

Newsflash

ROBINOWIS

VALUERS: NO DUTY OF CARE TO THE BUY-TO-LET PURCHASER



On 17 June 2011 the Court of Appeal handed down its eagerly awaited decision, allowing Colleys' appeal from the decisions of Mr Richard Snowden QC in **Emmett Thomas Scullion v Bank of Scotland Plc (trading as Colleys) [2010]**¹.

The Court of Appeal held unanimously that Colleys did not owe a duty of care to Mr Scullion, a buy-to-let investor, in preparing a valuation report for the lender, Mortgages Plc.

The decision is welcome news for valuers, surveyors and their insurers.

Background

Mr Scullion was a self-employed builder. He decided to invest monies from his pension fund in the residential buy-to-let property market. With the assistance of an intermediary called Portfolios of Distinction Limited he purchased a two-bedroom flat in Cobham, Surrey ("the Flat") in October 2002.

Colleys were instructed to value the Flat. Their report dated 3 September 2002 ("the Report") valued the Flat at £353,000 and the rental value it might achieve at £2,000 per calendar month. A rental at this level would have been sufficient to service the monthly mortgage payments of around £1,440.

The sale proceeded, but Mr Scullion was only able to let out the Flat for £1,050 per month. The tenant vacated after a year. Mr Scullion sold the Flat for £270,000 in May 2006.

Mr Scullion brought a claim against Colleys alleging they had negligently overvalued the Flat and its rental yield.

First instance decisions

In *Smith v Eric S Bush [1990]*² (which also decided *Harris v Wyre Forest District Council*) the House of Lords held that a valuer instructed by a lender owes a duty of care to the purchaser of residential property at the lower end of the market.

Richard Snowden QC held that the reasoning in *Smith* applied to Mr Scullion's case and found that (i) Colleys "knew or ought to have known that there was a very high probability" that the Report would be shown to Mr Scullion, (ii) Mr Scullion relied upon the Report when deciding to purchase the Flat, and (iii) Colleys knew that Mr Scullion would have paid for the Report, by reimbursing Mortgages plc.

He did not think, as a general proposition, that a modest buy-to-let transaction is very different from the ordinary residential house purchase which was in issue in Smith.

He therefore held that Colleys owed Mr Scullion a duty of care when preparing the Report.

Mr Scullion was not entitled to damages for the negligently high capital value in the Report, as he had not suffered any loss as a result (the true value was £300,000, but Mr Scullion in fact only paid £299,800).

However, he was entitled to damages attributable to the negligently high rental value, which were assessed at £72,234.54, representing his net income loss on the Flat from October 2002 to June 2006.

The appeal

Permission to appeal was granted on the legal issues of:

- 1 Whether Colleys owed a duty of care in tort to Mr Scullion at all.
- 2 If so, whether the scope of that duty extended to the losses in respect of the defective rental valuation.

The most significant part of the Court of Appeal's judgment relates to the first ground.

Did Colleys owe Mr Scullion a duty of care when submitting the Report?

The Court of Appeal considered that the three findings made by Richard Snowden QC considerably assisted Mr Scullion's claim that Colleys owed him a duty of care.

However, Mr Scullion needed "... to establish foreseeability of damage, a sufficient degree of proximity between him and Colleys, and that it would be "just fair and reasonable" to impose on Colleys a duty of care to him".

The question was whether Colleys appreciated that Mr Scullion would rely on the Report when deciding to purchase the Flat. The distinguishing factor was that Mr Scullion was purchasing the Flat as an investment. Lord Neuberger MR stated:

"...in the light of this feature... it is not sufficiently clear that it would have been foreseeable to [Colleys] that Mr Scullion would rely upon the Report, rather than obtain his own advice from an estate agent or valuer. I also consider, effectively for the same reasons, that it is by no means clear that the relationship was one of proximity. However that may be, I am of the view that Mr Scullion's case should fail on the ground that it is not just and equitable that Colleys should be liable to him for any damages he suffered as a result of their negligence in assessing the rental value of the Flat when preparing and submitting the Report to Mortgages. The fact the underlying transaction was buy-to-let rather than a purchase for owner-occupation has a number of repercussions, which distinguish it from the type of case being considered in Smith....Accordingly, I consider it wrong in principle to extend the decision in Harris v Wyre Forest to apply in a case such as the present, where the perceived policy basis for the decision does not appear to exist...."

Lord Neuberger MR gave four reasons for this conclusion. In summary:

- 1 The transaction was essentially commercial in nature. People who buy to let can be regarded as more likely to obtain, and more able to afford, an independent valuation or survey. Further, commercial purchasers of low to middle value properties, such as those buying to let, can properly be regarded as less deserving of protection by the common law against the risk of negligence than those buying to occupy as their residence.

