capital value of the property, and any advice on rental value would be provided simply to confirm that the property was suitable for the purpose for which it was to be purchased. Thus, the valuer would approach the task of valuing the property from a very different perspective when instructed by the lender, rather than the borrower.

In light of these factors, the Court of Appeal unanimously held that there was no inherent likelihood that a purchaser, buying a property for the purposes of letting it out, would rely on a valuation report prepared for the lender. Whilst Lord Neuberger had considerable sympathy for Mr Scullion, he concluded that "*as a matter of general principle…the law must be developed in a principled and coherent way, so as to be clear. The fact that a particular result may be perceived by many people to be fair in one case is a point which any sensible judge deciding that case will take into account. However, what appears to be a fair result in a particular case does not mean that the law as developed to achieve that result will satisfy two even more important requirements of any judicial decision, namely legal clarity and coherence, and fair results in ensuing cases.*"

**The appeal on quantum**

Again, Colleys was successful in this appeal. The court concluded that the judge at first instance appeared to have approached the quantification of damages on the basis that Mr Scullion was entitled to be compensated for all costs he had incurred as a result of his decision to buy the property. In the Court of Appeal's view, this was not the correct approach. It was inevitable that, having purchased the property, there would have been a period during which Mr Scullion was seeking a tenant, during which period he would have had to fund the mortgage himself. There was also a subsequent period, after the original tenant gave notice, when Mr Scullion would have had to find another tenant, when, again, he would have had to fund the mortgage.

Matters were slightly complicated in that, when the tenant left, Mr Scullion decided to sell the property and therefore he decided to keep it empty. However, because of the conveyancing solicitor's failure to register his title properly, the sale was delayed. There were therefore compelling arguments that Colleys should not be responsible for any losses arising from the delay in selling the property. Whilst the court did not have to reach a finding on what sum should be awarded in this case, given its decision on liability, nevertheless it made it clear that only losses directly attributable to a valuer's negligence would be recoverable.

**The implications for valuers**

As a result of the original decision in the case, a number of claims organisations were approaching buy-to-let landlords to suggest that they might have claims against the lender's valuer. Now that the Court of Appeal has overturned that decision, and Mr Scullion has decided not proceed with his appeal, any such claims are doomed to failure. The decision restores the status quo in terms of when a valuer will be assumed to owe a duty of care to a third party who receives a copy of the valuation report. The reasoning in *Smith v Bush* was always intended to apply only to cases where the borrower is buying a modest residential property, for their own use, and not for commercial transactions such as buy-to-let transactions. Mr Scullion's decision not to go through with his appeal therefore brings welcome relief to valuers, who are already facing a barrage of claims from lenders.

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