



BANKING & FINANCE LITIGATION UPDATE

Issue 50

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The Banking & Finance Litigation Update is published monthly and covers current developments affecting the Group's area of practice and its clients during the preceding month.

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If you would like further advice, please contact **Paula Johnson** on **08700 111 111**.

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DOMESTIC BANKING

BARCLAYS

1. Barclays has decided to offer grants of £5,000 over the next three years (£1.25m in total) to parents hoping to set up 'free' schools. The bank will also offer free financial advice and work experience opportunities to teenagers from free schools and academies.

Guardian, 19 January 2012

2. Barclays' CEO, Bob Diamond, could receive a £10m bonus as share awards despite the Government's efforts to curb bonuses.

Observer, 15 January 2012

3. Nick Clegg's 'banking compact', which pledges payment or expenses for young people doing internships, has been signed by over one hundred companies including Barclays and Tesco.

Independent, 12 January 2012

4. According to the European Banking Authority, Barclays will have €4bn of 'deferred tax assets' this year which can be set against tax claims to reduce the final bill. A spokesman declined to comment on where the losses were sustained or whether the loss-making entities had been closed.

Daily Telegraph, 3 January 2012

CLYDESDALE

5. Clydesdale Bank has received a capital injection of £400m from its parent National Australia Bank, raising its capital ratio to around 11 per cent.

Daily Telegraph, 13 January 2012

HSBC

6. An analyst at Bank of America Lynch has stated that HSBC's repositioning in the US plus the doubtful outlook for investment banking could mean that the bank's revenues this year could be \$6bn below market forecasts.

Times, 13 January 2012

7. KeyBank, a US bank based in Ohio, has agreed to buy 37 HSBC branches from First Niagara Bank as part of its purchase of HSBC's entire upstate New York retail network. First Niagara promised to sell some of the HSBC branches it owned to satisfy anti-trust concerns.

Guardian, 13 January 2012

8. The Law Society of Scotland has argued that HSBC's decision to restrict its solicitor panel to four firms in Scotland imposes a penalty on homebuyers who want to choose their own solicitor, by imposing a separate charge of almost £200 on those who do not agree to use an HSBC panel firm.

Law Society of Scotland, 11 January 2012

Further information can be found on the LSS website:

http://www.lawscot.org.uk/news/press-releases/2012/january/news_20120109

LLOYDS BANKING GROUP

9. St James's Place, the wealth manager 60 per cent owned by Lloyds, has announced a 6 per cent increase in its funds under management at the end of 2011 compared with 2010 and has stated that it has retained 95 per cent of its clients.

Daily Telegraph, 20 January 2012

10. Lloyds has announced a further 700 job cuts in all divisions of the bank as part of an ongoing overhaul by CEO Antonio Horta-Osorio, which will result in 15,000 job losses.

Independent, 19 January 2012

11. Investors have filed a class action lawsuit in the Southern District of New York against Lloyds Bank, alleging violation of parts of the US Exchange Act. Sir Victor Blank and Eric Daniels are named personally in the action as well as the bank. All are accused of making misleading statements about the HBOS takeover.

Independent, 3 January 2012

SANTANDER

12. Santander Private Equity, part of Spanish banking group Santander's asset management arm, has sold its stake in Thames Water to CIC, a Chinese sovereign wealth fund, through a wholly-owned subsidiary of the fund.

Daily Telegraph, 21 January 2012

THE ROYAL BANK OF SCOTLAND

13. The Royal Bank of Scotland ("RBS") is determined to call the Prime Minister's bluff over promises to curb executive pay and putting a stop

to 'rewards for failure'. Chairman Sir Philip Hampton and the bank's board are to press ahead with a bonus of around £1.5m for CEO Stephen Hester, even though the bank's share price has almost halved in twelve months.

Financial Times, 19 January 2012

14. John McIntyre, head of corporate finance at RBS, together with a team of dealmakers from the bank, is considering a management buyout as RBS slims down its investment bank. It is unclear if any private equity firms would be prepared to back the buyout.

