Neutral Citation Number: [2011] EWCA Civ 693

Case No: A3/2011/2584

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr Richard Snowden QC
Case No: HC07C02643

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/06/2011

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE ETHERTON
and
LORD JUSTICE GROSS

- -

Between:

Emmett Thomas Scullion	**Respondent**
- and -	
Bank of Scotland PLC (trading as Colleys)	**Appellant**

- -
- -

Tom Leech QC and **Thomas Grant** (instructed by **Walker Morris**) for **Bank of Scotland plc**
William McCormick QC and **Philip Noble** (instructed by **Miller Rosenfalck**) for **Mr Scullion**

Hearing date: 23 May 2011

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Judgment

Lord Neuberger MR:

Introductory

1. This is an appeal from an order made by Mr Richard Snowden QC, sitting as a Deputy High Court Judge, by which, following two conspicuously clear and careful judgments, he awarded Mr Emmett Scullion £72,234.54 (plus interest and costs) against the Bank of Scotland plc ("BOS"). Mr Scullion's claim was based on the contention that a valuation, provided for his prospective mortgagee, of a flat which he subsequently purchased, had been negligent. The valuation had been effected by property surveyors trading under the name of Colleys, which, at the time of the valuation had been part of the Halifax plc group, but which was subsequently transferred to BOS. For convenience, I shall refer to the defendant as Colleys.

2. On this appeal, Colleys raise four points, which were argued in the following order. The first and most significant point, both to the parties and more generally, is whether the Judge was right to conclude that Colleys, whose valuation was carried out for Mr Scullion's prospective mortgagee, owed Mr Scullion a duty of care. The second point is whether, having found that Colleys' negligent capital valuation caused Mr Scullion no damage, the Judge was right to assess damages on the basis that Colleys' rental valuation was also negligent. The third point is whether the Judge was right to conclude that Colleys' valuation actually played any part in Mr Scullion's decision to purchase the flat. The fourth point is whether the Judge was right to assess Mr Scullion's damages as being the difference between the outgoings he incurred, and the income he received, in respect of the period of his ownership of the flat.

3. The first point is connected to the second, and the second and fourth points are best taken together. Accordingly, because it raises a self-contained and relatively short issue, I propose to take the third point first, then to deal with the first point, and I will finally briefly discuss the second and fourth points together. Before that, however, it is appropriate to summarise the relevant facts, as agreed or found by the Judge.

The relevant facts

4. Mr Scullion started his working life as a plasterer, and, having become a jobbing builder, he took over a small property management and maintenance company. Having reached the age of 50, he decided to invest some of the money which he had accumulated in his private pension fund, in the residential buy-to-let property market. In February 2002, he attended a seminar on the topic given by a Mr and Mrs Churchill. At the seminar, Mr Scullion met a Ms Lynch who was a mortgage broker, and a Mr Connolly whose business was locating investment properties.

5. Two months later, the Churchills formed a company called Portfolios of Distinction Ltd ("POD"), whose business was the provision of services in connection with finding investment properties, and which had some sort of connection with Mr Connolly. In May 2002, POD approached a company called Linden Homes South-East Ltd ("Linden Homes"), which had developed a building called Fieldgate Court, in Portsmouth Road, Cobham, Surrey ("the block"), which consisted of 18 flats with underground car parking. These flats had been developed with a view to being sold off on long leases. It appears that Mr Connolly either already knew of the flats, or was told about them by the Churchills. Many of the flats had not yet been sold, and Mr

Connolly informed Mr Scullion of the opportunity they represented. Mr Scullion paid him £1,000 as a deposit on (an unspecified) flat.

6. In May 2002, Ms Lynch instructed Colleys to value ten of the flats, apparently as a result of POD's interest in the block. These instructions were given on behalf of a division of BOS, which specialised, *inter alia*, in buy-to-let mortgages. On 7 June 2002, Mr Collins of Colleys visited the block for the purpose of valuing the ten flats.

7. On the same day, Mr Connolly took Mr Scullion to see Mr Churchill, who explained that, in return for a fee of £25,000, POD would, within a year, find him a portfolio of properties worth £1m, which he could acquire for minimal capital outlay. This was on the basis that POD would introduce Mr Scullion to mortgage brokers who would ensure that mortgage finance would be provided for the purchase of properties by reference to appropriate valuations, and that POD would find tenants for those properties and collect the rents, which would be used to finance the interest payments on the mortgages.

8. Mr Scullion decided to enter into an agreement with POD, which reflected this arrangement, and, to that end, after entering into a preliminary contract with POD, he executed a short (and rather one-sided) contract ("the POD contract") on 15 July 2002. Among other provisions, the POD contract included an obligation on POD to propose properties for Mr Scullion to purchase, and that each such proposal would be accompanied by "a full appraisal sheet showing purchase costs and expected rental returns."

