

# Legal Mortgage Monthly Update

## April 2025

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| Case name<br>Neutral citation | Bluestone Mortgages Ltd v Stoute<br><a href="#">[2025] EWHC 755 (Ch)</a>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Legal points                  | Debt Respite Scheme Regulations – enforcement of ‘mixed’ judgment for capital and arrears – requirement for court permission to enforce                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Facts                         | <p>In 2018 BML, a mortgage lender, loaned Mr &amp; Mrs S £305,000 on the security of a first legal charge over their home. In 2019 S defaulted and BML issued proceedings and obtained an order (1) requiring S to give up possession, (2) requiring S to pay £12,061.56 for mortgage arrears, and (3) “judgment outstanding mortgage debt £319,923.68”.</p> <p>BML obtained a number of warrants. The first two were suspended. The third was not executed because Mr S entered a number of breathing space moratoria with a debt adviser under the <a href="#">Debt Respite Scheme (Breathing Space and Mental Health Crisis Moratorium) (England Wales) Regulations 2020</a>. BML applied to have the last of these (a September 2023 moratorium) cancelled in relation to the debt owed to it, and when the party debt adviser refused to do so, BML applied to court for a number of orders including: (1) declaring that S’s debt to them is not a qualifying debt in relation to the moratorium; (2) cancelling the Sept 23 moratorium in relation to that debt; and (3) that it “can enforce” the 2019 order for possession “irrespective of the moratorium”.</p> <p>At a hearing before a Circuit Judge, it was held (1) the debt, to the extent that it does not amount to arrears, is not a qualifying debt and therefore not a moratorium debt but that to the extent it does amount to arrears, the debt is a qualifying debt and a moratorium debt; (2) although the majority of the debt (the capital element of the debt) is not a qualifying debt the arrears element was, and that BML required permission to enforce the security under <a href="#">Reg 7(7)(c)</a>, on the basis that that the security is indivisible: a single asset charged to a creditor in respect of both types of debt is “<i>security held in respect of a moratorium debt</i>”.</p> <p>The judge adjourned the question of whether he should grant a possession order.</p> <p>BML appealed. It agreed with the finding that the debt consisted of a moratorium debt only to the extent of the arrears (as at Feb 24, the arrears were £108,395.78 out of a total debt of £415,309.15 (plus costs)) but disputed the finding that <a href="#">Reg 7(7)(c)</a> meant that it could only enforce the possession order with the permission of the court under <a href="#">Reg 7(2)(b)</a>.</p> |
| Held                          | (Mellor J): The appeal was largely overtaken by the recent decision in <i>Seculink Ltd v Forbes</i> <a href="#">[2025] EWHC 524 (Ch)</a> but it was not academic principally because of the risk that Mr S would enter into further moratorium based on different symptoms of mental crisis and BML did not want to have to incur the cost of challenging such a moratorium afresh.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |

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|         | <p>The appeal proceeded on the basis that the judge was correct to find that whilst the arrears (£108k +) were a moratorium debt, the non-arrears portion of the secured debt (approx. £300k) was a non-qualifying debt and could not be a moratorium debt. It was not controversial that where a creditor wishes to enforce a judgment or order which relates wholly to a moratorium debt, taking such a step would be enforcement action under <a href="#">Reg 7(7)(b)</a>. Likewise where security is held solely in respect of a moratorium debt, enforcement of that security would be enforcement action under <a href="#">Reg 7(7)(c)</a>. The question on the appeal was what the position was where the judgment or order relates only in part to a moratorium debt (a "mixed judgment") or the security secures both a moratorium debt and other debt (a "mixed security").</p> <p>The question was principally one of interpretation - the judge addressed a number of arguments raised by counsel including a point raised by the judge below on <a href="#">s 36 Administration of Justice Act 1970</a>, namely that if a debtor sought a stay or suspension on the usual terms as to payment of the current monthly instalment (in respect of capital, being a non-moratorium debt) AND a reasonable sum off the arrears, then if the arrears pre-dated the moratorium the effect of the order would be to compel the debtor to make payments towards that moratorium debt.</p> <p>The judge's interpretation was correct.</p> <p>62. Stripping out the technical language of the Regulations and using the facts of this case as an example, whilst the debtor is in <i>mental health crisis treatment</i>, [BML] would have the automatic right to enforce as regards the approx. £300k debt but not in respect of the £108k arrears. On [BML's] case, the permissible enforcement would necessarily entail eviction from and then the sale of the family home. In my judgment, there are very few events which could be more detrimental to the debtor's health than those.</p> <p>A purposive interpretation of <a href="#">Regs 7(7)(b) and (c)</a> pointed firmly in favour of the interpretation reached by the judge.</p> <p>Appeal dismissed.</p> |
| Comment | <p>We reported on <i>Seculink Ltd v Forbes</i> <a href="#">[2025] EWHC 524 (Ch)</a> in the <a href="#">March 2025 monthly update</a>. It contained a detailed review of the Regulations.</p> <p>The first instance decision in this case (HHJ Parker, sitting in the County Court at Canterbury) also contains a helpful review of the Regulations and some careful analysis about how the Regulations apply.</p> <p>The position reached in <a href="#">Seculink</a> was that the capital element of a mortgage debt is not a qualifying debt and not a moratorium debt; but that the arrears element is. Where, as in the present case, there is a mixed judgment, comprising both capital and arrears, and giving rise to both moratorium and non-moratorium debt, enforcement requires the permission of the court under <a href="#">Reg 7(2)(b)</a>.</p> <p>Unfortunately, the judge at first instance adjourned the question of whether the lender should be granted permission to take any (further) enforcement action, and this point was left open on appeal. Given the court's findings on <a href="#">s 36 AJA 1970</a>, it is difficult to see any/many District Judges making an order for possession or permitting a warrant to be issued during the period of a moratorium.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |

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|  | Note the unusual form of order made by the District Judge (a) for possession, (b) for payment of arrears, and (c) for payment for the whole of the judgment debt. (b) is fairly rare in practice, but it may have been done with half an eye on the application of the Regulations. |
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| Case name<br>Neutral citation | Yerbury v AZETS Holdings Ltd<br><a href="#">[2025] EWHC 757 (KB)</a>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| Legal points                  | LPA Receivers – whether employer vicariously liable for breaches of duty to third parties                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| Facts                         | <p>A company purchased a site for development with bridging finance from a lender based on a site value of £5M. Following default in payment lender appointed two LPA receivers (employees of A) to sell the site and recover the outstanding debt. The receivers sold the site for £4.28M being £722K less than the valuation.</p> <p>Y, an assignee of the borrower subsequently sued A (not the receivers) in respect of an alleged sale at undervalue. The Master struck out the claim on the application of A on the basis the claim was against the wrong party on a number of grounds, including that there was no authority for the proposition that an employer of an LPA receiver was vicariously liable for the receiver's breaches of duty to a third party. Permission to appeal was given on this ground only.</p> <p>Y's main argument was that since an employer benefits from the receivers' activities, it should bear the risk of wrongdoing committed during those activities, relying on <i>Trustees of the Barry Congregation of Jehovah's Witnesses v BXB</i> <a href="#">[2024] AC 567</a>. Y also suggested it was common for claims to be made against the receivers' company.</p> |
| Held                          | <p>(Sweeting J) There are restrictions on who may be appointed as LPA receivers, which demonstrates the personal nature of the appointment. Thus, a corporate body cannot be appointed as a receiver over the property of a company.</p> <p>While receivers act as agents of the borrower to repay the debt, they can sue for possession in their own name against the borrower.</p> <p>Both the powers and duties of receivers are vested in them by their personal appointment and are the result of the long development of the law and practice relating to the custodial responsibility for property.</p> <p>Y's decision to rely on vicarious liability was because he made an error in his choice of party. Establishing vicarious liability involves a 2-stage test:</p>                                                                                                                                                                                                                                                                                                                                                                                                                             |

