CONTRIBUTORY NEGLIGENCE IN VALUERS' CLAIMS:

THE DECISION IN PLATFORM HOME LOANS LTD -V- OYSTON SHIPWAYS LTD AND OTHERS

By Katherine Holder and Robert Hogarth

Imagine a valuer being asked to value a property by a mortgage lender, for a potential borrower who wishes to re-mortgage. The time is August 1990 and the property a vast nine-bedroomed Georgian house complete with coach house and large garden in Edgbaston, Birmingham. The interior is not what the valuer expects. The house is adorned with gilt ceilings, marble floors and a four poster bathroom (sic). The potential borrower has clearly spent a substantial amount of money on the property.

The valuer is not just impressed, he is mesmerised by the glittering gold and values the property at £1.5m, which is the borrower's own opinion of his property's worth. Never mind that the decoration was not to everyone's taste; that the borrower purchased the house only two years earlier for £375,000; and that the highest price ever paid beforehand for a property in the area was £650,000. Another valuer is similarly carried away and also values it at £1.5m.

As the original trial Judge, Jacob J, in *Platform Home Loans Limited -v- Oyston Shipways Limited & Others said, "being impressed is not the same thing as being able to value a property... Valuation is an art and not a science but it is not astrology... The valuers were star-struck by what they saw and did not have their feet on the ground."* He found that the maximum reasonable valuation for the property in August 1990 was £1 million and that the valuers had been negligent.

Meanwhile, it was the usual story. The valuers lent the sum of £1.05m to the borrower, the borrower defaulted in 1993, and the property market crashed. Following repossession, the lender only managed to obtain £435,000 on the sale. By the time the property was sold, the lender was left with a shortfall of approximately £610,000. The lender sued the valuers on the basis that their valuations, upon which it had relied in making the loan, were negligent.

SAAMCO Starting Point

Now picture the Judge. Having decided that the valuer is liable, should he award the lender the whole of the loss it has suffered, or disregard the loss attributable to the property crash? The lender would not have made the loan but for the valuation, but the general state of the property market was outside the valuer's control. Should the valuer or the lender bear the risk of the property falling in value, not by virtue of any particular characteristic of that property, but owing to market trend?

This fundamental debate had apparently been resolved by the House of Lords in *South Australia Asset Management Corporation -v- York Montague Limited and Others ("SAAMCO")* (reported later at [1997] AC191 and confirmed and applied in *Nykredit Mortgage Bank plc -v- Edward Erdman Group Ltd* (No 2) 1997 1 WLR 1627). In SAAMCO the Court of Appeal had come down on the side of the lender, holding that the valuer should bear the whole risk of the transaction which, but for his negligence, would not have happened.

The Lords reversed that decision. Lord Hoffman thought that the Court of Appeal's decision offended common sense because it made the valuer responsible for consequences which, although in general terms foreseeable, did not appear to have a sufficient cause or connection with the subject matter of the duty, i.e. to provide a valuation of a particular property at a particular date. He considered that unless the valuer's duty extends to advising on the merits of the entire loan transaction, which in normal circumstances it does not, the loss for which the valuer should be responsible is limited to that which falls within the scope of his duty of care. This, the Lords decided, should exclude the loss suffered by the lender as a result of the fall in value of the property market.

However, the Lords chose a mechanism which does not operate by quantifying elements of loss by reference to causation. Instead they adopted the simple mechanism of restricting damages to the difference between (1) the value placed on the property by the valuer at the time the lender made the loan and (2) its "true" value (as decided by the Court with the help of expert evidence) at the same date ("the SAAMCO limit"). In Platform Home Loans the extent of the overvaluation was £500,000. The SAAMCO limit therefore was £500,000 The calculation was simple to do, and did not require an in-depth analysis of causation.

Contributory Negligence

The valuers alleged that Platform Home Loans had itself been contributorily negligent, firstly in acting unreasonably in making a loan of 70% of the property's reported value without investigating the borrower's ability to repay, and secondly, in failing to require part of the re-mortgage application form to be completed, which would have cast considerable doubt on the valuation. If the borrower had been forced to state the price he paid for the Property two years' earlier, the valuation would immediately have been called into question.

The basis for reducing damages for contributory negligence lies in the Law Reform (Contributory Negligence) Act 1945. Section 1(1) provides: *"(1) where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, ... the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage..."*

Jacob J accepted that Platform Home Loans had been contributory negligent. Having assessed the negligence at 20%, he then had to decide whether that 20% should be deducted from the whole of Platform Home Loans' loss or from the limited amount for which the valuer was found to be responsible. The order in which the calculations are done is critical. If the total "uncapped" loss of £610,000 is first reduced by 20% the net damages are £490,000, within the SAAMCO limit of £500,000 and unaffected by it. If, however, the SAAMCO limit is applied first and the damages then reduced for contributory negligence, damages of £500,000 are reduced to £400,000.

In Platform Home Loans, the Judge deducted the 20% for contributory negligence from the lender's total loss. On appeal, the Court of Appeal disagreed with the trial Judge, and held that the damages should be reduced to £400,000. Their decision went to the House of Lords whose Judgment was given in February of this year. By a majority, the House of Lords decided that the SAAMCO limit should be applied second, resulting in the higher award of damages. This pattern of violent swings in outcome from one level of the judiciary to the next has characterised the important decisions on valuers' liability in the 90's.