9. Meanwhile, Mr Scullion had been in touch with Mr Connolly about buying one of the flats, and Mr Scullion was told that he would be able to buy on the basis that part of the purchase price would be deferred for a year. Mr Scullion then completed a mortgage application form (sent to him by Ms Lynch at Mr Connolly's request), and returned it to Ms Lynch together with a cheque which included a sum to pay for a valuation of the relevant flat for the benefit of the proposed mortgagee. Mr Scullion told the Judge that it did not occur to him to obtain his own valuation, because, as the Judge put it, "so far as he was concerned, the purpose of the valuation was to satisfy the mortgage company of the value of the flat and that the rent would be sufficient to meet the payments on the mortgage" – [2010] EWHC 572 (Ch), para 31.

10. On 20 June 2002, Mr Collins sent his valuation reports on the ten flats which Ms Lynch had asked him to value. The reports were each in the form of a letter addressed to BOS, with a disclaimer of liability to any third party. In relation to the flat which Mr Scullion eventually bought, Flat 17 ("the Flat"), Mr Collins's valuation report ("the initial Report") stated that the capital value was £353,000 and the achievable rental value was £2,000 per month; it contained some details justifying these figures. Mr Scullion did not see the initial Report.

11. By early July 2002, it appears that the flat Mr Scullion had been interested in buying had ceased to be available, but he was told by Mr Connolly that another, namely the Flat, was available, albeit that it was somewhat more expensive. He was told the Flat would cost about £350,000, that he would have to pay a 5% deposit from his own funds, that POD would negotiate a discount of about 10% (the basis and nature of which was never made clear), and that the balance would be funded by a loan secured by a mortgage.

12. At the end of August 2002, Mr Scullion was told by POD that there would be a change of mortgage brokers from Ms Lynch to a Mr Garvin, and that the solicitors acting on the purchase of the Flat would be a firm called Kings.

13. Mr Garvin visited Mr Scullion the next day, and got him to sign an application ("the Application Form") for a so-called "Bond to Let" mortgage on a form designed for buy-to-let purchasers. The Application Form contained a number of provisions in small type which were "only just legible" (according to the Judge – [2010] EWHC 572 (Ch), para 46). They included a provision authorising "the Lender" to obtain a valuation at Mr Scullion's expense, and an acknowledgment by Mr Scullion that neither Mr Garvin nor the Lender were "qualified valuers" or could be liable to him "in respect of the value or state or condition of the property". The Application Form also included a provision that "[t]he inspection of the property will be carried out on behalf of the Lender and will not include a detailed survey", and an acknowledgment that neither the Lender nor the valuer was to be treated as giving any assurance as to the value of the property.

14. On 29 August, having received the Application Form, Mr Garvin telephoned Mr Collins, and asked him to issue his valuation in the standard form of a company called Mortgages plc ("Mortgages"). Mr Collins complied with this and issued a report ("the Report") on behalf of Colleys, on 3 September. The Report consisted of two pages. The first page has Mortgages' name printed at the top right, is headed "Buy to Let Report and Valuation", identifies Mr Scullion as "Applicant", and contains various details of the Flat, such as its location, number of rooms, and services.

15. The second page of the Report has four sections. The first is headed "Suitability of Property for Letting Purposes", where Mr Collins recorded his view of the rental value of the Flat as £2,000 per month, and described the suitability of the location for letting within 60 days as "Average". The second section contains Mr Collins's brief description of the Flat. The third section is headed "Valuation", and records Mr Collins's view of the capital value of the Flat and its area, refers to three transactions relied on in support, and identifies the date of his visit as 7 June 2002. The fourth section is a declaration, and includes the statement that the Flat "offered as security has been inspected by" Mr Collins, and that "the above valuation is a fair indication of the current value for mortgage purposes". The fourth section also states that the Report may be relied on by, and acknowledges a duty of care to, Mortgages "and its successors in title". The Report was signed by Mr Collins and countersigned by a colleague.

16. Mr Garvin paid Colleys £35 (plus VAT) for the Report. On the face of it, this was a low payment for a property valuation, but it was based on the fact that the Report merely involved copying out what was contained in the initial Report. It appears that the £35 was recovered from Mr Scullion, presumably through the sum paid to Ms Lynch as referred to in para 9 above.

17. On the same day, contracts were exchanged for the sale of the Flat between solicitors for Linden Homes, and Kings on behalf of POD. This contract ("the sale contract") recorded a purchase price of £352,950 (plus £4,000 for carpets and a fireplace). POD apparently did not have Mr Scullion's authority to commit him to this transaction, but they behaved as if they did, and as if they were acting on his behalf.

18. Although the ostensible purchase price was £352,950, there was a provision which provided for a "gifted deposit" of 15%. This mysterious provision betrays the fact that the transaction appears to have been part of a regrettably familiar form of mortgage fraud, but nothing hangs on that, as the Judge acquitted Mr Scullion of involvement in any wrongdoing. The essence of the point for present purposes is that, as the Judge explained, the total consideration paid for the Flat was, in reality, £300,007.50. In addition to this 15% "gifted discount", there was a provision whereby 10% of the purchase price was deferred The contract provided that the sale was conditional on the purchaser obtaining a mortgage offer of at least £283,000.

