



Year's End Perspectives

December 15, 2023

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In This Issue ...

In this issue of REF News and Views, we bring you an analysis of *Hope Capital Ltd v Alexander Reece Thomson LLP*, a case which has caused much discussion amongst Lenders when it comes to instructing their Valuers, and much discussion around duty, breach and damage, the core components of bringing successful negligence claims.

We also take this opportunity to offer our thoughts for the CRE market in 2024.

We will not rehearse the doom and gloom of the rate rises, inflationary issues and cost of capital, which have been well documented by market commentators in 2023 and the back end of 2022. We hope and believe the storm is passing.

Many of us will remember in 2008-9 during the “credit crunch” how governments and the central banks looked to unlock capital and stimulate the velocity of circulation of money starting with “ZIRP” (zero interest policies), “then to “NIRP” (negative interest policies) and finally “to “quantitative easing”, all to stimulate capital and growth. Everything was done to make inflation. The legacy of this artificial inflation undoubtedly exacerbated by post COVID supply chain inflation issues and led to the interest rate rises which have had a severe impact in our sector this year. It has been widely reported that investment in 2023 has been at a decade low, tracing back to the credit crunch.

However, the good news is that inflation has significantly fallen in the last couple of months and many commentators believe there is a real prospect of rate reductions starting in Q3 of 2024. Canvassing the views of many of our clients in London, we believe that this will mean a significantly better year in 2024 for CRE. Whilst many of our Fund clients have been in holding patterns, many have also planted the seeds for a strong 2024 by setting up the infrastructures to be prepared to push the button in 2024. There is a wealth of capital looking for the right opportunities now and the anticipated interest rate stabilisation should give the confidence for Funds to compete to buy and Lenders to finance opportunities and thus the CRE CLO market to crank up the volume.

We are optimistic for a fruitful and busy 2024, and wish all our clients, readers and friends a happy holiday and a prosperous New Year.

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Slips Happen – A Reminder on the Importance of Defining Terms



By **Steven M. Herman**
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The New York Court of Appeals recently delivered an opinion in *Skaneateles Country Club v. Cambs* (unpublished at this time) that upheld an at-will termination of boat slip license. In 1999, Skaneateles Country Club (“SCC”) built 80 boat slips on Skaneateles Lake for use by its members. One member, Olivia Cambs, entered into an “Assignment Agreement” with SCC, paid the required \$4,500 initial capitalization payment, and agreed to pay an annual maintenance fee – all in exchange for the right to use and occupy a boat slip assigned by SCC.

The assignment agreement included a provision allowing participants to make a legacy transfer of the slip to qualifying offspring provided the assigning member was in good standing with SCC. After more than 25 years after Cambs entered in the assignment agreement, following an unrelated dispute with SCC in which Cambs successfully pursued the club for overcharging her maintenance fees, SCC filed a declaratory judgment action seeking a determination that the agreement was a license terminable at will by SCC. The New York Supreme Court granted SCC’s motion, but it was later reversed by the New York Appellate Division. The case was then appealed to the New York Court of Appeals, New York’s highest court (the “Court”).

In what was an open and shut case for the majority of the Court, the question before the justices was whether SCC improperly terminated Olivia Cambs’ access to and use of the boat slip she was granted pursuant to the assignment agreement with the club. After stating that the parties had previously agreed that the agreement in question was a license, the Court cited precedent holding that a license is a revocable privilege that may be terminated at will by the licensor. Finding nothing in the agreement which limited SCC’s ability to terminate it at will, the Court reversed the Appellate Division’s finding that the agreement was not terminable at will, and the case was remanded back to the Supreme Court. As an aside, the Court briefly acknowledged that there are circumstances that would make an ordinary license irrevocable; however, the Court did not find sufficient evidence that any such circumstances were present in this case.

Justice Rivera, authoring a by-comparison lengthy dissent, put forward two arguments to counter the majority: first, the language of the assignment agreement, which did not indicate the agreement was a license, should have taken precedence over the label on which the parties had previously agreed; and second, even if the agreement was a license, there was sufficient evidence to conclude the license was irrevocable.

