

EXAMPLE 1 – LONGER 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

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.
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 Property comprised firstly a hotel with restaurant, bar and function facilities and secondly retail/leisure space. The hotel was owned by Venture Properties Limited ("the Owner") and operated by Tower Hotels Limited ("the Operator") as a hotel pursuant to a Management Agreement. Subject to its provisions for earlier termination, the term of the Management Agreement was due to end on 31 December 2030. The retail/leisure space was tenanted by third parties under leases. Centre Hotel Investments Limited ("the Customer") had approached the Pursuer in October 2015, seeking loan facilities to allow it to purchase and develop the hotel. The Letter of Instruction confirmed the Pursuer's instructions to the Defender to prepare a valuation of the Property in accordance with the RICS Appraisal and Valuation Manual (the "Manual"). The Letter of Instruction stated that the valuation report was required by the Pursuer to enable it to determine whether the Property will 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. The Letter of Instruction indicated that the Customer proposed to purchase the Property as an investor at a price of £63.5m plus purchasing costs and to operate the hotel under the Management Agreement as let to the Operator and the occupying tenants. The period of loan contemplated was over five years. The Letter of Instruction reflected the fact that the Defender had already inspected the Property and stated that any information required for the purposes of carrying out the valuation may be obtained from the Customer or its agents. The Letter of Instruction sought valuations on three bases: (i) Market Value taking into account the occupational leases in place at the date of valuation (which was understood as including the Management Agreement); (ii) Market Rental Value; and (iii) Alternative Value based on special assumptions understood to be the market value of the hotel assuming vacant possession throughout and the market value of the retail/leisure space assuming vacant possession throughout. The Letter of Instruction envisaged, as would in any event have been obvious to the Defender, that the contemplated purchase price of the Property might be significantly different from the valuation

placed on it by the Defender and specifically asked the Defender, if the price was more than 5% higher or lower than valuation, to report reasons for that being the case. The Letter of Instruction asked the Defender to confirm, among other things, that the Defender accepts that the Pursuer is relying on the terms of the valuation report for the purpose of evaluating the Customer's proposal and the security value of the property and that a duty of care exists in relation to the Pursuer. The purpose of the instruction was evidently to enable the Pursuer to assess the Customer's loan application and in particular to decide whether to lend the money needed by the Customer to buy the Property. The Defender agreed to provide a valuation. By accepting the Pursuer's instructions, the Defender confirmed that the Pursuer could rely upon the contents of its valuation report for the purpose of evaluating the application for credit in relation to deciding whether and if so how much to lend secured against the Property, and acknowledged that a duty of care existed in favour of the Pursuer. The valuation of hotels is a specialist area of valuation practice and at all material times the Defender held itself out as having the requisite experience and expertise of a hotel valuer.

3. The Defender had already prepared a draft valuation report for the Pursuer dated 20 October 2015. The Defender had also been instructed by the Customer to assist with preparation of an Information Memorandum to potential investors which had in view that such investors would acquire an interest in the Property by means of the acquisition of an indirect ownership interest in the Customer. For the purposes of the Information Memorandum, the Defender had carried out valuations of the Property for the Customer which were reported in the Information Memorandum. 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. The Pursuer relied on the Valuations provided in the XYZ Report in reaching the decision to provide the requested loan facility to its Customer and in December 2015 offered the 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.

4. The term loan was formally provided by way of a facility agreement dated 5 January 2016 (the “Facility Agreement”), which was signed by the Pursuer and by the Customer and amended by an amendment letter dated 2 February 2016 prior to drawdown. At the time of drawdown, the Customer proceeded with the purchase of the Property by means of an acquisition of the share capital of the Owner. The principal security granted to the Pursuer was the security over the Property. The loan term was five-years, commencing from the date of drawdown. The customer was obliged to make regular interest payments to the Pursuer in accordance with the amortisation schedule at Schedule 7 to the Facility Agreement. Full repayment was to be made by the Customer on the final repayment date being five years from the date of drawdown. Under the Facility Agreement, the maximum LTV ratio in respect of the Property was 79% at drawdown falling over the term.

5. The Pursuer also offered the Customer the overdraft facility in the sum of £500,000. The overdraft was to be used for working capital purposes. It was repayable on demand and the Pursuer had the right to offset debit balances with credit balances in the Customer’s current account. The overdraft facility was also accepted by the Customer. No further sums were provided by the Pursuer to the Customer following the initial advance in February 2016 of £52,500,000 being the aggregate of the term loan and the overdraft.

