

EXAMPLE 1 – ABBREVIATED VERSION

IN THE COURT OF SESSION

(Commercial Action)

SUMMONS

in the cause

ABC BANK PLC, a public limited company incorporated under the Companies Acts (company number SC123456) and having its registered office at 1 High Road, Edinburgh EH1 1ZZ

against

Pursuer

XYZ LIMITED, a company incorporated under the Companies Acts (company number SC234567) and having its registered office at 1 Main Street, Edinburgh EH1 1QQ

Defender

Elizabeth II, by the Grace of God, of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith, to XYZ LIMITED.

By this summons, the pursuer craves the Lords of our Council and Session to pronounce a decree against you in terms of the conclusions appended to this summons. If you have any good reason why such decree should not be pronounced, you must enter appearance at the Office of Court, Court of Session, 2 Parliament Square, Edinburgh, EH1 1RQ, within three days after the day of the calling of the summons in Court. The summons shall not call in Court earlier than 21 days after the date of service on you of this summons. Be warned that, if appearance is not entered on your behalf, the pursuer may obtain decree against you in your absence.

Given under signet at Edinburgh on

CONCLUSIONS

1. For payment by the Defender to the Pursuer of the sum of TEN MILLION POUNDS STERLING (£10,000,000) with interest thereon at eight per cent per annum or such other rate as the Court may deem appropriate from the date of service hereof or such other date or dates as the Court may deem appropriate until payment.

2. For the expenses of the action.

CONDESCENDENCE

Parties and jurisdiction

1. The Pursuer is a public limited company incorporated under the Companies Acts (company number SC123456) and having its registered office at 1 High Road, Edinburgh EH1 1ZZ. The Defender is a firm of property consultants, having its registered office at 1 Main Street, Edinburgh EH1 1QQ. So far as the Pursuer is aware, there are no proceedings in any other Court in respect of the subject matter of the present action, nor is there any agreement to prorogate the jurisdiction of another Court in respect of said subject matter. This Court has jurisdiction.

The valuation instructions from the Pursuer to the Defender

2. By letter dated 1 November 2015 (the "Letter of Instruction"), the Pursuer instructed the Defender to provide a valuation of the Tower Hotel in Glasgow (the "Property"). The salient features of the instructions were:
 - (i) The nature of the Property which comprised firstly a hotel with restaurant, bar and function facilities and secondly retail/leisure space. The hotel was occupied and operated as a branded hotel under a Management Agreement and the retail/leisure space was let to tenants. The valuation of hotels calls for specialist expertise which the Defender held itself out as having.
 - (ii) The valuation was to be in accordance with the RICS Appraisal and Valuation Manual (the "Manual").
 - (iii) The stated purpose of the valuation report was to enable the Pursuer to determine whether the Property would provide suitable and adequate security for facilities to be provided by the Pursuer and to assess the validity of the Customer's proposal in relation to the Property which was to purchase the Property as an investment as more fully described in the Letter of Instruction. The Pursuer was evidently going to rely on the valuation report for those purposes.
 - (iv) The Letter of Instruction sought valuations on three bases which it described and specifically asked the Defender to address differences between valuation and the purchase price which it was envisaged that the Customer would pay.

The Defender's valuation and reliance on it

3. Following on from a draft report, a final valuation report dated 18 November 2015 was then provided by the Defender to the Pursuer (the "XYZ Report"). The Defender provided its valuation opinions, which were a Market Value of the Property (with the benefit of

the existing Management Agreement and the existing leases for the retail units and leisure facilities) of £65,700,000, and a Market Value (assuming vacant possession) of £50,000,000 for the hotel and £5,000,000 for the retail leisure space giving an aggregate vacant possession valuation of £55,000,000 for the Property (the "Valuations"). The Valuations corresponded with those reported in the Information Memorandum prepared for the Customer in connection with which the Defender had also been instructed by the Customer.

4. The Pursuer relied on the Valuations and in December 2015 offered its Customer a term loan of £52,000,000, plus an overdraft facility of £500,000, to be secured against the Property by way of a first legal charge. The loan to value ("LTV") ratio was 79% of the Market Value of the Property (with the benefit of the existing Management Agreement and the existing leases for the retail units and the leisure facilities), as reported by the Defender. The Customer accepted the offer and acquired the Property with the term loan being formally provided by means of the Facility Agreement in the schedule of documents and principally secured over the Property. The overdraft facility was also taken up and provided.

Breach of the Facility Agreement by the Customer and reliance on the security

5. The Defender provided updated valuations of the Property from time to time on the instructions of the Customer and the Market Value as reported by them declined from £64,500,000 (as at 31 March 2016) to £50,050,000 (as at 31 March 2017) and £50,950,000 (as at 31 March 2018). The Pursuer instructed New Valuers Limited to report on the current value of the Property and on 1 June 2018 they reported a Market Value as at that date of £35,000,000.
6. The Market Value of the Property was such that there was an Event of Default by the Customer under the Facility Agreement being a breach of the LTV covenant as the indebtedness of the Customer exceeded 78% of the Market Value of the Property. There was a further Event of Default due to a failure of the vendor which sold the Property to the Customer to make payment in respect of a minimum income guarantee provided to the Customer in the Acquisition Agreement. Ultimately the Pursuer required to have recourse against the security provided to it which was very substantially made up of the security against the Property.
7. The Property was sold for the sum of £27,600,000 on 14 February 2019. The Customer entered into administration on 24 February 2019.