Lord Hobhouse considered that it was not just and equitable (the test referred to in the 1945 Act) to make a further reduction in the damages beyond that already required by the application of the SAAMCO limit. He considered that the totality of the lender's loss was partly caused by the valuer's fault, and that the reduction for contributory negligence should therefore be applied to the total loss. Otherwise, he considered, the effect was to make the same deduction twice over.

Lord Millett reached a similar conclusion, stating that if the damages were reduced to £400,000, being 80% of the overvaluation of £500,000, *"the remarkable consequence is that... the appellant will bear more than one third of a loss for which it was only 20% to blame."* Lord Cooke, in a dissenting Judgment, considered that, since that valuer was not liable to the lender for the total loss, the starting point should be the SAAMCO limit of £500,000. In his view, the proper award of damages was therefore £400,000. He did not regard the balance of the loss, that is the loss over and above £500,000 suffered by Platform Home Loans as a result of the fall in the property market, as being *"damage"* within the meaning of Section 1(1) of the Act of 1945, since it was not recoverable from the lender.

The majority decision is now the law and there is little point in yielding to the temptation of debating whether or not it correctly applies the rationale of the decision in SAAMCO. Unfortunately, the temptation is for these authors irresistible, who like many others have attempted over a period of more than 5 years to guide their clients through a mass of contradictory and ever changing judicial law.

In the SAAMCO judgment Lord Hoffman pronounced the Delphic statement that his mechanism for excluding losses attributable to falls in the property market was not "a cap". Most commentators wondered what he meant by that, and essentially Platform was purely about that question.

If the applicable rationale of SAAMCO is that valuers should not be liable for falls in the property market, then the SAAMCO limit should be applied before issues of contributory negligence are decided. By adopting the alternative sequence, the Lords in Platform seem to have ignored Lord Hoffman's Delphic words and treated the SAAMCO limit as a "cap".

However, as was immediately apparent, Lord Hoffman's statement that his mechanism is not a "cap" was clearly not true. In the Platform case had the property market not collapsed, the lender would have suffered losses of less than £100,000. Most of the loss awarded against the valuers, using the SAAMCO mechanism, in fact originated purely from falls in the property market. The mechanism does not distinguish between causes of the lender's loss: it simply imposes a limit, as a matter of policy, on the amount recoverable from a valuer for a negligent valuation.

SAAMCO must be understood as though it has written into every valuer's contract a limitation of liability clause reading as follows:-

"In the event of any negligent overvaluation, the valuer shall not be liable for any claims in excess of the amount of any overvaluation".

SAAMCO does not exclude losses attributable to falls in the property market (notwithstanding its purported assertion to the contrary). Recognising that fundamental principle, the decision in Platform Home Loans can be seen as logical and consistent with SAAMCO's true implications. SAAMCO achieves certainty at the expense of a more reasoned or scientific examination of causation.

Remaining Uncertainty

Platform Home Loans had also argued that the nature of the contributory negligence should affect the extent to which the damages should be reduced. It argued that since the SAAMCO rule had limited the damages which lenders were entitled to recover to the extent of the overvaluation, which represented the scope of the duty owed by the valuers, only contributory negligence which had affected the valuation should be taken into account. Any negligence on the part of the lender arising from purely lending issues, such as failing properly to investigate the borrower's ability to repay, should, it argued, be ignored.

The Court of Appeal rejected this argument, as did Lord Hobhouse, who considered it misconstrued the 1945 Act and failed fully to reflect the decision of the House of Lords in SAAMCO which had recognised that the whole of the Plaintiff's loss was caused, in part, by the Defendant's fault. Lord Hobhouse held that provided the

lender's damage had been caused in part as a result of its own fault, the damages would fall to be reduced to such extent as the Court thought "just and equitable".

Lord Millett agreed that the right approach was to reduce the lender's overall loss by 20%. However, the route by which he reached his conclusion allowed the possibility that the nature of the contributory negligence could affect the manner in which damages were calculated: *"where the lender's negligence has caused or contributed directly to the overvaluation, then it may be appropriate to apply the reduction to the amount of the overvaluation as well to the overall loss. Where, however, the lender's imprudence was partly responsible for the overall loss but did not cause or contribute to the overvaluation, it is the overall loss alone which should be reduced, possibly but not necessarily leading to a consequential reduction in the damages. When the consequences of the lender's imprudence cannot be calculated, the Judge will have to do the best he can to assess the party's respective contributions. But the Court should not speculate when it can calculate."*

Since the two instances in which Platform Home Loans was found to be at fault neither caused nor contributed to the overvaluation, Lord Millett's remarks were, strictly, unnecessary for the decision. The remarks do leave open the possibility of arguing that if the lender's negligence has contributed directly to the overvaluation, the reduction could be applied to the amount of the overvaluation (i.e. to the "cap") as well as to the overall loss. This is at odds with the Judgment of Lord Hobhouse, who was at pains to stress that the application of the percentage reduction to the lender's overall loss, followed by the application of the SAAMCO limit, were rules of thumb and did not aspire to mathematical precision. We consider Lord Millett's approach is inconsistent with the SAAMCO mechanism, and that of Lord Hobhouse should be preferred.

It remains to be seen whether a lender will in the future attempt to resurrect the argument that the nature of the contributory negligence should impact on the extent to which the damages should be reduced. Possibly a better opportunity for lenders lies in the words *"just and equitable"*, which allows the Court a great deal of scope in fixing the amount of the reduction to be made. We would submit that if the test of assuming the insertion of a limitation clause is applied, then these cases are no longer difficult to resolve.

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