



Winning the battle but losing the war

We have previously commented on the need for claimants to establish all elements of a claim (duty, breach, causation and loss) if they want to achieve more than a Pyrrhic victory. The case of *Mortgage Express v Countrywide Surveyors Limited* provides another example of this, but with a slightly different twist.

Mortgage Express sued Countrywide for losses it said it had suffered as a result of advancing monies to borrowers purchasing properties in a development in Eastbourne, in alleged reliance on valuations provided by Countrywide. Mortgage Express brought its claim in deceit only; it claimed that Mr Driver, the valuer who gave the valuations, had no honest belief that his rental valuations were correct. Mortgage Express did not criticise Mr Driver's capital valuations.

Initially, Mortgage Express pursued a claim for losses on 64 properties. Because some of the borrowers had not defaulted at the time Mortgage Express commenced proceedings, it did not fully quantify its loss, although in broad terms it was expected to be about £5m.

The claim proceeded to trial in January 2016. Perhaps having regard to the comments made by Lord Hoffmann in *Nykredit v Edward Erdman* regarding the difficulty a lender may have in showing it had suffered a loss when the borrower's covenant appeared to be good and interest payments were still being made, about a week before trial Mortgage Express abandoned its claim in connection with 23 loans which were still performing. This left 41 loans where the borrowers had defaulted and Mortgage Express had sold the security properties as mortgagee in possession.

Mortgage Express largely succeeded in establishing its claim on liability, the Court finding that Mr Driver had provided his rental valuations recklessly, not caring whether they were true. The Court held that Mortgage Express had relied on Mr Driver's valuations when deciding whether to lend in all the cases except for two, where Countrywide had provided revised rental figures before Mortgage Express advanced monies to the borrowers. Accordingly, Countrywide was found liable for Mortgage Express's losses in 39 cases.

In those cases, Mortgage Express claimed damages of £3.045m as its loss to the date of sale of the security properties, calculated in accordance with the principles in *Swingcastle v Alistair Gibson*. It also claimed interest from the date of sale under section 35A of the Senior Courts Act at LIBOR + 1%. The *Swingcastle* figure included £1.395m claimed for interest as damages.

This part of the claim was originally advanced as a claim for cost of funding losses. However, after the liability trial, Mortgage Express changed the basis of this claim to one for losses representing the amount it would have earned on lending the monies advanced to the Eastbourne borrowers to other borrowers. Although Mortgage Express

Any comments or queries?

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suggested that it had not changed the basis of its claim, the Court found that it had. It is not clear why Mortgage Express made this change, although perhaps it was because it could not show a particular source of funding for the Eastbourne loans, in order to substantiate a claim for cost of funding.

In support of its claim, Mortgage Express adduced evidence from an employee in its Treasury Department, who said that, because of the underlying arrangements it had in place, if Mortgage Express had not made the loans to the Eastbourne borrowers, it would have had to make loans to other borrowers on similar terms. He said that Mortgage Express would have made a return on those other loans of LIBOR + 0.5% compounded quarterly.

Countrywide submitted that the claim for loss on alternative loans was entirely speculative and that Mortgage Express had not discharged the evidential burden to establish that it had suffered such a loss: there was no evidence of a demand that Mortgage Express had been unable to satisfy as a result of making the Eastbourne loans; and no evidence of any borrower being refused a loan because Mortgage Express had advanced the monies on the Eastbourne properties. In fact, the evidence suggested the opposite: Mortgage Express would and could have satisfied any demand for loans it faced; and did not turn away any borrowers who otherwise satisfied its lending criteria.

The Court agreed with Countrywide and found that Mortgage Express had not proved its claim for loss on the alternative loans it said it would have made. The burden was on

Mortgage Express to establish that it would have made alternative loans. As Neill LJ had pointed out in *Swingcastle*, that was usually quite a difficult task. Here, Mortgage Express had not come within a measurable distance of establishing that claim. Contrary to what Mortgage Express suggested, the evidence established that it was able to satisfy whatever demand there was for loans. As such, its claim for interest as damages failed.

The classic analysis of the ways in which a lender may claim interest as damages comes from the judgment of Neill LJ in *Swingcastle*. In that judgment, he suggested four ways in which a lender might make such a claim, being: (i) interest that the lender might have earned by using the money on an alternative loan; (ii) interest that the lender might have earned if the money would have been placed on deposit; (iii) loss caused by the lost opportunity of investing elsewhere; or (iv) the cost of funding, if the lender borrows money from third parties in order to make loans to its borrowers. However, as Neill LJ noted, and as has been pointed out elsewhere, proof of such damage is not straightforward and each alternative gives rise to significant evidential hurdles for a lender. This case exemplifies the difficulties for lenders in establishing a claim for interest as damages.

Mortgage Express may have been better served advancing its claim for interest as damages on one of the other bases set out above. By advancing an unsuccessful claim for loss on alternative loans, it turned what started as a £5m claim into a £2m claim, thereby arguably winning the battle but losing the war.

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