Breach of contract and fault of the defender

8. The true Market Value of the Property (subject to the existing management agreement and the existing leases) as at December 2015 was £53,750,000 and the true Market Value (assuming vacant possession of the entire Property) then was £45,000,000. No ordinarily competent hotel valuer exercising the degree of skill and care reasonably to be expected of him would have placed the Valuations on the Property which the Defender did. The Defender breached the implied term of its contract with the Pursuer that it would exercise such skill and care, and it has caused the Pursuer to sustain loss. More particularly:
- (i) the Defender should have valued the Property at the foregoing true Market Values or at least within a reasonable margin for error of no more than about 10% above or below those true Market Values.
 - (ii) the Defender ought to have made a detailed analysis of the future trading potential of the hotel.
 - (iii) the Defender ought not to have treated the income arising under the Management Agreement as if it were rent subject to annual upwards only rent reviews. The Defender ought to have recognised that income to the Owner under the Management Agreement could move upwards and downwards in accordance with trading performance, subject to the operation of the contractual income guarantee provisions which applied.
 - (iv) the Defender ought to have produced a detailed set of projected profit and loss accounts for the hotel analysing in detail the likely level of net operating profit over a future period of at least 5 years. and it ought then separately to have considered such projections against the contractual income guarantee provisions in order to assess the overall level of risk in relation to income and to arrive at an assessment of the likely fair maintainable income and net operating profit for the hotel.
 - (v) the Defender ought to have applied an appropriate capitalisation rate to such an assessed figure for fair maintainable net operating profit.
 - (vi) the Defender ought to have considered projected profit earning potential distinctly from the contractual income guarantee provisions.
 - (vii) the Defender should not have adopted a form of discounted cash flow valuation methodology without preparing detailed projections to assess future cash flow.
 - (viii) The Defender should not have adopted a valuation methodology which increased the scope for valuation error by adding the net present value of an estimated increase in income each year to an initial value.

- (ix) Likewise, in valuing Market Value of the Property on the vacant possession basis, the Defender should also have undertaken a detailed assessment of the future trading potential of the hotel and in so doing should have produced a detailed set of projected profit and loss accounts for the hotel analysing in detail the likely level of net operating profit over a future period of at least 5 years.
 - (x) the Defender ought to have had regard to the purchase price paid by the vendor for the Property only about 12 months before and ought to have assessed the extent to which matters relevant to valuation had changed since that previous sale.
9. The Defender also breached the express obligation to prepare a valuation in accordance with the Manual which required a detailed assessment of future trading potential as above.
10. As a result of the foregoing breaches of their obligations, the market valuation figures provided by the XYZ Report were significantly outside the range of values that a non-negligent valuer and/or surveyor would have provided to the Pursuer.
11. The Pursuer's loss was also caused through the negligence of the Defender. The Defender owed a duty of care to the Pursuer to exercise the degree of skill and care reasonably to be expected of an ordinarily competent hotel valuer. The Defender failed to carry out such duties in the respects identified in Article 7 above. As a result, the Defender over-valued the Market Values of the Property as condescended upon.

Loss and need for litigation

12. As a result of the Defender's breach of contract and negligence, the Pursuer has suffered loss. Had the Defender provided an accurate assessment of the market value of the Property to the Pursuer, the Pursuer would have realised that the Customer's credit application was simply not viable and the transaction would not have proceeded. As a result of granting the customer the secured loan and the shortfall in their security, the Pursuers have suffered loss and damage in the amount of at least £32,974,448. Reference is made to the calculations shown in the schedule produced herewith.
13. The difference between the Defender's valuation of the market value (with the benefit of the Management Agreement and the existing leases for the retail units and leisure facilities) and the correct valuation provided by the expert is £10,000,000 which is the sum first concluded for. The sum sued for is a reasonable estimate of the Pursuer's loss and damage recoverable from the Defender.
14. The Pursuer has, by suitable correspondence pre-action, called upon the Defender to compensate the Pursuer for the loss and damage but the Defender refuses or delays

unreasonably to do so, rendering the present action necessary.

PLEAS-IN-LAW

1. The Pursuer having sustained loss and damage through the Defender's breach of contract as condescended upon is entitled to reparation from the Defender therefor.
2. *Separatim* the Pursuer having sustained loss and damage through the fault and negligence on the part of the Defender is entitled to reparation from the Defender therefor.
3. The sum sued for being a reasonable estimate of the Pursuer's loss and damage decree therefor should be pronounced as concluded for.

IN RESPECT WHEREOF

SCHEDULE OF DOCUMENTS

1. Letter of Instruction from the Pursuer to the Defender dated 1 December 2015;
2. Valuation Report of the Hotel provided by the Defender to the Pursuer dated 18 November 2015;
3. Facility Agreement between the Pursuer and the Customer dated 5 January 2016; and
4. Reservation of Rights Letter dated 23 December 2018 sent from the Pursuer to the Defender.
5. Expert Report by New Valuations Limited dated 1 January 2019.
6. Schedule showing calculation of the loss and damage suffered by the Pursuer.

IN RESPECT WHEREOF