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Buy-to-Let

Buy-to-let Purchasers cannot rely on Mortgage Valuations

A judgement of the Court of Appeal given on Friday 17th June 2011 has made it clear that buy-to-let purchasers cannot rely on valuation reports prepared by surveyors appointed by their mortgage lender.

In the 1990 House of Lords case of Smith v. Eric S Bush the Court considered whether or not a property surveyor preparing a valuation report for a lender also owed a duty of care to the borrower. Although there is no contractual relationship between the borrower and the surveyor, the House of Lords nevertheless decided that the surveyor's duty of care to the lender, to prepare the valuation report with skill and care, also extends to the purchaser of the property being valued.

The case of Scullion v. Bank of Scotland plc (trading as Colleys) was heard by the Court of Appeal on appeal from the Chancery Division of the High Court. In the initial High Court case, Mr Scullion was awarded damages of over £70,000.00 against Colleys on the basis of a negligent valuation, provided for his prospective lender, of a flat which he subsequently purchased.

The brief facts are as follows. Mr Scullion was a plasterer and jobbing builder who decided to invest some of the money from his private pension fund in the residential buy-to-let property market. He offered to purchase a new flat being built in Cobham, Surrey and submitted a mortgage application via a broker. Colleys were asked by the proposed lender to value the property and also to provide advice as to the likely rental return. In their report they advised that the achievable rental was £2,000.00 per month. The valuation was addressed to the lender and initially Mr Scullion did not see it. Before he completed his purchase, Mr Scullion was advised to change to a different lender but Colleys were asked to re-issue their valuation report for the benefit of the new lender. It would seem that Mr Scullion did see this subsequent report. He purchased the property and then found that he was only able to let the property for £1,050.00 per month.

The most important part of the appeal turned on whether Colleys owed Mr Scullion a duty of care when submitting their report to his lender, in addition to the duty that they undoubtedly owed to the lender.

In the High Court, the judge had followed the 1990 case of Smith v Bush and concluded that a surveyor owed a duty of care not only to the lender but also to the purchaser. A large part of the reasoning in Smith v Bush turned on the fact that the valuer knew that it was very likely that the purchaser would be relying on the valuation.

In the case of Mr Scullion, the court found:

1. That Colleys knew or ought to have known that there was a very high probability that their report would be shown to Mr Scullion;

2. That Mr Scullion did rely on the report when deciding to proceed with the purchase; and

3. That Colleys knew that Mr Scullion would have paid for the report by reimbursing the mortgage lender.

However, the Court of Appeal distinguished Mr Scullion's case from that of Mr Smith. In doing so, the Master of the Rolls drew the distinction between somebody, like Mr Smith, who was purchasing a property as their home and somebody, like Mr Scullion, who was purchasing a buy-to-let property. He indicated that the latter is "essentially commercial in nature" and that "people who buy properties to let are, as a class, likely to be richer and more commercially astute than people who buy to occupy". For that reason, he considered that buy-to-let purchasers are more likely to obtain and be able to afford an independent valuation or survey. 9168865v1/MKT - LAYTONS 2

He also indicated that a statement made in Smith v Bush that "surveyors knew that approximately 90% of purchasers relied on valuations provided to mortgagees" did not apply to buy-to-let properties. Evidence was adduced that nearly 60% of buy-to-let owners own more than 2 properties and, consequently, the court considered them to be more likely to obtain independent advice of their own.

The Master of the Rolls also pointed out that Mr Scullion's claim was largely based on the rental value not having been achieved and the losses that he suffered as a result of that, whereas that would not have applied to a prospective owner/occupier like Mr Smith.

Whether the Master of the Rolls' assumptions about the affluence and commercial astuteness of investors, and the extent to which they obtain advice, are correct or not, it is now clear that anyone purchasing a buy-to-let property must obtain their own independent advice on both the capital value of the property that they are purchasing and also the likely rental that may be achieved on a letting of the property. Any information provided by the lender's valuer to the lender which comes to the attention of the purchaser must be regarded as solely for the purposes of allowing the lender to assess whether or not

to make the loan to the purchaser.

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