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|         | <p>(1) Whether the relationship between the defendant and the persons who committed the tort was one of employment or akin to employment. In most cases determining whether an employer-employee relationship exists will be straightforward, because there will be a contractual employer. Identifying a relationship which is “akin to employment” is more complex and will involve a careful examination of the features of the relationship.</p> <p>(2) Whether the tortfeasor’s wrongful conduct was so closely connected with acts that the tortfeasor was authorised to do that it can be fairly and properly regarded as having been done by the tortfeasor while acting in the course of their employment or quasi-employment.</p> <p>However, the law contemplates that the contractual or “general” employer may not be vicariously liable in some situations. Here:</p> <p>(a) The receivers were appointed personally under a deed of appointment over the company’s assets and they owed their duties to the company’s creditors, not to their employer. The duties were wide ranging and in discharging them the receivers were required to act autonomously and independently, including making independent commercial decisions regarding the sale of the company’s property;</p> <p>(b) Actions for breach of duty <i>qua</i> receiver are typically brought against the receiver personally, not against the firm that employs them or offers their services;</p> <p>(c) The legislative framework means that LPA receivers are appointed personally so there is a direct relationship, and this accountability, between the receiver and the borrower, and, by extension, parties interested in the equity of redemption.</p> <p>(d) Since the appointment is personal it does not depend upon the receivers maintaining their employment with any particular employer. The law treats receivers as independent agents, not as employees or representatives of their employer during the course of the receivership;</p> <p>(e) For the purpose of an analysis of vicarious liability, once appointed a receiver is acting in the course of their appointment in respect of acts and defaults in the receivership and not in the course of their employment. Thus their employer is not vicariously liable for such acts and defaults.</p> <p>The Master was correct. Appeal dismissed.</p> <p>There is a consequential judgment at <a href="#">[2025] EWHC 758 (KB)</a></p> |
| Comment | <p>Sue receivers individually, not their firms. It is a uniquely personal appointment.</p> <p>This case does not deal with the substantive merits of a claim for an account for breach of duty to obtain best price (sale at an undervalue), but these claims are not straightforward either. See the website: <a href="https://www.legalmortgage.co.uk/sale-at-an-undervalue">https://www.legalmortgage.co.uk/sale-at-an-undervalue</a></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |

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| Case name<br>Neutral citation | R v Financial Ombudsman Service Ltd on the application of Chapman (Santander UK Plc third party)<br><a href="#">[2025] EWHC 905 (Admin)</a>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| Legal points                  | Standard variable rate interest-only mortgage – bank refusing to switch products – subsequent complaint to FOS – time limits - waiver                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Facts                         | <p>Cs had a fixed rate interest-only mortgage with Santander, which reverted to a standard variable rate in 2009. The mortgage was redeemed in 2016 and in 2022 Cs complained to the bank that they had been trapped as ‘mortgage prisoners’ on the standard variable rate on the basis the bank refused to switch them to another mortgage product, and they were unable to re-mortgage with another lender.</p> <p>S investigated the complaint but in a ‘final response’ did not uphold it. The final response said that Cs had the right to refer the complaint to the FOS within 6 months of the date of the letter, but did not refer to any historic time bar. Cs complained to the FOS within 6 months, but S responded by saying the complaint was brought (a) more than six years after the event complained of, and (b) more than three years after Cs knew or should reasonably have known they had cause to complain.</p> <p>The Ombudsman held that she had no jurisdiction to entertain the complaint because it was out of time. Cs applied to challenge the decision by way of judicial review, with permission to the KBD Administrative Court.</p>                                                                                                                                                                                                                                                                                                                                                          |
| Held                          | <p>The time limits are in <a href="#">DISP 2.8.2R</a>. The Ombudsman cannot consider a complaint if the complainant refers it to the FOS:</p> <p>(1) More than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution communication,<br/>or</p> <p>(2) More than (a) six years after the event complained of, or (if later) (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint,<br/>...</p> <p>unless</p> <p>(5) the respondent has consented to the Ombudsman considering the complaint where the time limit in <a href="#">DISP 2.8.2R</a> or <a href="#">DISP 2.8.7R</a> have expired.</p> <p>Following a review of the relevant legislative framework, including the Ombudsman’s jurisdiction to consider a complaint in <a href="#">s 225 etc Financial Services and Markets Act 2000</a> and the <a href="#">FCA Handbook Dispute Resolution: Complaints guide</a>, and the caselaw on the interpretation of <a href="#">DISP</a> in <i>Shop Direct Finance Co Ltd v Official Receiver</i> <a href="#">[2023] EWCA Civ 367</a> together with other authorities it was held that the question is ultimately one of interpretation, which was a point of law.</p> <p>The Ombudsman had not misdirected herself and there was no challenge on public law grounds to her findings of fact.</p> <p>Application for judicial review dismissed.</p> |