Daily Telegraph, 16 January 2012

15. It is expected that RBS will announce job cuts at its investment banking division and possibly put part of the unit up for sale. Analysts at UBS are recommending that RBS should consider selling its US regional bank, Citizens, which could be worth around £9.5bn – a bold move which would be good for the bank and its shareholders.

Guardian, 11 January 2012

16. It has emerged that RBS and Lloyds between them have hired eight lobbying and public affairs companies over the past year. The news will fuel concerns that taxpayers' money is being used to find ways of watering down banking reforms and proposed caps on executive remuneration. The revelation comes despite a ban by ministers on recipients of taxpayers' money hiring public affairs firms to lobby other arms of Government.

Independent, 11 January 2012

17. The state-owned China Development Bank is leading the €4.8bn race to buy RBS's aircraft leasing business, RBS Aviation Capital, which is based in Dublin.

Independent, 3 January 2012

DOMESTIC GENERAL

18. Algirdas Semeta, EU tax commissioner, has said that the UK's continued reluctance to sign up to the so-called 'Tobin tax' – a tax on financial transactions – will result in the UK paying the tax anyway and not receiving any benefit in return.

Financial Times, 23 January 2012

19. The FSA is having 'robust' discussions with UK banks about cutting bonus pools to reflect the losses triggered by the mis-selling of payment protection insurance. Although the FSA does not

have the power to intervene on bonuses it believes strongly that bank staff should bear the consequences of the mis-selling scandal.

Financial Times, 23 January 2012

20. The Treasury is consulting on whether up to fifteen of the top banks and investment houses should have to publish details of their top eight bankers without seats on the board. It is unlikely the new rules will be in place in time for this year's annual reports.

Guardian, 23 January 2012

21. Giving evidence to the Treasury select committee, Sir Mervyn King, Governor of the Bank of England, has hinted that big bonuses will end when the Government's banking reforms come into effect and the Bank of England becomes the main financial regulator at the end of 2012.

Daily Telegraph, 18 January 2012

22. Chancellor George Osborne, appearing before the Treasury Select Committee to discuss banking reforms, has stated that he does not believe banks will leave London if the reforms are implemented. He added that the reforms would not dent the City's competitiveness and that the UK remains the best regulated centre for an international bank.

Financial Times, 12 January 2012

23. Chancellor George Osborne has warned banks that they must finance the proposed reforms from the Independent Commission on Banking by reducing bank employee remuneration rather than increasing the cost of lending. It is estimated that the reforms, which include bigger loss-absorbing capital buffers, will add £4bn to £10bn in costs for UK banks.

Daily Telegraph, 12 January

24. The Financial Stability Board has announced that it will handle complaints from bankers who believe that rivals in other countries are violating new global restrictions on pay and bonuses.

Financial Times, 11 January 2012

25. Analysts at UBS have advised that the Bank of England's policy of no new support programmes for UK banks has left the banks vulnerable if the eurozone crisis were to spread to the UK. The research adds fuel to concerns about the suitability of handing the Bank of England the responsibility for regulating British banks.

Daily Telegraph, 11 January 2012

26. It is understood that some City bankers are in discussions with lawyers about possible legal action if they feel their discretionary bonuses are too low.

Daily Telegraph, 3 January 2012

27. The Chancellor has endorsed the Independent Commission on Banking's proposal that all banks authorised to take retail deposits in the UK should ring-fence that business. The Chancellor has, however, left a loophole which permits foreign banks (not incorporated in the UK) to dodge the provisions, which could give such banks a competitive advantage.

Daily Telegraph, 3 January 2012

EUROPEAN BANKING

COMMERZBANK

28. Former employees of Dresdner based in London are taking legal action against Commerzbank (which bought Dresdner in 2008) over £41.5m in unpaid bonuses. The four-week hearing will begin on Wednesday 25 January 2012.

Guardian, 23 January 2012

CREDIT SUISSE

29. Oksana Denysenko, a former vice-president at Credit Suisse, is suing her former employers for a second time, alleging she was paid lower bonuses than male colleagues. She also claims that managers allocated bonuses as they saw fit, rather than based on performance levels.

Daily Telegraph, 13 January 2012

DEUTSCHE BANK

30. A former managing director at Deutsche Bank's Hong Kong warrants division has been charged with giving illegal advice which generated fees of HK\$24.8m. If convicted he could face up to seven years in prison.