6. The Defender provided updated valuations of the Property from time to time on the instructions of the Customer. On 11 July 2016, the Defender valued the Property as at 31 March 2016 as having a Market Value of £64,500,000. On 5 June 2017, the Defender valued the Property as at 31 March 2017 as having a Market Value of £50,050,000. On 1 July 2018, the Defender valued the Property as at 31 March 2018 as having a Market Value of £50,950,000. The Pursuer instructed New Valuers Limited (“NVL”) to report to it 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. The Pursuer subsequently instructed NVL to undertake a retrospective valuation of the Property as at the date of the XYZ Report. The retrospective valuation was provided to the Defender in draft on 1 November 2018. It stated that the market value of the Property as at November 2015 (with the benefit of the Management Agreement and the existing leases for the retail units and leisure facilities) was around £55,700,000 and the market value (assuming vacant possession) was around £48,250,000. NVL has since provided a report for the purposes of this litigation which is produced and referred to for its terms. In that report, NVL has updated its valuation calculations in light of further information which became available for the purposes of preparing the report.

7. A Reservation of Rights letter dated 23 December 2018 was served by the Pursuer on the Customer. The Pursuer detailed in this letter that there had been Events of Default under the Facility Agreement being: (i) a breach by the customer of its LTV covenant as the indebtedness of the latter exceeded 78% of the Market Value of the Property as at 1 June 2018; and (ii) a failure by 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. The Pursuer outlined its position, namely that it considered the customer to be in a position of default. For a period of time, the Pursuer sought proposals from the management of the Customer to resolve the position in respect of the Events of Default but ultimately no satisfactory proposals were forthcoming from them and the Pursuer required to have recourse against the security provided to it which was very substantially made up of the security against the Property.

8. Repossession Commercial Limited was appointed by the Pursuer to market and sell the Property in January 2019. The Property was sold for the sum of £27,600,000 on 14 February 2019. The Customer entered into administration on 24 February 2019.

9. Hotels are in the category of property normally bought and sold on the basis of trading potential. Reference is made, in particular to section GN1 of the Manual entitled Specialised Trading Property Valuations and Goodwill. It is fundamental to the valuation process that the valuer makes a detailed assessment of future trading potential of the hotel. Under the Management Agreement for the Property, the Operator did not pay rent to the Owner but rather paid to the Owner the yearly net operating profit of the hotel calculated in terms of the Management Agreement. The Management Agreement provided for an income guarantee by the Operator in favour of the Owner to provide a minimum level of income each year down to 31 December 2025 subject to a right on the part of the Operator to extend the period of the income guarantee for a further 5 year period from then until 31 December 2030. In addition, there was a top-up guarantee, supplementary to that provided by the Operator, provided by the Developer of the Property which was due to expire on 31 January 2019 and, at the time of the Defender's valuations, it was envisaged that the vendor of the Property to the Customer would, as an incentive to the purchase, provide an extension to this top-up guarantee until 31 January 2025. These contractual arrangements did not dispense with the need for the Defender to undertake a detailed assessment of the future trading potential of the hotel for the purposes of its valuations. However, the Defender did not undertake such an assessment. Rather, for the purposes of valuing Market Value on the occupational basis, the Defender incorrectly treated the income arising under the Management Agreement as rent subject to annual upwards only rent review. The Defender apparently failed to recognise the fundamental

difference that income to the Owner under the Management Agreement, representing the calculated level of net operating profit, could move upwards and downwards in accordance with trading performance, subject to the operation of the contractual income guarantee provisions. The Defender did not produce 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 then separately consider 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. The Defender did not apply an appropriate capitalisation rate to such an assessed figure for fair maintainable net operating profit. The Defender did not consider projected profit earning potential distinctly from the contractual income guarantee provisions. In its valuation methodology, the Defender adopted a form of discounted cash flow methodology but did not prepare detailed projections to assess future cash flow. The methodology the Defender adopted also increased the scope for valuation error in that it calculated an initial value and then added to it the net present value of their view of the extent to which the income would increase in each year down to the end of the term of the Management Agreement. The Defender also did not have regard to the fact that the Property had been purchased by the vendor for a price of £52,500,000 in November 2014, only about 12 months prior to the date of the Valuations and assess the extent to which matters relevant to valuation had changed since that previous sale. Similarly, in valuing Market Value of the Property on the vacant possession basis, the Defender also did not undertake a detailed assessment of the future trading potential of the hotel. The Defender again did not produce 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. In its valuation on the vacant possession basis (in an unexplained difference from its valuation on the occupational basis), the Defender included an element for unclaimed capital allowances even though this did not comply with the approach to Market Value provided for by the Manual which is not a value for a specific purchaser or for a specific set of purposes. At no point in its report did the Defender address the potential valuation implications of the position that the Management Agreement for the hotel would not automatically terminate on the insolvency of the Customer.