19. Two weeks later, a mortgage offer ("the offer") in the sum of £290,766 was sent by Mortgages to Mr Scullion together with a copy of the Report. The offer included a rather obscurely worded provision, which imposed a penalty for early repayment. Mr Scullion was unhappy with this penalty provision, but was (quite wrongly) advised by Kings that he nonetheless was obliged to accept the offer and complete the sale contract, and completion took place on 10 October 2002. The effect of the 15% "gifted discount" and the 10% deferred payment was that Mr Scullion did not have to pay any of his own money on completion. He had paid £900 out of his own monies by way of a deposit on exchange of contracts, and, on completion, he received £156.69, which was the balance of the mortgage monies after the purchase price and conveyancing expenses had been paid.

20. Thereafter, POD failed to let the Flat, and Mr Scullion decided to find a tenant himself. Local letting agents told him that a rent of £2,000 per month was unachievable, and they eventually found him a tenant in April 2003 at £1,050 per month. The tenant vacated after a year.

21. In spring 2004, following a dispute with Linden Homes, Mr Scullion paid them a total of £32,500 to meet his liability for the 10% deferred payment under the sale contract. Meanwhile, following the tenant vacating the Flat, Mr Scullion put it on the market. It took some time to sell, at least in part because of Kings' failure to register his title properly. Eventually, the Flat was sold for £270,000 in May 2006. Mr Scullion paid Mortgages £260,032.17, leaving a balance on his mortgage account of £61,932.15, which has remained unpaid.

These proceedings

22. Mr Scullion issued proceedings against Colleys on the basis that (i) he had relied on the capital and rental valuations in the Report when deciding to purchase the Flat, (ii) Colleys owed him a duty of care when preparing the Report, (iii) the capital and rental valuations of the Flat in the Report had been negligently high, (iv) Colleys' defences based on disclaimer of liability and the principle of *ex turpi causa non oritur actio* were misconceived, and (v) he was therefore entitled to damages. After a five day trial, the Judge held that Mr Scullion succeeded on all five points – see [2010] EWHC 572 (Ch). The Judge then heard further argument on quantum, and held that (vi) 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, but (vii) 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, but (viii) he was not entitled to any further damages - [2010] EWHC 2253 (Ch).

23. Colleys appeal against findings (i), (ii), (v) and (vii), but (realistically) they do not appeal against finding (iii) and (iv); Mr Scullion (again realistically) does not appeal against findings (vi) and (viii).

24. As indicated, I propose to deal first with issue (i), reliance, then with issue (ii), duty of care, and then compendiously with issues (v) and (vii), measure of damages.

Was the Report causative of Mr Scullion's loss?

25. The issue whether Mr Scullion relied on the Report when deciding to proceed with his purchase of the Flat is a matter of fact (albeit, arguably, inferential rather than primary fact) and therefore very much a matter for the Judge. Unless he misdirected himself relevantly as to a matter of law, or took into account irrelevant material or failed to take into account relevant material, or unless there was no evidence to support his view, or he reached a conclusion on the point which no reasonable judge could have reached, an appellate court should not interfere.

26. At [2010] EWHC 572 (Ch), para 143, the Judge "accept[ed] Mr Scullion's evidence that it was essential to him that the property was worth the value which the mortgagee's valuer placed upon it and that it would generate the level of rentals which the valuer advised could be obtained." He rejected the contention that the fact that Mr Scullion only saw the Report after exchange of contracts assisted Colleys' case, as he had not authorised the exchange, and could have refused to complete. That is because Mr Scullion was advised by Kings that he was obliged to complete – advice which appears, at least on the evidence we have seen, to have been negligent at best.

27. The Judge also rejected Colleys' argument that Mr Scullion cannot have relied on the Report when he completed, because he completed simply in the light of Kings' (wrong) advice that he was obliged to do so. In rejecting that contention, the Judge said that, in order to succeed, Mr Scullion had to show that the Report had played a "real and substantial part" in inducing him to enter into the relevant transaction. There has been no challenge to that test, which is derived from the judgment of Phillips J in *Banque Bruxelles Lambert SA v Eagle Star Life Insurance* [1995] 2 All ER 769, 793h-794d. In my view, it is the correct test (although I doubt that the words "real and" add anything other than emphasis).

28. Turning to Kings' negligent advice, the Judge said that, although it obviously played a large part in Mr Scullion's decision to complete the purchase of the Flat, he had also relied on the contents of the Report which he had seen, and on the fact that the mortgage offer (without which he could have refused to complete, even on the basis of Kings' advice) had only been made because of the valuations in the Report. Unless this conclusion was against the weight of the evidence, it must stand.

29. We were taken to various passages in the transcript of Mr Scullion's evidence in cross-examination and re-examination. It is always difficult to know what weight to give to the testimony of a party who is asked what he would have done if negligent advice had not been given: not only is it a hypothetical question, but the witness almost always knows what it is in his interest to answer, and will have had a long time to persuade himself of the truth of that answer. In this case, despite Mr Leech QC's valiant attempts on behalf of Colleys to get him to do so, Mr Scullion never reneged from his position that he did rely on the Report when deciding to complete the

purchase of the Flat, although it is fair to say that some of his answers were pretty unclear and ill thought out.

