

The Bowerman duty lives on

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Last year, the Court of Appeal handed down a significant judgment in *E.Surv v Goldsmith Williams* [2015], reiterating the need for solicitors to report matters to lenders which may affect the lender's security and clarifying the burden of proof required for claimants in contribution claims.

Background

The case related to a borrower applying to The Mortgage Business ("TMB") for a remortgage on the basis that he had purchased the property in October 2005 for £450,000. The claimant surveyor, E.Surv, having been instructed by TMB, had valued the property at £725,000 in November 2005.

The defendant solicitors ("GW"), who were instructed to act for both the borrower and TMB, discovered that the property was in fact purchased in September 2005 for £390,000. GW did not pass that information on to TMB.

The remortgage completed in February 2006, however the borrower subsequently defaulted. TMB repossessed the property, sold it and suffered a loss. The lender pursued a claim against E.Surv which was settled for £200,000 inclusive of costs, and E.Surv then sought a contribution from GW.

E.Surv argued that, while GW was jointly instructed, it was nevertheless under a duty to advise TMB of facts it discovered in the course of its investigations which a reasonably competent solicitor would consider may have an impact on the valuation of TMB's security. This is often referred to as the "Bowerman duty", after the decision in *Mortgage Express Ltd v Bowerman & Partners* [1996].

The High Court agreed, finding that GW had breached its duty to TMB by not passing on the information about the original purchase price, and that this failure was causative of TMB's loss. GW was ordered to make a contribution to E.Surv of £100,000 plus interest and costs. GW appealed the decision.

The Appeal

The Court of Appeal rejected GW's appeal on its scope of duty, finding that GW was subject to the Bowerman duty to report relevant valuation information to the lender. It also held that this duty was not excluded by, or inconsistent with, the terms of the solicitors' retainer pursuant to the CML Handbook.

But, the Court upheld GW's appeal on causation. It agreed with GW's argument that the information it had failed to pass onto TMB was not materially different to the information which TMB already held i.e. TMB knew that there was a significant discrepancy between E.Surv's valuation and the original purchase price (albeit an incorrect one), but proceeded to lend regardless. In effect, E.Surv had not met the necessary burden of proof in showing that TMB would not have lent to the borrower had GW informed it of the true original purchase price.

Commentary

On the question of duty, the Court of Appeal's decision has confirmed that the Bowerman duty lives on and is not limited in any way by the CML Handbook. Hence, when acting for lenders - jointly or otherwise - solicitors must be vigilant for any information which may impact on the lenders' security, such as recent purchase prices and conflicting valuations. Further, provided the information is not confidential and that disclosure is not expressly excluded by the CML Handbook, solicitors must report the information to their lender client. Failure to do so will result in a breach of the Bowerman duty, and solicitors may find themselves liable for any resulting losses.

As for causation, E.Surv's failure to adduce evidence to show that TMB would not have proceeded with the remortgage if informed of the true original purchase price was fatal to its case. Claimants in contribution claims must therefore ensure that they prove their case as if they were the original victim, which in this case was the lender.

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