Between a rock and a hard place

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Difficulties for lenders arising out of limitation

In a previous Alert ("Time's up" – limitation for a claim against a valuer), we reported on the decision of HHJ Seymour QC in *Toombs v Bridging Loans*. In that case, the judge made an order for summary judgment in the defendant valuer's favour on the basis that the lender's claim was bound to fail as being statute barred.

The Court of Appeal granted the lender permission to appeal that decision but has now dismissed the appeal. The appeal only addressed the issue of when the primary limitation period in tort expired, as the lender did not appeal the judge's decision on section 14A of the Limitation Act.

The facts in *Toombs* were similar to those in many valuers' negligence claims. In short: the defendant valued the property in November 2006 at £730k; the claimant made a loan of £502,750 to the borrower on 3 November 2006; the loan was due to be repaid on 3 May 2007, but it was not repaid then or ever; and the claimant commenced proceedings against the defendant on 16 May 2013.

In its Particulars of Claim, the claimant alleged that the property was worth only £450k in November 2006. It sought to recover damages by reference to the principles in the *SAAMCo*[1] case. In its defence, the defendant did not admit the true value of £450k alleged by the claimant, but pleaded that the claim was statute barred, having been brought more than six years after the claimant first suffered loss.

The test for determining when a cause of action against a valuer accrues in tort was established in *Nykredit v Edward Erdman*. In essence, the lender's cause of action accrues when it first suffers relevant, measurable loss, which is when the amount it has advanced together with interest at a proper rate exceeds the value of the rights it acquired when making the loan, being the value of the security property and the value, if any, of the borrower's covenant.

The judge, in considering the application for summary judgment, found that the claimant's cause of action had accrued no later than 3 May 2007, because the amount of the loan at that time exceeded the value of the property as pleaded by the claimant and the borrower's covenant, which he said was worthless. He therefore found that the claimant had no real prospect of defeating the limitation defence. The Court of Appeal agreed with the judge's reasoning.

Toombs does not change the law as to when a lender's cause of action against a valuer accrues in tort. Its interest lies in the application of that principle in a summary

Any comments or queries?

Alexandra Anderson
Partner
+44 20 3060 6499
alexandra.anderson@rpc.co.uk

Jonathan Angell
External Consultant
+44 20 3060 6073
jonathan.angell@rpc.co.uk

1. *South Australian Asset Management Corporation v York Montague Ltd* [1996] UKHL 10

judgment context and the light it throws on the difficulties lenders face in seeking to sue on valuations prepared more than six years ago.

A lender needs to obtain expert valuation evidence as to the property's true value when deciding whether to pursue a claim against a valuer. The lower the expert's retrospective valuation, the greater the amount the lender is likely to be able to recover, if successful. This is because a lower retrospective valuation will result in a higher *SAAMCo* "cap" and therefore a higher award of damages if this, rather than the lender's actual loss as adjusted for contributory negligence and failure to mitigate, provides the basis for calculating damages.

However, the lower the retrospective valuation, the higher the risk that the lender's claim will be found to be statute barred, particularly where the lender advanced monies at a high loan to value ratio. In this regard, if the retrospective valuation is lower than the amount of the loan, then the court is likely to conclude that the lender's cause of action accrued when it made the loan and that its claim is statute barred. This is because the court will often find that the borrower's covenant was at all times worthless, based on the borrower's ultimate default. The lender can therefore find itself between a rock and a hard place, with its interests in increasing its recovery and avoiding the claim being time barred pulling in opposite directions.

The claimant tried to get around this problem in *Toombs* by arguing that the court might conclude at trial that the property was worth more than £450k (essentially that the court should not take its expert evidence at face value). The claimant said that the defendant was likely to adduce expert evidence supporting a higher value and that the Judge would probably find a true value somewhere between the experts' figures. However, in this case, the defendant had not, at the time of the summary judgment hearing, advanced any positive case as to true value; it had simply not admitted the claimant's figure of £450k, which was the only evidence as to value before the court at that hearing.

The Court of Appeal's endorsement of the judge's approach is good news for valuers and their insurers. It reinforces the lesson that, before suing a valuer, a lender needs to consider very carefully whether it has any reasonable prospect of avoiding the conundrum which arises as a result of the decision in *Toombs*.

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Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

11/F Three Exchange Square
8 Connaught Place
Central Hong Kong
T +852 2216 7000

12 Marina Boulevard
#38-04 Marina Bay Financial Centre Tower 3
Singapore 018982
T +65 6422 3000