30. In my view, when it came to considering whether the Report had been relied on by Mr Scullion when deciding to proceed with the purchase of the Flat, the Judge asked himself the right question, and answered it in a way which was, to put it at its lowest, open to him on the evidence. It is far from fanciful to think that Mr Scullion could have been prepared to refuse to complete the purchase of the Flat, despite Kings' advice that he was obliged to do so, if he had appreciated that the capital and rental valuations in the Report were significantly too high. As the Judge said, if he had appreciated that fact, he may well have "refuse[d] to complete and take his chances in litigation" – [2010] EWHC 572 (Ch), para 150.

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

31. The Report was, both as a matter of fact and according to its terms, prepared for Mortgages in its capacity as prospective mortgagee of the Flat. There can therefore be no doubt but that Colleys owed a duty of care in tort (as well as contract) to Mortgages to prepare the Report, and in particular the capital and rental valuations it contained, with appropriate skill and care. The question is whether the scope of that duty extended to Mr Scullion as the prospective mortgagor and purchaser of the Flat.

32. The Judge's conclusion that Mr Scullion was within the scope of Colleys' duty rested on the decision and reasoning of the House of Lords in *Smith v Eric S Bush* [1990] 1 AC 831. That decision involved two cases, in each of which a valuer instructed (in *Smith v Bush* itself) or employed (in *Harris v Wyre Forest District Council*) by the prospective mortgagee, to prepare a report on a property for the mortgagee, was held to owe a duty of care to the prospective mortgagor-purchaser. In each case, the property involved was a relatively modest house to be acquired as a residence by the purchaser, and the purchaser had reimbursed the mortgagee the cost of the report.

33. In both cases, the purchaser's claim against the valuer succeeded. Reasoned speeches were given by Lord Templeman, Lord Griffiths and Lord Jauncey, and Lord Keith and Lord Brandon agreed with all three reasoned speeches.

34. It is worth mentioning that, while it was contended in *Harris v Wyre Forest* that no duty of care was owed to the purchaser by the local authority, either as prospective mortgagee or as the employer of the negligent valuer, it was conceded in *Smith v Bush* that a duty of care was owed by the valuer engaged by the mortgagee to the purchaser. The only issue in *Smith v Bush* was whether a disclaimer of liability was effective – see at [1990] 1 AC 830, 856.

35. In addition to the passages in the speeches dealing with the appeal in *Harris v Wyre Forest*, where the issue at stake was plainly in point for present purposes, we were referred to observations which went to the issue in *Smith v Bush.* I am not persuaded that it is safe to rely on those observations. It is true that the question whether the valuer's disclaimer satisfied the requirement of reasonableness under the Unfair Contract Terms Act 1977 involved issues similar to those raised by the question whether the valuer owed a duty of care. However, not all the same factors necessarily arise on each question, and, even if they did, it does not follow that they should be

given the same weight. Certainly, in each of the three speeches, the two questions were discussed separately.

36. Lord Templeman described "the relationship between the valuer and the purchaser as 'akin to contract'", because "[t]he valuer knows that the consideration which he receives derives from the purchaser and is passed on by the mortgagee, and the valuer also knows that the valuation will determine whether or not the purchaser buys the house" – [1990] 1 AC 830, 846. He appeared to consider that the vital point was that "the valuer … know[s] that the valuation fee has been paid by the purchaser, and … that the valuation will probably be relied on by the purchaser in order to decide whether … to purchase the house" - [1990] 1 AC 830, 847, and repeated the point on the following page of the report. He also referred to the fact at [1990] 1 AC 830, 852 (albeit in the context of the disclaimer issue in *Smith v Bush*) that "the valuer knows that 90 per cent of purchasers in fact rely on a mortgage valuation and do not commission their own survey", pointing out that "[m]any purchasers cannot afford a second valuation."

37. In his speech, Lord Griffiths said, at [1990] 1 AC 830, 862, that in cases such as *Hedley Byrne & Co Ltd v Heller & Partners* http://www.bailii.org/uk/cases/UKHL/1963/4.html[1964] A.C. 465:

> "[T]he advice was being given with the intention of persuading the recipient to act upon it. In the present case, the purpose of providing the report is to advise the mortgagee but it is given in circumstances in which it is highly probable that the purchaser will in fact act on its contents, although that was not the primary purpose of the report. I have had considerable doubts whether it is wise to increase the scope of the duty for negligent advice beyond the person directly intended by the giver of the advice to act upon it to those whom he knows may do so. Certainly in the field of the law of mortgagor and mortgagee there is authority that points in the other direction."

38. However, after considering the relevant principles, Lord Griffiths concluded that a duty of care should be owed by a valuer "only if it is foreseeable that if the advice is negligent the recipient is likely to suffer damage, that there is a sufficiently proximate relationship between the parties and that it is just and reasonable to impose the liability" – [1990] 1 AC 830, 865. He continued:

> "In the case of a surveyor valuing a small house for a building society or local authority, the application of these three criteria leads to the conclusion that he owes a duty of care to the purchaser. If the valuation is negligent and is relied upon damage in the form of economic loss to the purchaser is obviously foreseeable. The necessary proximity arises from the surveyor's knowledge that the overwhelming probability is that the purchaser will rely upon his valuation, the evidence was that surveyors knew that approximately 90 per cent of purchasers did so, and the fact that the surveyor only obtains the work because the purchaser is willing to pay his fee. It is just and reasonable that the duty should be imposed for the advice is given in a professional as opposed to a social context and liability for breach of the duty will be limited both as to its extent and amount. …

> The amount of the liability cannot be very great because it relates to a modest house. … I would certainly wish to stress that in cases where the advice has not been given for the specific purpose of the recipient acting upon it, it should only be in cases when the adviser knows that there is a high degree of probability that some other identifiable person will act upon the advice that a duty of care should be imposed."