Financial Times, 16 January 2012

31. An arbitration panel at the US Financial Industry Regulatory Authority has ordered Deutsche Bank to pay a former director Stephen Colavito £2.3m after ruling that he was prevented by the bank from doing business with its institutional investors.

Daily Telegraph, 4 January 2012

EUROPEAN GENERAL

32. The EU has published a draft Directive which will mean that all EU loans must be treated as if they are in default when they are ninety days in arrears. There is concern that if it becomes law, there will be a rise in the number of mortgage foreclosures.

Financial Times, 23 January 2012

33. According to analysis by UBS, central banks are in danger of seeing their capital wiped out in any future banking crisis, which would see an end to the independence of monetary authorities. UBS sees the European Central Bank as having the most severe problems.

Daily Telegraph, 17 January 2012

INTERNATIONAL BANKING

CITIGROUP

34. Citigroup has reported profits in Q4 of 2011 of \$1.16bn – a figure below analysts' forecasts which represents a drop of 11 per cent. The bank blamed the fall on the eurozone debt crisis.

Guardian, 18 January 2012

COMMERZBANK

35. Commerzbank is planning to scale back its operations because of a €5.3bn capital shortfall under the new EU bank regulations. The bank's 2,000 staff in London are expected to retain their jobs and there is speculation that German government may bail out Commerzbank again.

Times, 20 January 2012

GOLDMAN SACHS

36. Goldman Sachs is expected to pay \$385,000 in salary, bonuses and stock options to its staff despite a fall in profits to its second lowest position in a decade.

Daily Telegraph, 18 January 2012

37. Edward Eisler and David Heller, co-heads at Goldman Sachs' securities division, are stepping down. Both will become directors.

Daily Telegraph, 12 January 2012

MORGAN STANLEY

38. Morgan Stanley has apparently used 51 per cent of its \$32.4bn revenues to pay staff salaries,

mainly because of deferred bonuses from previous years.

Guardian, 20 January 2012

NOMURA

39. Jesse Bhattal, head of wholesale, and Tarun Jotwani, head of global markets, are to leave Nomura. Bhattal was the first non-Japanese board member.

Times, 11 January 2012

INTERNATIONAL GENERAL

40. Goldman Sachs, Barclays, Bank of America and Credit Suisse are finalising bids for mortgage-related securities with a value of \$7bn being auctioned by the US Federal Reserve. The securities used to belong to AIG.

Financial Times, 18 January 2012

PRESS RELEASES

41. Ombudsman news - issue 99

The Financial Ombudsman Service has issued the latest edition of Ombudsman News covering:

- recent disputes involving debt
- complaints about personal accident insurance
- a snapshot of the ombudsman's complaint figures for the third quarter of the 2011/2012 financial year;
- Natalie Ceeney, chief ombudsman, on proposed new arrangements for charging financial businesses case fees.

Financial Ombudsman Service, 17 January 2012

Further information can be found on the FOS website:

<http://www.fos.org.uk/publications/ombudsman-news/99/99.pdf>

42. Treasury Committee publishes report into Financial Conduct Authority

The Treasury Committee has published a report into the Financial Conduct Authority (FCA) containing a number of recommendations for the Government's consideration ahead of the drafting

and publication of the Financial Services Bill early in 2012.

Treasury Select Committee, 13 January 2012

Further information can be found on the Parliament website:

<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmtreasy/1574/157402.htm>

43. All internet and phone payments to be faster from 2012

From January 1, 2012, a new legal requirement comes into force for UK and Eurozone electronic payments to reach the recipient's account by the business day after being sent at the latest. The changes are also expected to mean more internet, phone and standing order payments are processed within two hours through the Faster Payments Service.

Payments Council, 28 December 2011

Further information can be found on the Payments Council website:

http://www.paymentscouncil.org.uk/media_centre/press_releases/-/page/1995/

ARTICLES

44. Making interim charging orders final

Andrew Horton of DLA Piper discusses a recent case which highlights the need for creditors to act swiftly to enforce their judgment debts.