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| Comment | <p>One of the issues here was whether the bank had complied with <a href="#">DISP 1.6.2R</a> which requires its 'final response' to indicate whether or not it consents to waive the relevant time limits in <a href="#">DISP 2.8.2R</a> by including the appropriate wording set out in <a href="#">DISP 1 Annex 3R</a> (which contains a menu of statements), with it being contended the bank had waived the right to rely on the complaint to the FOS as having been made out of time, or had impliedly consented to it going forward, as a result of not having complied with <a href="#">DISP 1.6.2R</a>. However, on the evidence before the Ombudsman there was no positive evidence that the bank had consented to waive the historic time bar. Whether there had been consent was also a question of interpretation or the rules and a point of law.</p> <p>The short point is do not delay in pursuing a complaint to the FOS unless [your lender] has positively consented to the Ombudsman considering the complaint where the time limits in <a href="#">DISP 2.8.2R</a> have expired, and which ought to be indicated in the 'final response' in accordance with <a href="#">DISP 1.6.2R</a>.</p> |
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| Case name<br>Neutral citation | McGuinness v Goldentree Financial Services Plc<br><a href="#">[2025] EWHC 870 (Ch)</a>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| Legal points                  | Regulatory compliance – investment property loan – summary judgment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Facts                         | <p>In 2019 G advanced development finance to M and his company on the security of an all monies legal charge over the development property, a debenture over the company and a personal guarantee from M. Following default in repayment, G appointed administrators over the company, LPA receivers over the mortgaged property and subsequently commenced county court proceedings for possession, and M issued high court proceedings for declarations and damages in relation to the loans. The possession proceedings were transferred to the high court to be case managed together.</p> <p>G applied for reverse summary judgment or an order striking out the high court proceedings. M had contended that the loan was a regulated mortgage contract under <a href="#">Art 61 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001</a>; that <a href="#">s 19(1) FSMA 2000</a> prohibits anyone from carrying on a regulated activity in the UK unless authorised to do so; and that <a href="#">s 26(1)</a> provides that agreements made in contravention of this general prohibition are unenforceable.</p> <p>G contended this was an exempt investment property loan under <a href="#">Art 61A(1)(d)</a> and that the loan agreement included a declaration for exemption signed by M for the purposes of <a href="#">Art 61A(3)</a>.</p> |