39. At least on the face of it, Lord Griffiths may seem to have circumscribed the circumstances in which a valuer, who values a property for a mortgagee, can be liable to the purchaser, even where he knows that the purchaser will be shown the valuation and will be paying for it, rather more than Lord Templeman. However, Lord Templeman said in terms at the end of his speech that he agreed with Lord Griffiths's speech – see at [1990] 1 AC 830, 854.

40. Lord Jauncey, at [1990] 1 AC 830, 872, referred to *Hedley Byrne* [1964] AC 465, where, as he put it, the defendant "was effectively the only source of [the relevant] information", and said that:

> "It would not be difficult therefore to conclude that the person who sought such information was likely to rely upon it. In the case of an intending mortgagor the position is very different since, financial considerations apart, there is likely to be available to him a wide choice of sources of information, to wit, independent valuers to whom he can resort, in addition to the valuer acting for the mortgagee. I would not therefore conclude that the mere fact that a mortgagee's valuer knows that his valuation will be shown to an intending mortgagor of itself imposes upon him a duty of care to the mortgagor. Knowledge, actual or implied, of the mortgagor's likely reliance upon the valuation must be brought home to him. Such knowledge may be fairly readily implied in relation to a potential mortgagor seeking to enter the lower end of the housing market but non constat that such ready implication would arise in the case of a purchase of an expensive property whether residential or commercial."

41. Lord Jauncey had little difficulty in accepting that a surveyor who frequently acted for a building society (as in *Smith v Bush*) would be aware that purchasers of cheaper houses relied on valuations provided to building societies (but that was in the context of a concession of liability by the valuer in that case, subject to the disclaimer of liability). However, it is interesting to note that he was by no means so sure where the valuer was the employee of a local authority mortgagee (as in *Harris v Wyre Forest*). He referred to an earlier case, *Yianni v Edwin Evans & Sons* [1982] QB 438, where, as he explained, Park J "concluded that the defendant surveyors … were aware that their … valuation would be passed on to the [purchasers] and were aware that [they] would rely upon it". Lord Jauncey continued:

> In the absence of such a specific finding of awareness in the present case I do not think that it can necessarily be assumed that the experience of a local authority valuation surveyor must be the same as that of an independent surveyor regularly acting on behalf of a

> large building society. … I do not find it easy to infer from such findings as were made by [the trial judge] that [the valuer] was aware that the Harrises would be likely to buy on reliance on his valuation without obtaining further advice. However, I understand that your Lordships do not share this difficulty and in these circumstances I do not feel disposed to dissent from the majority view."

42. The decision in *Smith* [1990] 1 AC 830 was considered in three of the speeches in the subsequent House of Lords case of *Caparo Industries plc v Dickman* [1990] 2 AC 605. Lord Bridge referred to the importance of the fact that the valuer knew it was "very likely" that the purchaser in *Harris v Wyre Forest* would rely on the valuation - [1990] 2 AC 605, 621. After approving an observation of Millett J that the valuation in *Harris v Wyre Forest* would "almost certainly be relied on" by the purchaser, Lord Oliver pointed out at [1990] 2 AC 605, 642, that "no decision of this House has gone further" (but that was in connection with a claim which unsuccessfully sought to extend the scope of the duty of care for an auditor for negligent misstatement to an indeterminate and potentially unlimited class of persons). Lord Jauncey said that *Smith* [1990] 1 AC 830 turned on the fact that the valuer knew that the valuation "had been paid for by the plaintiff, and would be shown to and probably relied on by her in deciding whether or not to buy the house" - [1990] 2 AC 605, 657.

43. In the present case, the Judge found that (i) Mr Collins "knew or ought to have known that there was a very high probability" that the Report would be shown to Mr Scullion (at [2010] EWHC 572 (Ch), paras 65 and 85), (ii) Mr Scullion relied on the Report when deciding to proceed with the purchase of the Flat (discussed in the previous section of this judgment), and (iii) Mr Collins knew that Mr Scullion would have paid for the Report, by reimbursing Mortgages, the prospective mortgagee for whom it was prepared at [2010] EWHC 572 (Ch), para 85). I have already explained why I would reject the attack on finding (ii) and I did not understand findings (i) or (iii) to be challenged on behalf of Colleys.

44. These three findings get Mr Scullion's case that Colleys owed him a duty of care a considerable way. However, as explained in all three of the reasoned speeches in *Smith* [1990] 1 AC 830 and by Lord Bridge in *Caparo* [1990] 2 AC 605, 617-8, he needs to establish foreseeability of damage, a sufficient degree of proximity between him and Colleys, and that it would be "fair, just and reasonable" to impose on Colleys a duty of care to him.