"The early bird : whether interim charging orders should be made final," Journal of International Banking and Financial Law, Vol 26 No 11 p 706

CASE LAW

45. Appointment of receivers not unfair under S.140A and B of the Consumer Credit Act 1974

R was the controlling force behind a group of entities ("Rahman Group") which had built up a large portfolio of commercial and residential properties. HSBC Bank PLC ("Bank") provided secured overdraft facilities and term loans to members of the Rahman Group to enable them to acquire and/or refurbish the properties.

On 30 August 2011 the Bank served demands on various members of the Rahman Group for the repayment of various 5 year term loan facilities that it alleged had expired between 31 May and 4

August 2011. It alleged that the failure to repay these facilities triggered defaults in relation to other remaining term loans under express cross-default clauses. Demand was made on those other term loans on 31 August 2011. On 1 September the Bank appointed receivers ("Receivers") over the properties provided as securities for those facilities.

The Bank contended that the demands on 30 August 2011 related to term loans of 5 year duration. R, however, claimed that the Bank had orally agreed or represented on 28 June 2006 that all the facilities under R's control would be extended to 15 year terms and that it had reiterated this on 30 May 2008. R also contended that this agreement extended not only to existing term loans but also all present and future facilities, including overdraft facilities.

R argued that the appointment of the Receivers was invalid as:

- the Bank had agreed to extend the facilities to 15 year terms;
- the Bank was estopped from acting in the way it did;
- the appointment was unfair under s.140A of the Consumer Credit Act and the court should make an order under s.140B effectively discharging the receivership.

The Bank disputed each of these points. It accepted that R had 15 year term loans in relation to residential properties but denied that it had agreed anything other than 5 year terms for commercial premises and on demand terms for overdrafts.

The judge considered the documentary evidence and the evidence given by each side's witnesses. He had no hesitation in preferring the Bank's evidence to R's. R's evidence was wholly inconsistent with the contemporaneous documents both from himself and from the Bank. R's explanations for the difficulties the documents caused his case were unconvincing. He had shown himself to be an active correspondent quite ready to complain and set out any disagreement he had with the Bank yet the points he relied on had not been raised in correspondence.

The judge found as a fact that there had been no agreement at the meeting on 28 June 2006 or any representation that R would be offered commercial interest only loans for 15 year terms. Such loans were not even discussed. Equally no

agreement or representation was made on 30 May 2008 or in correspondence to the effect that all of R's loans were on 15 year terms.

The five facilities which were at the heart of the dispute and which had been entered into between May and August 2006 had all expired in September 2011 when the Receivers were appointed.

The judge also rejected a number of subsidiary points which R had advanced to effect that the Bank had agreed to provide funds for various other developments and properties and that in breach of an agreement it had wrongly allocated proceeds of sale from various properties.

On the Consumer Credit Act point, R argued that the terms of the agreements and mortgages and the manner in which the Bank enforced its rights were unfair.

With regard to the terms the judge noted that the facts in this case bore some resemblance to those in *Paragon v McEwan Peters* [2011] EWCH 2491 (Comm). He agreed with the judge's conclusion in that case that the repayment of overdraft facilities on demand could not remotely be considered to be unfair. Such terms are commonplace in the industry and in the nature of an overdraft. In the instant case there was commercial lending involving very substantial sums of money. There was no suggestion that R had the weaker bargaining position. At no stage had he complained about the terms that he now suggested were unfair yet the evidence showed that he had complained about a number of other terms. Here the 5 year facility was not repayable on demand it was repayable after 5 years. There was nothing unfair about that. A term entitling a mortgagee to appoint an LPA receiver on breach is also standard in the industry and could not be regarded as unfair.

Equally the cross default clause could not be regarded as unfair. Whilst it was not clear whether such a clause was standard, at least one of the other banks offering terms to R would have included such a clause. In this case there were multiple facilities being offered to various entities all of which were supported by multiple securities. In such a case there were sound commercial reasons for the cross default clause. A property might, for example, be security for both a 15 year term and a 5 year term. If at the end of the 5 year term no repayment was made and the property was sold realising more than enough to satisfy the sums due under the 5 year term then, in the absence of a cross default clause, there would be doubt as to whether the mortgagee

could retain the surplus as security for sums due in respect of the 15 year term.