- 2 Evidence accepted by the House of Lords in *Smith* was that “surveyors knew that approximately 90% of customers” relied on valuations provided to lenders when deciding whether to purchase. At the time *Smith* was decided the buy-to-let market was pretty under developed insofar as it involved individuals. There was no evidence to support the proposition that anything like 90% of those who bought to let in 2002 relied only on valuations prepared by a valuer instructed by their mortgagees, rather than obtaining their own valuation.
- 3 Any valuer would appreciate that a purchaser buying a property to let is at least just as interested in its rental value as in its capital value. A valuer valuing a property for the prospective lender of a buy-to-let purchaser would expect a prudent purchaser to obtain his own advice on important matters not covered in the report, relating to rental return.
- 4 A valuer would also appreciate in these circumstances that his lender client is primarily interested in the property’s capital value and that the loan is properly secured and can be repaid, if necessary, out of the proceeds of sale of the property.

For these reasons, Lord Neuberger MR considered there was no inherent likelihood that a purchaser buying the Flat for the purposes of letting it out would rely on a valuation provided to the Lender, rather than obtaining his own valuation advice on the rental and capital values of the Flat.

The Court of Appeal therefore held that Colleys owed no duty of care to Mr Scullion.

The measure of damages

It was not necessary for the Court of Appeal to consider the level of damages awarded by Richard Snowden QC. However, the court did comment that his approach to the quantification of damages was not wholly correct.

The approach in cases involving properties purchased pursuant to a negligent valuation (i.e. those where the valuer is found to owe a duty of care to the purchaser) is governed by the general guidance given in *SAAMCO*³, namely that damages must be limited “to the consequences of the [relevant] information being inaccurate”.

In this case the inaccurate information was that the rental value of the Flat was said to be £2,000 per month. The extent of the inaccuracy was that the correct figure was about £1,050 per month.

Crucially, it was not the correct approach to assess damages to ensure Mr Scullion was not out of pocket, in terms of revenue, as a result of buying the Flat. That approach is close to treating the negligent misstatement as a warranty.

Comment

Whilst Lord Neuberger MR was not satisfied with the outcome of the Court of Appeal’s decision on duty of care from a fairness point of view, it is clearly correct as a matter of general principle.

Valuers, surveyors and their insurers will no doubt breathe a sigh of relief that the scope of a valuer’s duty of care is no wider than envisaged in *Smith*, where the key factors of the imposition of such a duty were the low value of the transaction and the additional cost to the residential purchaser of obtaining a separate valuation.

Other issues in the case that were not subject to appeal remain good law. For example, the finding that Mr Scullion could not recover compensation for any fall in the value of the Flat between his purchase in October 2002 and its sale in 2006 was not challenged.

From a risk management point of view, despite the Court of Appeal's decision, it remains good practice for valuers and surveyors to:

- 1 Not address any comments in their reports to, nor refer in their reports to the "borrower" or the "loan applicant"; instead refer to them as a *"third party"*.
- 2 Incorporate in their reports an appropriate disclaimer emphasising that the valuation has been done for the lender's use only and draw this to the attention of any third parties.
- 3 As part of the disclaimer, consider inviting third parties to obtain their own independent valuation on both capital value and issues relevant to the viability of any buy-to-let-transaction, including rental income.

- 1 [2010] EWCA Civ 693
- 2 [1990] 1 AC 831
- 3 South Australia Asset Management Corporation v York Montague Limited [1997] AC 191

For more information, please contact

Sarah Mawbey: sarah.mawbey@robinsimonllp.com

Louisa Robbins: louisa.robbins@robinsimonllp.com

Hilary Harrison: hilary.harrison@robinsimonllp.com

Debbie Taylor: debbie.taylor@dcsclaims.co.uk

We can put together a seminar/talk or panel discussion on the issue above, or any of the issues featured in our publications to be held at any of our offices, or yours.

If you are interested, please contact any one of our lawyers or David Simon at: david.simon@robinsimonllp.com

London
Minster House
42 Mincing Lane
London EC3R 7AE
T +44(0)333 010 0000
F +44(0)333 010 0001

Leeds
2 St David's Court
David Street
Leeds LS11 5Q
T +44(0)333 010 0000
F +44(0)333 010 0003

Manchester
80 Mosley Street
St Peter's Square
Manchester M2 3FX
T +44(0)333 010 0000
F +44(0)333 010 0006

Birmingham
37a Waterloo Street
Birmingham
B2 5TJ
T +44(0)333 010 0000
F +44(0)333 010 0005

E info@robinsimonllp.com

W www.robinsimonllp.com

[Terms](#) | [Privacy Policy](#) | [Unsubscribe](#)

These brief articles and summaries should not be applied to any particular set of facts without seeking legal advice. Robin Simon LLP is a Limited Liability Partnership registered in England and regulated by the Solicitors Regulation Authority. Its registered office is at 2 St David's Court, David Street, Leeds LS11 5QA. Registered number OC304019 The Members may also be referred to in correspondence as "partners" in Robin Simon LLP.

Copyright © 2011 Robin Simon LLP