45. In that connection, the first question is whether Mr Collins appreciated, or ought to have appreciated, that the Report would be relied on by Mr Scullion when deciding to purchase the Flat. In his evidence to the Judge, Mr Collins did not accept that he appreciated this, nor did he admit that he ought to have done so. Nor was any evidence led on the point - e.g as to what a normally well-informed valuer would have known, or what normal practice was among buy-to-let purchasers. The Judge nonetheless held that the reasoning in *Smith* [1990] AC 830 (and in particular in *Harris v Wyre Forest*) applied, so that Colleys should, in effect, be treated as knowing that Mr Scullion would probably rely on the Report, and hence he effectively found foreseeability and proximity established. By holding that the reasoning in *Smith* [1990] AC 830 (and in particular in *Harris v Wyre Forest*) applied, the Judge also

effectively must have found that it was just and reasonable to hold that Colleys owed a duty of care to Mr Scullion when preparing the Report.

46. In my view, this case is distinguishable from the two cases considered in *Smith* [1990] AC 830 on four grounds, which are to some extent connected, and which all stem from the fact that the transaction which Mortgages was proposing to fund, as Mr Collins well knew (not least because it was stated in terms at the top of the Report), was the purchase of a residential unit, not as the purchaser's residence, but for the purpose of an investment. In other words, this was not a case, such as those considered in *Smith* [1990] 1 AC 830, which involved an "ordinary domestic householder purchasing his home" as it was put by Henry LJ in *Omega Trust Ltd v Wright Son & Pepper* [1997] 1 EGLR 120, 122.

47. I consider that, in the light of this feature of the transaction underlying the proposed mortgage, at least on the evidence available to the Judge, it is not sufficiently clear that it would have been foreseeable to Mr Collins that Mr Scullion would rely on the Report, rather than obtaining 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 damage 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 that the underlying transaction was a 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* [1990] 1 AC 830.

48. It is to be noted that that Lord Griffiths had "considerable doubts" about finding for the plaintiffs in *Harris v Wyre Forest*, and that Lord Jauncey did not think it "easy" either. We were also referred to *Williams v Natural Life Healthfoods Ltd* [1990] 1 WLR 830, 837, where Lord Steyn said that *Harris v Wyre Forest* was "decided on its own special facts". I also see that the decision was described as "represent[ing] the high water mark in this field" where "Lord Griffiths took the view [it] was at the outer limit" by Balcombe LJ in *Saddington v Colley Professional Services* [1999] Lloyd's Rep PN 140, 143. The editors of *Jackson & Powell on Professional Liability* (6th edition, paras 10-049 to 10-051) suggest that the decision should not be extended, both as a matter of principle and because of the double jeopardy to which exposes a valuer, namely to mortgagee and purchaser. 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. I turn to my four specific reasons.

49. First, the transaction in the present case was, from the point of view of the purchaser, essentially commercial in nature. That may not be decisive of itself, but it seems to me to colour the issue. At least when it comes to lower or middle range properties, people who buy properties to let are, as a class, likely to be richer and more commercially astute than people who buy to occupy. People who buy to let can therefore be regarded as more likely to obtain, and more able to afford, an independent valuation or survey. As Lord Templeman said in *Smith* [1990] 1 AC 830, 852, many people buying a property for their home have little money left to pay for their own survey, whereas there is no reason to think that the same is true of people buying a property as an investment to let. Further, commercial purchasers of low to

middle value residential 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.

50. Secondly, the evidence accepted by the House in *Smith* [1990] 1 AC 830 was that "surveyors knew that approximately 90 per cent of purchasers" relied on valuations provided to mortgagees when deciding whether to purchase, and so "the overwhelming probability is that the purchaser will rely upon his valuation" – see for instance per Lord Griffiths at [1990] 1 AC 830, 862. At the time of that decision, the buy-to-let market was pretty undeveloped insofar as it involved individuals. Certainly, there was no evidence to support the proposition that anything like 90% of those people who bought to let in 2002 relied only on valuations prepared by a valuer instructed by their mortgagees, rather than obtaining their own valuation. The only evidence of any possible relevance we were taken to suggests that a little over 40% of buy-to-let owners own only one or two properties, but that would indicate that the great majority of purchases in that market are by people who own more than two properties. (The figure of 40% is taken from the evidence given to Mann J in *The Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), para 28; it is germane to mention that the 90% figure in *Smith* [1990] 1 AC 830 was based on the evidence given in another case, namely *Yianni* [1982] QB 438 – see at [1990] 1 AC 830, 852).

51. Thirdly, as any valuer would appreciate, a purchaser buying a property to let is at least just as interested in its rental value as he is in its capital value. He needs to make sure that the rental income will meet his outgoings on the property, including, in particular, the payments due under the mortgage, every bit as much as he needs to make sure that he is not overpaying for the property. As Etherton LJ pointed out, unlike capital value, rental return can be a tricky and sensitive issue, as is well demonstrated by the fact that the Report had to state how easy it would be to let the Flat within sixty days. A valuer valuing a property for a prospective mortgagee for a buy-to-let purchaser would, I think, expect the purchaser, at any rate if he was prudent, to obtain his own advice on some important matters not covered in the Report. Those matters would include the ease with which the property could be let, the level of rent he could expect to get, the rent free period he may have to allow, the other terms he would have to agree, the fee he would have to pay for finding a tenant, the fee payable for managing the property, the likely length of any tenancy, and the probable period of any voids.