It was not unfair that a borrower should be able to maintain 15 year interest only residential investment property loans only so long as it honoured the terms of its 5 year commercial investment property loans and repaid them when they fell due.

With regard to the manner in which the Bank had sought enforcement this was not a case where the Bank had arbitrarily decided to serve a demand for immediate repayment and then appointed receivers. On the contrary, the Bank had adopted a patient attitude and had tried to find a solution to the dispute. Its decision to enforce its securities at the end of August could not remotely be described as unfair. R had been given more than sufficient time to make proposals but had declined to do so. The application under s.140A and B was accordingly dismissed.

Hugh Evans and Chris Harvey of DLA Piper's Leeds office acted on behalf of the Bank.

(1) Shafik Rahman and others v (1) HSBC Bank PLC and others, Chancery Division, Leeds District Registry, 17 January 2012

46. Mortgagor's rights to challenge mortgagee's legal costs under s.71 of the Solicitors Act 1974

To what extent can a mortgagor challenge its mortgagee's legal costs by applying for assessment under s.71 of the Solicitors Act 1974?

Tim Martin Interiors Ltd ("TMIL") borrowed money from the Bank of Ireland ("Bank") on security of mortgages of several properties and of guarantees given by two directors M and J.

The mortgages included a covenant for payment of "all legal and other costs, charges and expenses incurred by the Bank ... in relation to the Mortgagor or the Mortgaged Property ... on a full indemnity basis."

Previous case law establishes that such a clause entitles a mortgagee to recover its actual costs, charges and expenses except for any which are not reasonably incurred or which are unreasonable in amount.

TMIL defaulted. It owed the Bank £1.15 million including £114,216 of legal fees which the Bank had paid its solicitors.

M and J paid the £1.15 million to the Bank. TMIL then reimbursed M and J. So in effect TMIL had paid the legal costs.

TMIL applied for an order assessing the Bank's solicitors' costs under s.71. It complained that:

The Bank's legal costs included costs in relation to bankruptcy proceedings against M and J. These were nothing to do with the mortgages so the costs referable to them could be nothing to do with the liability of TMIL;

The charge-out rates were unreasonable. It was wrong of the Bank to instruct a City firm rather than a local one and for a partner to have done an extensive amount of the work;

Amounts charged in relation to attendances and communications were excessive.

The costs judge accepted most of these objections and assessed the solicitors' costs at £31,447.50. He ordered the solicitors to pay £82,768.97 (the amount disallowed) to TMIL.

Some of the costs were disallowed on the basis that whilst the Bank might have been liable to the solicitors for them in full they were outside the scope of TMIL's liability.

The solicitors succeeded on appeal, the judge ruling that the extent of the Bank's rights against TMIL ought to be raised in proceedings as between the Bank and TMIL.

TMIL appealed to the Court of Appeal which had to resolve the following issues:

What can a court strike out of a bill on an assessment under s.71? Can it reduce the amount of an item in a bill when the item itself is properly chargeable but the amount claimed is excessive and unreasonable?

Where a third party (in this case TMIL) has paid a solicitor's client (in this case the Bank) and the client has then paid the solicitor, can the court order the solicitor to repay any disallowed amounts to the third party or should the liability to repay rest with the client (the Bank)?

The Court of Appeal reviewed the authorities. It concluded that third party assessment under s.71 is of limited use to a third party. On the first issue, s.71 only allows a costs judge to follow a "blue pencil" approach. He can eliminate items which should not be laid at the door of the third party at all because they are outside the scope of his liability (in this case the costs of the bankruptcy proceedings) and also items which would only be allowable as between solicitor and client due to a special arrangement within the terms of CPR rule 48.8(2)(c). But he cannot eliminate any other item or reduce the quantum of

any item which is properly included in the bill but which he thinks is excessive in amount unless he could have done so as between client and solicitor. So, if a client and solicitor have agreed a charge-out rate, a third party will find it hard to challenge.

On the second point, if the third party has not yet paid anything in respect of the bill then a s.71 assessment may be useful because the third party will only be liable to pay the amount certified. Although the client will not be bound by the result of the assessment (as it was not a party to it) in practice it may be as effective against the client as it is between the third party and the solicitor.

