



Whose fault is it anyway?

Lee O’Sullivan, an associate at Sprecher Grier Halberstam LLP, considers how lenders contemplating claims against solicitors could potentially side-step allegations of contributory negligence in the latest round of lender litigation

Many lenders involved in the prosecution of claims in contract and negligence against solicitors will no doubt be all too familiar with allegations of contributory negligence.

Such claims normally arise where a lender suffers a loss in respect of a transaction where the completion solicitor acted for both the borrower and lender, and failed to report some fact that would have affected the decision to lend. Undisclosed discounts and post-completion cash-backs to the borrower are typical examples, and quite often tell-tale signs of fraud.

In the midst of an unprecedented boom, lenders were for a decade keen to increase their share of the lucrative residential property market, achieved, in part, by providing mortgage finance to individuals more readily than ever before. Cases before the courts arising out of the recession in the 1990s considered issues of imprudent lending, and the level to which damages should be reduced on account of the lenders’ own decision to lend.

Contributory negligence

In this context, contributory negligence may be defined as being the relative degree of blame attributable to the lenders’ own conduct. Such allegations relate to inadequate investigations by lenders into the borrowers’ ability to repay the loan, and offering high loan-to-value ratio products. The courts have previously held:

- 75 per cent contributory negligence for failing to investigate the borrower’s income, heed previous arrears and making a loan of 90 per cent of the valuation;
- 40 per cent from failure to take up bank and credit references and obtaining proper accounts;
- 66 per cent from in-house over valuation, failure to investigate the borrower’s ability to pay and lending

in excess of 75 per cent LTV - to quote but a few.

Reductions in damages to this extent could render claims commercially unviable leaving lenders licking their wounds for some years to come. Lenders should consider alternative ways of bringing claims against solicitors, where possible, to avoid potentially drastic reductions in damages. Seeking equitable compensation for breach of fiduciary duty may well achieve this result.



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A solicitor, who misrepresents some fact which he knows, or must be taken to know, will or may affect the lenders’ decision to proceed with the loan, is likely to be guilty of breaching fiduciary obligations.

Example

Let’s then consider the example of an undisclosed discount, where the purchase price is £200,000 and B obtains a mortgage of 80 per cent LTV, i.e. £160,000. The developer offers an incentive to B of a £40,000 discount on completion so that the price actually paid upon completion is £160,000.

The completion solicitor is fully aware of the discount and knows this is a matter which should be reported to the lender prior to completion. B instructs the

solicitor not to disclose the discount to the lender knowing that it would likely result in the mortgage offer being withdrawn. In this example, the solicitor obeys and continues to act for both parties and the purchase completes. The solicitor has been consciously disloyal and therefore is guilty of breaching his fiduciary obligation to the lender.

In a case where conscious disloyalty is established, what then is the effect on allegations of contributory negligence?

This is perhaps best answered by reference to Blackburne’s J judgment in the Nationwide Litigation where he said: “In English law contributory negligence has never been a defence to an intentional tort,” where conscious disloyalty is established, “the fiduciary is disabled from asserting that the other contributed, by his own want of care for his interests, to the loss which he suffered flowing from the breach.”

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Solicitor relationship

As a general rule solicitors may not act for more than one client on the same transaction because of the risk of a conflict of interests arising between those clients. Acting for both borrower and lender on specified terms in a residential mortgage transaction, however, is an exception to the rule.

In addition to the contractual obligations contained in the lenders’ instructions, a solicitor is bound by additional equitable duties. The relationship between a solicitor and his client is one in which the client reposes trust and confidence in the solicitor. It is a fiduciary relationship. Breach of a fiduciary obligation therefore connotes disloyalty or infidelity. A fiduciary must act in good faith and where a solicitor acts for both borrower and lender he must serve each as loyally and faithfully as if he were the only client.