52. Fourthly, where a property is being bought to let, a valuer instructed by the prospective mortgagee would appreciate that his client is primarily interested in the property's capital value, because a mortgagee's principal concern is that any loan is properly secured and can be repaid, if necessary, out of the proceeds of sale of the property. That is why the "Valuation" section of the Report in this case is only concerned with the capital value of the property, and does not extend to its rental value. The only section of the Report dealing with rental value is headed "Suitability for Letting", which may well be included solely, or at least primarily, to confirm to the mortgagee that the property was suitable for the purpose for which it was being ostensibly acquired by the purchaser.

53. It can fairly be said on behalf of Mr Scullion that the third and fourth reasons only go to the rental valuation. However, there are two answers to that. The first is that, if there was no duty of care in relation to the rental valuation in the Report, because one would have expected Mr Scullion to obtain his own rental valuation of the Flat, it

follows that one would have expected him to instruct his own valuer. At least in the absence of evidence to the contrary, I would have thought that the natural inference is that that valuer would also have been asked to advise on the capital value. Secondly, and more specifically to this case, even if that is not right, the only damages awarded to Mr Scullion by the Judge were based on Colleys' negligent rental valuation.

54. For these four (connected) reasons, it seems to me that there is no inherent likelihood that a purchaser, buying the Flat for the purpose of letting it out, would rely on a valuation provided to the mortgagee. Unlike in *Harris v Wyre Forest*, or indeed in *Smith v Bush* or in *Yianni* [1982] QB 438, there is simply no evidence to suggest that there was "a high degree of probability", let alone that there was an "overwhelming probability", or that it was "very likely" or "almost certain" (to use the expressions of Lord Bridge and - quoting Millett J – Lord Oliver in *Caparo* [1990] 2 AC 605, 621, 642) that a purchaser such as Mr Scullion would be expected to rely on the mortgagees' valuation, rather than obtaining his own valuation advice on the rental and capital values of the Flat.

55. It can fairly be said that the notion that a person in Mr Scullion's position would, and, many people might think, should, have been prepared to spend money on his own valuation derives a little support from the £25,000 which he agreed to pay POD (albeit that it is only right to add that Colleys were unaware of POD's involvement at the time they made the Report).

56. For Colleys, Mr Leech QC identified one or two other points of distinction between this case and the cases considered in *Smith v Bush* [1990] 1 AC 830. First, he said, the Flat was not necessarily a modest property in the same league as the property in *Harris v Wyre Forest*, which was bought for £9,450 around 1980. House price inflation over the last two decades of the last century was very substantial, but I would be inclined to accept that the Flat was a more valuable property than that considered by the House of Lords. However, not only is that a matter of speculation, but I am unpersuaded that the difference is of great magnitude, and therefore of any real relevance.

57. Secondly, Mr Leech relied on the low figure paid by Mortgages, and hence by Mr Scullion, for the Report, namely £35 (because this was a valuation which Mr Collins had already been paid for by another prospective mortgagee, namely BOS). The figure is very small, and one sees how it may be said that that is of a little additional assistance to Colleys' case. However, I do not consider that it carries any significant weight. £35 was what Colleys were prepared to accept for providing the Report with all that it entailed. It may have represented little more than the equivalent of an insurance premium for exposing themselves to liability for negligence in providing the Report, but, if Mr Scullion effectively did no more than pay for such insurance, that is enough to satisfy the principle behind the requirement that he paid for the Report.

58. Thirdly, Mr Leech relies on the fact that Mr Scullion's purchase of the Flat was intended to be the first in a portfolio of properties to be acquired through POD. That was not known by Colleys, and is anyway taken into account by the fact that this was a buy-to-let property as discussed above.

59. Fourthly, Mr Leech points out that Mr Scullion had been told on the Application Form that any valuation would be provided without liability for negligence. I consider that that merely goes to the issue of whether it was reasonable for Mr Scullion to have relied on the Report. It seems to me that it cannot go to the question of whether he was owed a duty of care by Colleys, as it was agreed that that issue must be judged from Colleys' perspective, and they were unaware of that statement on the Application Form.

60. Finally, picking up the point made in *Jackson & Powell* (op cit, para 10-051), Mr Leech says that it would be unfair that Colleys should be liable to both Mr Scullion and Mortgages. I do not think that there is anything in that point. The alleged unfairness can be said to arise in any case where the mortgagee's valuer is held liable to the mortgagor-purchaser. Thus, the problem also applied in *Harris v Wyre Forest*, and indeed in *Yianni* [1982] QB 438, which was approved in *Smith* [1990] 1 AC 830 (although it is fair to say that it does not appear to have been raised in argument in either case). The problem arises from the fact that the law does not impose some sort of obligation on the purchaser to pay any money which he owes to the mortgagee out of the damages which he recovers from the valuer. At least to an extent, the problem can be dealt with by the valuer joining the mortgagee to the purchaser's proceedings. It is not, of course, desirable to increase the number of parties to a claim beyond what is strictly necessary, but, if joined solely for this purpose, the mortgagee need play no part in the proceedings, save after judgment.