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| Held    | <p>(HHJ Halliwell, sitting as a judge of the High Court) Having reviewed the principles to be applied on a reverse summary judgment application under <a href="#">CPR 24.2(a)(i)</a> and the regulatory provisions governing the use of declarations for exemption in <a href="#">Art 61A(3)</a>, it was acknowledged that M had an arguable case that his declaration was ineffective, which would mean there was no statutory presumption that the 2019 loan agreement was an investment property loan (applying HHJ Rawlings' analysis in <i>Kumar v LSC Finance Ltd</i> <a href="#">[2023] EWHC 1439 (Ch)</a> (affirmed by the Court of Appeal at <a href="#">[2024] EWCA Civ 254</a>) but that it was obvious, from the evidence as a whole, that the 2019 loan agreement was an investment property loan within the meaning of <a href="#">Art 61A</a> and that M's case to the contrary did not have a realistic prospect of success. There were no reasonable grounds to believe a fuller investigation of the facts of the case at trial would affect the outcome of the case. G was accordingly entitled to summary judgment. In any event, M's case that this was a regulated mortgage contract was fundamentally flawed since for the purposes of <a href="#">Art 61</a> the transaction had to involve the provision of credit to an individual or to trustees whereas here the credit was provided to M's company. There was therefore no room for him to advance a claim for damages, and the remaining parts of his case would be struck out under <a href="#">CPR 3.4(2)(b)</a>.</p> |
| Comment | <p>The reported decision also deals with a number of other issues, but it is noted here because of the willingness of the court to grant summary judgment against a [borrower] on the availability of an exemption from regulation, notwithstanding that the written form of declaration for the purposes of <a href="#">Art 61A(3)</a> was ineffective with the practical result that a party who asserts a breach of the general prohibition is going to have to rely on more than just non-compliance with the form of declaration, where the available evidence all points towards exemption.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |

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| Case name<br>Neutral citation | <p>HNW Lending Ltd v Lawrence<br/><a href="#">[2025] EWHC 908 (Ch)</a></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Legal points                  | <p>Mortgage possession proceedings – miscellaneous defences, including entitlement to sue under Contracts (Rights of Third Parties) 1999 – applications to strike out</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| Facts                         | <p>HNW entered into a loan agreement and made a number of further advances to L secured on a number of mortgages. Following default in repayment, HNW issued proceedings for possession and a money judgment in the sum of £3,535,965.82. L defended the claim on the ground that the loan agreement and further advances had been procured by duress and/or undue influence and that HNW did not have title to sue. She also counterclaimed for damages.</p> <p>A possession order was initially made then set aside, and the proceedings were transferred to the High Court. HNW applied to strike out the defence and counterclaim, and L applied to strike out the claim.</p> |
| Held                          | <p>(Andrew Lenon KC) The court reviewed the lending arrangements, then the procedural requirements on the applications to strike out. The test for a strike out application under <a href="#">CPR 3.4(2)(a)</a> is whether the claim is unwinable and whether its continuance would be without any possible benefit to the respondent to the application: <i>MF Tel Sarl v Visa Europe Ltd</i> <a href="#">[2023] EWHC 1336 (Ch)</a> per Master Marsh.</p>                                                                                                                                                                                                                        |



The test is more stringent than for summary judgment. The focus under [CPR 3.4\(2\)\(a\)](#) is on the statement of case and for the purposes of the application the applicant is usually bound to accept the accuracy of the facts pleaded unless they are contradictory or obviously wrong. In contrast to [CPR 24.2](#), the court does not examine or evaluate the evidence.

The defence was confusingly drafted and did not reflect some of the points now being taken by L. As to the validity of the loan agreement, her main argument was that she had rejected amendments being proposed to the loan agreement and reached a different agreement in the course of a telephone conversation with a director of HNW, and that she never signed the loan agreement. Her account was fundamentally inconsistent with the contemporaneous documentation and with the lending which HNW in fact made without objection from L. The evidence showed that she authorised her solicitor to sign on her behalf. She was accordingly bound by the loan agreement.

In order to establish economic duress a defendant must show that there has been illegitimate pressure which caused it to enter into a contract and that there was no practical alternative but to accept the terms of the contract (*Pakistan International Airline Corporation v Times Travel (UK) Ltd* [\[2021\] UKSC 40](#)).

In order to set aside a transaction on the ground of undue influence, it is necessary to show that the parties were in a relationship of trust and confidence or emotional or physical dependency and that the transaction was an abuse of this relationship.

The main allegation was that HNW knowingly caused L to enter into the loan agreement knowing that she would not be able to complete the development and exit the loan by the term date (nine months) and that she would not be able to afford the interest charges. These allegations do not amount to a valid basis for a defence of either economic duress or undue influence and no facts were pleaded or alleged which would support L's case that HNW exerted illegitimate pressure on L to enter into the loan agreement or that there was no practical alternative to entering into the loan agreement or that there was a relationship of trust and confidence which HNW abused.

