

Valuers And Scope of Duty (Again)

Charles B Lawrence & Associates v Intercommercial Bank Ltd [2021] UKPC 30

Life as a lender can be dispiriting, particularly if your borrower defaults and you find your security has not just been negligently overvalued but your solicitor also failed to report it had no good title anyway.

Nor are you likely to be cheered by the thought that that poses an interesting question as to the proper award of damages against the valuer, given that a valuer will not ordinarily undertake any duty to protect you against loss attributable to the lack of good title.

That was the issue before the Privy Council in *Charles B Lawrence & Associates v Intercommercial Bank Ltd* [2021] UKPC 30 (judgment on 22 November 2021). It was considering an appeal from the Court of Appeal of Trinidad and Tobago, but it was applying English law when doing so. Its decision is therefore of real interest to those practising in England and Wales.

The essential facts were straightforward. Intercommercial Bank Ltd (“the Bank”) lent \$3million to Singapore Automotive Trading Ltd (“the Borrower”). The loan was guaranteed by Rafferty Development Ltd (“the Guarantor”), and the Guarantor provided security in the form of a mortgage of real property (“the Land”). Charles B Lawrence & Associates (“the Valuer”) valued the Land at \$15 million and the Bank relied on its valuation. The Valuer made clear that it was assuming the Land had good title, and valued it on the basis that planning permission would be granted for its commercial development. The Borrower and the Guarantor both defaulted and the Bank then discovered not just that the Land was worth far less than \$15 million because it was only suitable for residential development, but also that the Guarantor did not have good title, so the security was valueless.

The Bank sued its conveyancing attorneys (“the Conveyancers”) for the lack of good title and that action was settled for \$2.4 million. It also sued the Valuer and at trial it established that it was owed a duty and that the Valuer had been negligent in valuing the Land on the basis it could be developed commercially whereas it could only be developed for residential use, and because its value on that basis was only \$2,375,000. The Valuer had also failed to report the presence of occupiers of the Land.

How should damages be assessed against the Valuer?

In the courts of Trinidad and Tobago, with some variation on appeal, damages were assessed, broadly, by reference to the amount lent plus interest less the settlement sum of \$2.4 million recovered from the Conveyancers. That led to a revised award on appeal of a little over \$2 million, including by reason of a discount by 20% for the Bank’s contributory negligence in not sending its officers to inspect the Land as that would have revealed the presence of the occupiers.

Then came the appeal to the Privy Council. At this point that the Valuer invoked the ‘scope of duty principle’ established in SAAMCO and recently revisited in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 (“MBS”) and *Meadows v Khan* [2021] UKSC 2021 (“Meadows”).

The Valuer argued that it was necessary to distinguish between (1) the loss suffered because the Land was overvalued as suitable for commercial rather than residential use - but assuming there was good title (which reflected the Valuer’s essential negligence, and which was within the scope of its duty), and (2) loss suffered because the title was defective (which was outside the scope of the duty and therefore irrecoverable, it having been the job of the Conveyancers to investigate title).

The Valuer submitted that the correct calculation of damages should be as follows. One should take the loan amount of \$3 million and deduct the residential value of the Land at the date of the loan (assuming good title), which was \$2,375,000. That gave damages of \$625,000, from which should be deducted 20% to reflect the Bank’s contributory negligence, to which figure interest at the statutory rate should be added to the date of judgment. That yielded a sum of \$833,204 at the date of judgment.

The Privy Council agreed entirely, both with the Valuer’s invocation of principle, and with its application to the calculation of damages.

The Valuer’s submission correctly reflected the principles as to scope of duty, in particular the need to identify the purpose for which the advice or information was given and whether the risk of loss in question was something against which the defendant was supposed to guard against. The Valuer’s duty was directed at the value of the Land on the assumption it had good title and did not concern title: that was a matter for the Conveyancers. When assessing damages, it was therefore necessary to exclude from the total loss factually caused by the Valuer’s negligence that element which was outside the scope of its duty because it was attributable to the defect in title rather than the overvaluation. That was achieved by the Valuer’s calculation, by deducting from the loan amount the actual residential value of the Land at the date of the loan on the assumption it had good title. The Valuer was also right that contributory negligence and interest should be dealt with as it suggested.

There are a number of points of interest about this case.

The first is that it identifies a novel, and neat, way of applying the ‘scope of duty principle’ in a valuer’s case where a lender’s loss is in part attributable to a defect in title for which a lawyer is responsible and in part attributable to an overvaluation. In a normal lender/valuer case one would assess the lender’s basic loss and then limit the loss within the scope of the valuer’s duty to the difference between the valuation given and the valuation which should have been given. However, before the Privy Council that would have left the Valuer liable for the whole loss as it would not remove from the recoverable loss that element which had nothing to do with the Valuer, that is, the loss referable to the defective title. The solution was to deduct from the calculation of the Bank’s overall loss the value of the security it would have had if it had had good title (as that was not loss for which the Valuer was responsible).

The second point, linked to the first, is that this was an instance where the SAAMCO counterfactual did not work. If the Land had been worth what the Valuer said, the Bank would not have sustained any loss. That suggested the Valuer's duty *should* embrace the loss. However, that could not be right (because of the complication concerning the defect in title). The Privy Council did not think that that anomaly demonstrated there was something wrong with its own reasoning; it merely served to confirm the point made in *MBS* and *Meadows* that "the counterfactual is of second-order importance as regards establishing the scope of the duty, and is a helpful cross-check of that scope in most *but not all* cases".

The third point of interest is the Privy Council's decision on whether there should be any account taken of the settlement sum paid by the Conveyancers, which was credited in the lower courts. It was held to be irrelevant because concerned with the loss due to the defective title, and as there was no suggestion it had exceeded that sum such that there might be double recovery unless it was brought into account. There were, in other words, two distinct losses, that attributable to the overvaluation and that attributable to the defect in title, and the recovery in respect of the latter did not reduce the amount payable in respect of the former. That nicely illustrates how different professionals advising the same claimant may end up being liable for distinct losses reflecting their distinct duties to protect against different forms of loss. In turn, that can have important implications for whether any credit need be given for recovery from another professional, and indeed as to whether a contribution claim may be pursued between defendants.

Finally, it is noteworthy that of all the recent cases revisiting SAAMCO it was *Meadows*, a clinical negligence case, which particularly guided the reasoning of the Privy Council. Just as the haemophilia loss, but not the autism loss, was within the scope of the doctor's duty of care in *Meadows* (as he was only addressing the risk of haemophilia) so the overvaluation loss, but not the defective title loss, was within the scope of the Valuer's duty.

Simon Wilton

Hailsham Chambers

Simon.Wilton@HailshamChambers.com

25 November 2021

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