61. Although it seems to me that these additional points are therefore of no assistance to Colleys' case, I would, for the reasons given in paras 46-54 above, hold that they owed no duty of care to Mr Scullion. While that renders it unnecessary to consider the damages awarded by the Judge, I think that it would be right to address that issue, albeit shortly. The Judge's approach to the measure of damages was not, in my view wholly correct, and, as it may otherwise be relied on in other cases, that should be explained. However, as the argument on the issue was somewhat attenuated, it would be wrong to deal with all the issues arising on damages, as it is unnecessary to do so.

The measure of damages

62. The Judge assessed Mr Scullion's damages by reference to the fact that the rental value of £2,000 per month ascribed to the Flat in the Report was negligently high. In order to assess damages, he took the aggregate of the rents which Mr Scullion actually received, deducted it from the outgoings which he had to pay until he sold the flat, and awarded him the difference.

63. Mr Leech contends that the Judge was wrong to award damages by reference to the rental value ascribed to the Flat. I would reject that contention. For the reasons already explained in para 51 above, it seems to me that, if a valuer, who is asked to assess the rental value of a property which he knows is to be bought to let, owes a duty of care to the prospective purchaser, that duty must extend not only when assessing the capital value of the property, but also the rental value.

64. The attack on the Judge's assessment of damages seems to me to have more force. As the Judge accepted, the approach in case such as this, involving properties purchased pursuant to a negligent valuation, is governed by the general guidance given by Lord Hoffmann in *South Australia Asset Management Corporation v York Montague Ltd*

[1997] AC 191 (albeit that the cases there considered all involved mortgagees rather than purchasers). In effect, the damages must be limited to "the consequences of the [relevant] information being inaccurate", at [1997] AC 191, 213.

65. In this case, the inaccurate information was that the rental value of the Flat was £2,000 per month, and the extent of the inaccuracy was that the correct figure was about £1,050 per month. The damages which the Judge awarded effectively ascribed all the loss of revenue suffered by Mr Scullion to the inaccurate rental valuation. In other words, he seems to have thought that the damages should be such as to ensure that Mr Scullion was not out of pocket, at least in terms of revenue, as a result of buying the Flat. I do not consider that such an approach represents the right approach to assessing the loss that he suffered as a result of Colleys' negligent rental valuation of the Flat. As Mr Leech says, that approach is close to treating the negligent misstatement as a warranty.

66. The Flat would have taken some time to let anyway, so there would have been a period during which the outgoings (mortgage repayments and any payments in respect of the Flat) would have been uncovered in any event. Although it took around six months to let the Flat, much of the delay was no doubt due to the initial seeking of an unrealistic level of rent, which is plainly attributable to Colleys' negligent rental valuation. It could be right to take Colleys' sixty day "average" figure within which a letting would be likely, but, as Mr McCormick QC points out for Mr Scullion, Colleys allowed only a month in their case before the Judge, so that is the period I would allow. So, nothing should be allowed for October 2002, and from November 2002 to April 2003, a period during which the Flat was not let, there would have been a recoverable loss of £2,000 per month.

67. From May 2003 to April 2004, when the Flat was let at £1,050 per month, the recoverable loss would be £950 per month. The tenant vacated after a year, so May 2004 would be another month for which no loss should be allowed. In respect After May 2004, it is hard to decide how much loss to accord Mr Scullion. The difficulties he was in from May 2004 until he sold the Flat in May 2006 may have been because of a decision to keep it empty so he could sell it with vacant possession, and the time which that took was, in part, attributable to Kings' failure to register his title properly. If so, there would be a powerful case for saying that no, or at any rate rather limited, damages would be attributable to Colleys in respect of that period, as he would have received no income from the Flat, whatever its rental value may have been.

68. Having said that, it may well be that there should be some damages in respect of that period. If so, I would agree with Mr Leech that it is hard to see how Mr Scullion could claim more damages in respect of these two years than at the rate already mentioned, namely £950 per month, save, perhaps, in respect of, say, one of those twenty-four months, when he would have had to suffer a void while he would have been finding a new tenant. Given my conclusion that Mr Scullion has no claim against Colleys, I do not consider it would be appropriate to consider this aspect further, in the light of the limited argument, and very limited reference to the evidence, we had on the topic (and that is not said critically of counsel).

Conclusion

69. For the reasons given above, I would allow this appeal, dismiss Mr Scullion's claim, and enter judgment for Colleys. That is not a conclusion I reach with any satisfaction. Mr Scullion appears to have been taken advantage of by POD, to have been misled very badly by Kings, to have been innocently involved in a mortgage scam orchestrated by a number of people, and to have been misinformed by Colleys. As a result, he bought the Flat and lost a not insignificant amount of money.

70. Given that Colleys were negligent and their negligence was one of the causes of his loss, it would have been much more attractive to be able to conclude that they should make good at least some of his loss, particularly if, as I strongly suspect is the case, the bill would be footed by insurers. However, as a matter of general principle, and the field of negligence is certainly no exception, the law must be developed in a principled and coherent way, and 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 necessarily 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.

Lord Justice Etherton:

71. I agree.

Lord Justice Gross:

72. I also agree.