10. It was an implied term of the Pursuer's contract with the Defender that in preparing the Valuations, the Defender would exercise the degree of skill and care reasonably to be expected of an ordinarily competent hotel valuer use the knowledge, skill and care of a reasonably competent valuer and/or surveyor. 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 as the Defender

did. In fact, the true Market Value of the Property (subject to the existing management agreement and the existing leases) as at November 2015 was £53,750,000 and the true Market Value (assuming vacant possession of the entire Property) then was £45,000,000. In implement of their foregoing obligation, it was the Defender's duty not to place the Valuations on the Property. It was the Defender's duty to value 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. The Defender ought to have made a detailed analysis of the future trading potential of the hotel. The Defender ought not to have treated the income arising under the management agreement as rent subject to annual upwards only rent reviews. The Defender ought to have recognised the fundamental difference 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. 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 then separately consider 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. The Defender ought to have applied an appropriate capitalisation rate to such an assessed figure for fair maintainable net operating profit. The Defender ought to have considered projected profit earning potential distinctly from the contractual income guarantee provisions. The Defender should not have adopted a form of discounted cash flow valuation methodology without preparing detailed projections to assess future cash flow. The Defender should have adopted a valuation methodology which increased the scope for valuation error in the manner condescended upon. 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. The Defender should have again 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. The Defender ought to have had regard to the purchase price paid by the vendor for the Property only about 12 months before and assessed the extent to which matters relevant to valuation had changed since that previous sale. It was the Defender's duty to ensure that the person who prepared the Valuations had carried out a physical inspection of the Property. The Defender failed to record in the XYZ Report that the Property had been purchased for £52,500,000 just 12 months prior to the valuation by the Defender in the sum of £65,700,000. The Defender does not appear to have carried out any, or any adequate, analysis as to whether the value of the Property could sensibly have increased in value by £13,200,000 over such a short period of time as it ought to

have done. The Defender should have addressed in its report the potential valuation implications of the position that the Management Agreement for the hotel would not automatically terminate on the insolvency of the Customer. The Defender should not have included an element for unclaimed capital allowances in the Market Value on the occupational vacant possession basis. Not only did that amount to a failure to exercise the requisite degree of skill and care but it was also a breach of the express obligation to prepare a valuation in accordance with the Manual. The Defender failed to carry out a detailed analysis of the financial performance of the Property and to consider the position of the availability of other hotels in the locality. The Defender does not appear to have used any properties in Glasgow as comparables but instead used two comparables which were based in London. As a result of the foregoing breaches of the Defender's 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 could have provided to the Pursuer.

11. *Separatim*, the Pursuer's loss and damage was also caused through the fault and 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. It was the Defender's duty to exercise the degree of skill and care to be expected of a reasonably competent architectural and technical consultant. It was the Defender's duty to accurately value the Property. The Defender failed to carry out such duties. Reference is made to the averments in the preceding article of condescendence. As a result, the Defender over-valued the Market Values of the Property as condescended upon.

12. As a result of the Defender's breach of contract *et separativm* fault and negligence the Pursuer has suffered loss and damage. Section 21.1 of the Facility Agreement provides that the initial loan to value LTV ratio ought not to exceed 79% of the value of the Hotel. The Facility Agreement further provides at section 21.1.1 that if, at any point, the LTV were to exceed 79% (reducing to 78% LTV from the second anniversary of the loan and 77% LTV from the fourth anniversary of the loan), the Pursuer would be entitled to accelerate the loan and all sums would become payable immediately. The Pursuer applied an LTV ratio of 79% to the market valuation figure provided by the Defender. Had the Defender carried out an accurate valuation of the Property, the Pursuer would have recognised that there was insufficient equity in the Property to offer adequate security for the loan. Had the XYZ Report reflected the true market value of the Property, the Defender would not have been willing to make an advance of £52,000,000 to the customer, as this would have represented an unacceptably high LTV ratio (96% LTV). 79% of the true market value of the Property (as per the expert's retrospective valuation) equated to the sum of

£44,462,500. This would have generated insufficient funds to enable the Customer to proceed with its purchase of the Property. The position would have been the same with valuations at the top end of the non-negligent range of values as condescended upon. Had the Defender provided an accurate assessment of the market value of the Property to the Pursuer, the Pursuer would have realised that the credit application was simply not viable. As a result of the Defender's failure to provide an accurate assessment of the market value of the Property, the Pursuer was prevented from being able to properly fully assess the level of risk that the loan posed to them. As a result of granting the customer the secured loan and the shortfall in their security, the Pursuer has suffered loss and damage in the amount of at least £32,974,448. Reference is made to appendix 1 attached hereto which sets out the funds advanced, the Pursuer's own funding costs in making the advance, the deduction of the amortisation and interest payments made by the borrower, the break costs of the interest rate hedging arrangements, the deduction of sums received from the administrators of the borrower and from the deposit account and the application of simple interest on the loss from the date of sale of the property down to the date the last payment made by the administrators was received (which was after the present action was raised). In making the loan, it was reasonably foreseeable to the parties that the Pursuer would itself incur funding costs as in fact it did. A schedule detailing the Pursuer's funding costs is produced. 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.

13. The Pursuer has called upon the Defender to compensate the Pursuer for its 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.