For his first argument, Justice Rivera cited a well-known contract interpretation rule stating that the terms of the agreement should control. He then pointed out that the agreement was titled “Assignment Agreement” and that it never mentions granting a license. Rather, while referring to SCC as the assignor and Cambs as the assignee, the agreement assigns the exclusive use and occupancy of the boat slip to Cambs, subject only to the terms and conditions set forth in the agreement. While the assignment agreement did enumerate circumstances allowing the agreement to be terminated, including termination by the assignee or termination as a result of the assignee no longer being a member of SCC, nothing in the agreement permitted SCC to unilaterally terminate without cause. Reminding the Court that it is limited by the four corners of the agreement, Justice Rivera opined that in granting SCC the right to terminate the assignment agreement at will wrongly added a term which the parties chose to exclude.

Further on this same argument, Justice Rivera stated that the Court cannot imply a right that would be contrary to the intent of the agreement as written. Here, Cambs was granted the assignment in exchange for partially funding the construction of the slips (and of course the annual maintenance fee). Under the assignment, Cambs was required to (a) maintain her membership with SCC in good standing; (b) adhere to the rules and policies set forth by SCC; (c) comply with applicable law; and (d) pay the annual maintenance fee. Without Cambs (and other members opting to help capitalize the project), SCC presumably would not have had the adequate funding to build the slips. Moreover, the

existence of the right to a legacy transfer inferred that the assignment was not meant to permit an at-will termination by SCC. Thus, permitting SCC to unilaterally terminate the assignment undermines the structure and incentives of the agreement.

After outlining his belief that the agreement was not a license by its terms, Justice Rivera continued on to his second argument, which was that even if the agreement is a license, the circumstances in this case made the license irrevocable. He first looked at the conduct of SCC, who terminated the license solely in response to Cambs' continued efforts to receive a reimbursement for excessive maintenance charges. Quickly stating that this conduct would hardly be deemed a good faith response, Justice Rivera moves on his second point – that Cambs detrimentally relied on having continued, uninterrupted use of the boat slip. In reliance on continued use of the slip, Cambs (a) purchased a boat (and repurchased a separate boat after the first boat caught fire), (b) maintained insurance, and (c) invested maintenance fees each year to ensure future stability of the slip. For Justice Rivera, SCC's lack of good faith, coupled with Cambs' reliance on continued access to the boat slip, should have made the license irrevocable.

Given the reasoning for the majority's decision in this case, it is a reminder that, in codifying documentation, explicitness is not only preferred but necessary. The decision here is an example that the common law sometimes trumps the plain language within the four corners of a document absent sufficient specificity to dispel such analysis, application and determination. It remains to be seen whether the dissent will one day prevail as the majority opinion given similar facts and the passage of time.

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High Court Ruled That Lender Suffered No Loss Despite Negligent Valuation of Security

On 27 September 2023, the British High Court ruled that the claimant relying on the defendant's report suffered no actionable loss, despite the defendant's admission of negligence.

The case of *Hope Capital Ltd v Alexander Reece Thomson LLP* revolved around a lender's claim against its appointed valuer for breach of contract and negligence concerning a loan security valuation. The Court dismissed the lender's claim, ruling in favour of the valuer where it determined that the lender's loss is the consequence of the various inherent risks of the commercial transaction, not because of the risk that the valuation was overvalued, being the only risk that the valuer can fairly be held responsible for.

Factual Background

In February 2018 a report was prepared by a property firm (the "Valuer") who valued a long leasehold over a Grade II-listed property (the "Property") at £4 million (the "Valuation"). Subsequently, a bridging loan for £2.2 million was granted by a bridging loan company (the "Lender") with the Property as security. The borrower under that loan later defaulted and the receivers took possession of the Property on 12th November 2018.

A number of issues arose, the most significant being the service of a section 146 notice by the landlord National Trust on 18th November 2018 that required remedial work to the Property in respect of breaches caused by 'irresponsible renovations'. The Property was eventually sold in October 2020 for £1.4 million.

The Lender brought a claim against the Valuer alleging that the valuation was negligent and that given the crucial nature of the Valuation to the Lender's decision to provide the loan, no transaction would have taken place had the valuation reflected the true value of the Property. The claim for substantial losses included loss in capital, and loss of profits that would have been realised from the same loss of capital had it been used for other loans.

The Valuer accepted that it had been negligent and in breach of its duty, having overstated the value in its Valuation such that the true value of the Property fell outside of the margin within which a reasonable competent value should have fallen. However, it denied causation and loss, as the true value of the Property nonetheless exceeded that of the loan at the date of the default, and as the sale price was impacted by intervening matters.