If, however, the client has paid the solicitor, and the third party has paid the client, then the third party's remedy must lie against the client (in this case the Bank), not against the solicitor. It cannot be right to require a solicitor to pay a third party money which he received from his client and which his client was bound to pay him, merely because the third party was not liable to pay the same amount to the client.

In such circumstances a third party ought to bring proceedings against the client to establish how much is due from him to the client. In a mortgage case this would involve conventional proceedings for an account of what is due under the mortgage. Such proceedings would let the court determine the correct issue as between the correct parties, and, if appropriate, to order repayment by the mortgagee to the mortgagor. In such proceedings the court could disallow part of an amount claimed on the basis that the amount was excessive but this cannot be done under s.71.

*Tim Martin Interiors Ltd v Akin Gump LLP,
Court of Appeal, 21 December 2011*

47. Claim against valuer fails but court makes obiter comments on impact of securitisation and contributory negligence

GMAC RFC ("GMAC") (now called Paratus AMC) provided loans secured on residential properties. In July 2004 a Mr Stockton ("Borrower") applied to GMAC for a mortgage. The loan was to be secured by way of re-mortgage over a flat in York ("Flat").

GMAC instructed Countrywide Surveyors Limited ("Countrywide") to value the Flat. Countrywide valued it at £185,000. The floor area of the Flat was recorded as 62m² but in fact was probably 65.5m².

GMAC relied on the valuation and offered to lend £166,500. The Borrower accepted the offer. GMAC made a net advance of £164,430 and the re-mortgage completed on 30 September 2004.

GMAC had created a special purpose vehicle, RMAC 2005 NS1 Plc ("RMAC"), for buying packages of secured loans from GMAC. On 2 March 2005 GMAC sold the beneficial ownership of a package of mortgage loans and their related security to RMAC ("Securitisation"). The package included the loan to the Borrower and the mortgage over the Flat. At law GMAC remained the mortgagee of the Flat and entitled to receive payments in respect of the loan from the Borrower.

In 2007 the Borrower fell into arrears. GMAC obtained possession of the Flat and sold it in September 2008 for £123,500. After repossession and sale fees were deducted GMAC received £118,103.20.

GMAC and RMAC sued Countrywide for producing a negligent valuation.

Four main issues arose for determination:

- what was the true value of the Flat in July 2004?
- was the valuation of the Flat negligent?
- had either GMAC or RMAC suffered recoverable loss (the securitisation issue)?
- should any damages awarded be reduced for contributory negligence?

True Value

The court heard valuation evidence from two experts: H for GMAC and RMAC; and W for Countrywide. H valued the Flat at £154,000 in July 2004 whereas W valued it at £175,000.

The judge was unable to accept the evidence of either expert without qualification. In the event he preferred W's evidence which relied on comparable sales evidence obtained from the Land Registry for the period immediately prior to the valuation.

H had relied primarily on the application of a price per square metre to the floor area of the Flat. Although the size of a property might be relevant, it was only ever one factor among many that might be taken into account. Valuers would not normally have detailed information about the floor areas of comparable properties. The suggestion that a reasonably careful valuer ought

to obtain such information from developers was rejected. It was implausible to think that:

- (a) Developers would respond to such requests;
- (b) A valuer's ability to carry out a competent valuation would turn on whether he could obtain that information; and
- (c) The method of valuation should impose such an onerous duty on the valuer when the fees paid were so modest. Although a low fee could not excuse a valuer from doing what was necessary to provide a competent valuation it did set some parameters as to what was reasonably expected of him.

Was the valuation negligent?

Did Countrywide's valuation fall outside the range within which careful and competent valuers might reasonably differ (usually referred to as the "margin of error" or the "bracket")?

In *K/S Lincoln and others v CB Richard Ellis Hotels Ltd* [2010] EWHC 1156 (TCC) Coulson J stated that as a matter of general principle the margin of error for a standard residential property should be as low as plus or minus 5%. The margin of error for a one-off property should usually be plus or minus 10%. Where there are exceptional features to the property in question then the margin of error could be plus or minus 15% or even higher in an appropriate case.

