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Legal alert

November 2015

Lloyds Bank plc v McBains Cooper Consulting Ltd, [2015] EWHC 2372 (TCC)

A recent court case has highlighted the importance of the relationship between a lender and a technical adviser in the context of a development finance transaction.

In this case, Lloyds Bank plc (the "Lender") had provided a loan facility in the sum of £2.625 million to an SPV (the "Borrower") in order to finance the redevelopment of a church in North-West London (the "Project"). The project monitor engaged by the Lender was McBains Cooper Consulting Ltd (the "Project Monitor"). The Project Monitor's responsibilities included visiting the site, monitoring the progress of the Project and providing a monthly report to the Lender outlining the progress of the works and providing advice to the Lender in relation to drawdown requests being made by the Borrower.

The Project had difficulties from the outset. There was inherent confusion as to what the amount of the facility was, and, more pertinently, what this amount was intended to include – caused in part by the fact that the Lender failed to send a copy of the facility letter to the Project Monitor. It appears that the Project Monitor initially proceeded on the basis that the facility was in the sum of £2.250 million, not £2.625 million. Even assuming that the higher sum was correct, no account had been taken of interest charges and any other fees, costs and expenses which should be applied to the facility. Furthermore, no contingency was built in for the Lender or any third party to fund cost overruns on the Project.

Unsurprisingly against this backdrop, the Project did not progress as anticipated. Despite the construction being far from completed, the loan was almost completely exhausted. Crucially, there came a point just over a year into the Project when the Project Monitor failed to alert the Lender that the drawdown request under consideration at that time included works outside of the agreed parameters of the loan facility.

At this juncture, the Lender decided to try to minimise its losses by realising the security it had taken.

Even after taking this step, the Lender sustained a loss of approximately £1.4 million and decided to sue the Project Monitor for negligence, asserting that the advice it had given the Lender for the Project had been negligent. The Lender asserted that had the Project Monitor performed its duties properly, the Lender would have been aware of the lack of funds and would then have mitigated its own losses by realising its security at an earlier stage.

The Project Monitor counter-argued that not only had the advice given not been negligent, but that the Lender itself had been negligent in failing to rely on the advice which it had been given. In the end, both parties conceded that they had each fallen below their respective standards of care and of diligence.

During proceedings the Project Monitor admitted that it had acted negligently and in breach of its retainer, by failing to visit the site at least once a month. However, the Lender also admitted that it had failed to make appropriate responses to the Project Monitor's reports that it had received. The court found that relatively simple investigations on the part of the Lender would have led them to realise that there were insufficient funds in the facility to complete the development and that the Borrower would be unable to fund the shortfall itself.

In reaching its decision, the court found that whilst the Project Monitor had been negligent, a one third deduction from the damages payable to the Lender was to be made, in order to reflect the contributory negligence of the Lender by failing to conduct its own investigations.

This case serves as a warning to ensure that lenders engage, listen to and cooperate with or, where necessary, challenge their advisers. If they fail do so, as was evident in this case, they run the risk of losing the protection that the engagement of such an adviser is meant to afford them.

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