The High Court found that the Lender had suffered no actionable loss, and as a result the claim was dismissed.

Legal Analysis

The principal legal issue raised in this case was what damages are recoverable where (a) had it not been for the negligence of a professional adviser his client would not have transacted, but (b) part or all of the loss suffered in taking such course of action arose from risks that such adviser had no duty to protect his client against.

The Court highlighted the importance of determining the losses that are caused by a negligent act by first determining on a 'but-for' basis the extent of the loss that flowed from the alleged breach of duty. This meant comparing the position where the lender would not have entered into the transaction but for the breach of duty, versus the position had it not entered into it with his actual position. In determining this, it could then be considered whether the loss was within the scope of the Valuer's duty.

The Court then explained that the scope of duty of care of a professional adviser should be an objective determination of the 'purpose' of the duty with reference to the reason why the advice is being given (that is, in this instance, the Valuer was being paid to provide it). Moreover, in a case of negligent advice, the Court further explained that one would have to look at what risk the duty was supposed to guard against and whether the loss suffered represented the "fruition of that risk".

This led to a crucial distinction being made between 'information' and 'advice': that is, did the Valuer assume responsibility for the risk of the whole transaction, or just a part of it. The Court explained that a valuer will by its nature rarely supply more than a specific part of the material on which its client's decision is based and is therefore no more than a provider of information, and that the purpose of a valuation would only form part of the scope for which a lender would decide whether to lend. Equally, a valuer would not ordinarily be privy to the other considerations that a lender may use to decide whether to enter into their transaction, such as how much a borrower needs to borrow, the strength of their covenant, and any other commercial and personal considerations that may induce a lender to lend.

Ultimately, the Court highlighted that the purpose of the Valuation was to provide the Lender with an opinion on the value of the Property that was being offered as security for the loan. Whilst the Court acknowledged that the Lender is perfectly entitled to rely on the Valuation and that the value was an important consideration for a mortgage lender in making a loan, it is by no means the only factor; the Lender would have had to consider other factors, such as the borrower's credit risk, for which the Valuer has no responsibility for.

Moreover, the Valuer would have been assessing worth as at the date of the Valuation, not forecasting a projected worth, and as such there is always the risk that the value may go down, a risk that is for the Lender to take. The fact that the Lender did make the loan implies that the Lender was indeed willing to bear such risk. The Court also scrutinised the causes of the loss in the Property's value, concluding that factors such as the section 146 notice by the National Trust and the impact of the Covid-19 pandemic contributed significantly, all of which would not be safeguarded against by the Valuer's duty of care.

The Court therefore concluded that, to the extent there was any loss suffered by the Lender is the consequence of the inherent risks of the commercial transaction, and not because of the risk that the Valuation was overvalued, being the only risk that the valuer can fairly be held responsible for.

Closing Thoughts

The Court's decision in *Hope Capital Ltd v Alexander Reece Thomson LLP* reinforces the principle that a third-party professional adviser's duty is bounded by the purpose of its information. This decision emphasises the importance of considering what the specific risks are that the duty is meant to safeguard against, and that regardless of whether information provided by a professional adviser is critical to a party's decision to enter into a transaction, it does not in and of itself mean that the adviser is responsible for such decision, nor is it liable for all the financial consequences of that decision.

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Recent Transactions

Here is a rundown of some of Cadwalader's recent work on behalf of clients.

- Represented an administrative agent in connection with a \$177 million mortgage loan secured by four multi-family properties.
- Represented Deutsche Bank Securities, Inc. and Morgan Stanley Bank, N.A. as lenders in a \$780 million mortgage loan to refinance a portfolio of 84 hotel properties across the country for a joint venture between Värde Partners and Flynn Properties, Inc.
- Represented a financial institution in a \$330 million loan-on-loan transaction, securing 13 mortgage loans.
- Represented a financial institution in a \$90 million loan-on-loan transaction, securing three mortgage loans.
- Represented a financial institution in a \$150 million loan-on-loan transaction, securing two mortgage loans.

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Happy Holidays!



REF News & Views readers, as the holiday season approaches, we want to take a moment to express our gratitude for your continuous support throughout the year. Wishing you all a joyful and safe holiday season filled with warmth and cheer. We eagerly anticipate reconnecting in the new year!