L's pleaded case was unwinnable and did not give rise to a genuine dispute on grounds which appear to be substantial and accordingly the court struck out L's defence and counterclaim.

As to L's application to strike out the claim on the ground that HNW had no standing to bring the claim because it had no enforceable rights against L under the loan agreement – this was not pleaded but was based on a separate judgment by HHJ Dwight in the Central London County Court (*HNW v Mark*) in which HNW entered into the loan agreement as "security agent" but on the basis that it claimed to be entitled to take the benefit of, and specifically enforce the loan agreement pursuant to the [Contracts \(Rights of Third Parties\) Act 1999](#). In that case HHJ Dwight held that HNW was not a contracting party and that the cause of action belonged to the lender. The entitlement of HNW was not saved by the [1999 Act](#) because all the obligations had been entered into with the lender so that there was nothing that HNW could enforce.

The court considered that [s 1\(1\)\(a\) of the Act](#) was not limited to the enforcement by a third party of a term purporting to benefit the third party. It is sufficient that the contract expressly provides that the third party may enforce the term. This is what clause 26.7 did in the present case. It followed that HNW DID have title to sue on the loan agreement and the charge, and its claim should not be struck out.

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| Comment | <p>The court correctly noted (para [44]) that summary judgment is not available in proceedings by a mortgagee for possession of residential property (<a href="#">CPR 24.2(b)</a>) but that at a hearing under <a href="#">CPR 55.8</a> the court had to decide whether the claim was genuinely disputed on grounds which appear to be substantial, which is the same test for summary judgment under <a href="#">CPR 24</a> (<i>Global 100 Ltd v Laleva</i> [2021] EWCA Civ 1835).</p> <p>The court also rejected a submission (para [61]) which is often made that the court should not dispose of the case summarily prior to disclosure and that something may “turn up” on disclosure, but held that there were no reasonable grounds for believing that a fuller investigation into the facts of the case would lead to a different conclusion.</p> <p>The court’s analysis of duress and undue influence was somewhat brief. It is considered in more detail in <i>Atkin’s Court Forms, Vol 28(1), Mortgages (Lexis Nexis)</i> at paras [92]-[98] together with some precedent statements of case. See also the page on undue influence on the website: <a href="https://www.legalmortgage.co.uk/undue-influence">https://www.legalmortgage.co.uk/undue-influence</a></p> <p>Interestingly, on the <a href="#">Contracts (Rights of Third Parties) Act 1999</a> point, since the judge reached a different conclusion to HHJ Dwight, he proposed to give L permission to appeal to the Court of Appeal on that issue, and to stay enforcement of HNW’s claim in the meantime (sensible). Draftsmen do need to take care when drafting overly complex loan agreements and legal charges and always have in mind how they are going to be understood by the parties to them, and perhaps more importantly, how they are going to be interpreted by the court. Less is best – keep it simple.</p> |
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| Case name<br>Neutral citation | Basyouni v Anthony Gold Solicitors<br><a href="#">[2025] EWHC 10001 (Ch)</a>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| Legal points                  | Conveyancing – professional negligence – error in reporting to mortgage lender – whether causative of loss – application for summary judgment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| Facts                         | <p>B retained AG solicitors to act for him on the purchase of a property, subject to mortgage. He obtained a mortgage offer from Clydesdale Bank in the sum of £637,000 against a purchase price of £850,000. He paid a 10% deposit of £85,000 on 5 Feb 20 with completion set for 18 Feb 20. There were problems and delays in finding the balance required to complete plus the SDLT and legal fees, with B eventually borrowing £70,000 from a private lender, to be secured by way of second charge.</p> <p>AG initially reported this to Clydesdale as a gift, but then later advised it was a loan, as a result of which Clydesdale withdrew their mortgage offer. B was unable to complete and the sellers rescinded the contract by notice served on 26 Feb 20. It was noted that upon receipt of the second loan monies, AG made a suspicious activity report to the National Crime Agency, and despite an indication they were returning the monies to the lender, there was a lengthy delay. .</p> <p>B sued AG for damages for professional negligence taking three main points (1) the error by AG reporting the balance funds as a gift; (2) the delay in correcting that error; and (3) the delay in returning the second loan monies.</p> <p>AG applied for to strike out the claim or for summary judgment.</p> |