H argued for a margin of error of 4% either side of the correct valuation. W argued that given the difficulties in obtaining good comparable evidence and in accurately assessing the impact of discounts and incentives which developers might have given for off-plan or bulk purchases, the margin of error should be no less than 10% and probably higher, say 12.5%.

Again, the judge was not entirely convinced of either expert's case. On the whole he preferred W's opinion as the comparable evidence did lack consistency and clarity and the market was buoyant, even volatile. In the event he concluded that the acceptable range of valuations was from £160,000 to £190,000 i.e. a margin of error of plus or minus 8%.

As Countrywide's valuation fell within that range it was not negligent and the claim was dismissed.

As the claim was dismissed it was not strictly necessary for the judge to consider the remaining points on the impact of the securitisation and contributory negligence but he set out his obiter views on those points anyway.

Impact of Securitisation

Countrywide tried to argue that even if the valuation had been negligent then neither GMAC nor RMAC had suffered loss. It argued that the effect of the Securitisation was that GMAC had assigned its cause of action against Countrywide to RMAC. At the time of the assignment no substantial loss had been suffered. The Securitisation structure applied the income-stream in an order of priority (a cascade effect). Under that structure RMCA had suffered no loss at all, all of the losses suffered were in fact suffered by GMAC which found itself at the bottom of the cascade. GMAC could not however recover those losses as it had assigned its cause of action.

Had it been necessary for the judge to decide the point he would have rejected Countrywide's argument. Although there had been no substantial loss prior to the Securitisation, he considered that on the facts there had been no legal assignment of the cause of action. This was because the Mortgage Sale Agreement between GMAC and RMAC stipulated that no absolute assignment was to take place until the sale of the mortgages was completed and, on the facts, completion of the sale of mortgages had never taken place. The effect of all this was simply that GMAC must either in due course assign to RMAC its cause of action or account to RMAC for the proceeds of the cause of action if it sued in its own name.

Further it appeared from the evidence that GMAC had indeed suffered loss in that it received less from the income-stream under the mortgage pool.

Countrywide was seeking to exploit the consequences "of a strict application of technical rules concerning assignment to a widely used financing technique" and it would be "a sorry state of affairs if an unexceptional form of securitisation such as was employed in the present case meant that losses for which a negligent valuer would have otherwise have been liable became irrecoverable".

Contributory negligence

Countrywide criticised GMAC because it had:

- failed to carry out sufficient enquiries and investigations into S's honesty and reliability;
- operated an imprudent lending policy of lending up to 90% loan to value ("LTV") on a self-certified basis.
- The judge rejected the notion that GMAC's practice of making loans at 90% LTV on a

self-certified basis was negligent. It was certainly at the high-risk end of the market but expert evidence from both sides showed that it was in accordance with a significant, though small, sector of the market. The fact that high LTV lending creates high risks in any given case does not mean that it is imprudent for those whose business it is to make such loans.

However, if GMAC was going to lend at such a high LTV then it needed to ensure that it had properly investigated and verified matters of central importance. GMAC had failed to investigate debts which had not been disclosed in the application form but had been revealed by other checks. Those discrepancies raised doubts about the borrower's honesty. GMAC could not argue that honesty was of no concern provided that there was a sound credit history. That showed insufficient regard to the obvious risk that dishonest statements of borrowers' means, for the purpose of procuring more money than they would get if they told the truth, would lead to borrowers over-extending themselves and defaulting on their excessive liabilities.

GMAC also failed to investigate the borrower's income. Had it done so it would have found that he was unable to verify his declared income or to give satisfactory explanation for his inconsistent statements of earnings or his failure to give proper disclosure of his liabilities. It would have concluded that he was dishonest and would not have lent him money.

On that basis, if Countrywide had been found negligent, then the judge would have found that GMAC had been contributorily negligent and, given the comparatively flagrant nature of GMAC's lack of care, the judge would have made a deduction of 60% from GMAC's total loss.

(1) Paratus AMC Limited (2)RMCA 2005 NS1 Plc v Countrywide Surveyors Limited, Chancery Division, Leeds District Registry, 14 December 2011

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