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| Held    | <p>(Master Brightwell) Most of the submissions focused on the question of causation and the court considered the application could be determined on that issue.</p> <p>The court proceeded on the basis there was an arguable case that there was a breach of duty (noting that if a solicitor instructed in a conveyancing transaction conveys incorrect information to a mortgage lender without a good explanation for doing so, it will generally be at least arguable that there has been a breach of duty). But AG's case was that it was not causative of any loss and the provision of incorrect information, corrected shortly thereafter, could not in practice, have made any difference.</p> <p>The court considered the test for summary judgment in <i>Easyair (t/a Openair) v Opal Telecom Ltd</i> [2009] EWHC 339 Ch per Lewison J at [15]. The court also considered the 'but for' test on causation (<i>Kuwait Airways Corporation v Iraqi Airways Corporation (Nos 4 and 5)</i> [2002] AC 883 per Lord Nicholls at [71] etc and <i>Jackson &amp; Powell on Professional Negligence</i>. The court must apply a common sense approach in asking the question whether the defendant's assumed negligence might have caused the loss which is claimed. In a case like this, 'but for' causation is a necessary but not a sufficient criteria to be satisfied in order for liability to be established. Where the claimant relying for causation on a loss of chance depends on the actions of a third party (Clydesdale Bank) the claimant must prove that there was a 'real and substantial' chance (i.e. at least a 10% chance) of the third party taking the relevant action (<i>PCP Capital Partners LLP v Barclays Bank Plc</i> [2021] EWHC 307 (Comm) per Waksman J at [533]. In this it meant that there must be a real and substantial chance that Clydesdale would have maintained its mortgage offer in the face of the second loan if it had previously not briefly been told that the advance was a gift.</p> <p>There is no realistic prospect of the claimant establishing at trial that such negligence caused loss to the claimant. Clydesdale revoked the mortgage offer because of the second loan which had not formed part of the claimant's mortgage application. It is improbable that the bank will have available to it, if disclosure is ordered against it under <a href="#">CPR 31.17</a> (orders for disclosure against a person not a party) any documents tending to show that its decision would have been different if a gift had not been mentioned.</p> <p>The delay in repaying the £70,000 because of anti-money laundering concerns and the report made to the NCA did not result in any loss, because the requirement to pay interest on delayed completion had already accrued.</p> <p>Summary judgment granted.</p> |
| Comment | <p>It is important for purchasers' solicitors to report accurately, and in a timely fashion, to their clients' mortgage lender. The court was ready to accept that an error would invariably give rise to a breach of duty, albeit in this case, one that was not causative of any loss (or at least not one that gave rise to any 'real and substantial' chance of loss). When lending up to a loan to value ratio (in this case 75%) most mortgage lenders will be acutely concerned to ensure that the balance is not also being borrowed.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |

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|  | <p>Note the UK Finance Mortgage Lenders Handbook <a href="#">Part 1 requirements</a>:</p> <p>5.13.1 You must ask the borrower how the balance of the purchase price is being provided. If you become aware that the borrower is not providing the balance of the purchase price from his own funds or is proposing to give a second charge over the property, you must report this to us if the borrower agrees (see part 2), failing which you must return our instructions and explain that you are unable to continue to act for us as there is a conflict of interest. You should also have regard to 6.3.1 with regard to any implications on the purchase price.</p> |
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| Publication | <p>On 8<sup>th</sup> April 2025, HM Land Registry updated <a href="#">Practice Guide 76: charging orders</a>.</p> <p>Change made:<br/>Section 4 has been updated to explain that it will be unlikely for a Form K restriction to be applied for using our Business e-services.</p> |
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