

# News flash

## The three Rs: Re-mortgages, Repossessions and Recoveries

**E**ven though house prices are expected to rise by up to 40% over the next 5 years, steep increases will not operate as a safety net for homeowners already faced with outstanding mortgage repayments. In addition to these borrowers who will lose their homes, valuers are already paying the price for mortgages ending in possession.

The Council of Mortgage Lenders (CML) published its half yearly statistics on mortgage arrears and repossessions on 3 August 2007. 14,000 homes in the UK have already been repossessed in the first 6 months of 2007, averaging just over 77 properties per day. The CML say this is a 30% rise on a year ago and represents the highest level of repossession since 1999. If repossessions match this level in the second half of 2007, the total number of repossessions for 2007 will have reached a third of those at its height in 1991.

### Overvaluations

Mortgage lenders are already getting tough on the valuers on whose reports they say they relied when offering a mortgage advance. Lenders start asking questions of these valuers the moment it becomes clear the property is unlikely to offer sufficient security for the accumulated mortgage debt and where there is little hope of the borrower meeting any shortfall. In an era of increasing sub-prime mortgages and re-mortgages, these lenders more likely than not have only the amount they recover on sale of the repossessed property to reduce their total losses. Valuers consequently become a soft target for any shortfall. A typical initial approach will be a request for a copy of the valuer's file including site notes and comparables. Armed with the valuer's methodology, a retrospective valuation and otherwise irrecoverable contractual losses, lenders mount claims

to recover damages based on an alleged negligent overvaluation of the property. The other common feature in the lender claims is the statement that had the valuation provided been accurate no loan would have been made to the borrower.

The legal principles in these claims are not new – they are in fact very well established. Whilst the law may not need any clarification, those of us instructed to investigate and defend overvaluation claims need nevertheless to be wary of the way in which these claims are being advanced by lenders and their advisors. A common theme is emerging. It involves more often than not an oversimplification of the claim – the starting and end point being the recovery of the actual contractual losses and only to the extent these exceed the property's claimed diminution in value are lenders offering to restrict or otherwise "cap" their recovery at the level of the diminution. A closer look at their loss schedules may well reveal that the lender has incorporated losses which are irrecoverable from the valuer in any event. These would include:-

1 **Early redemption penalties** – it is debatable whether a sale of a property in possession by the lender (as opposed to the borrower repaying the mortgage early) can actually trigger a charge for early settlement. In any event, this will be a condition of the advance negotiated ▶

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- ▶ between the lender and the borrower and so must fall to the borrower's account. It is irrecoverable from a professional party who does not and can not warrant that the borrower will fulfil its covenants;
- 2 **Mortgage administration fees** – these would have been incurred even if the valuation had been correct.
- 3 **Interest as damages** – the recoverable rate of interest is likely to be less than the contractual rate of interest under the mortgage. The contractual rate will reflect the risk and creditworthiness of the borrower whereas the lender can only seek to recover interest equal to the cost of otherwise deploying the advance. If the funds are themselves borrowed, that is the most appropriate rate. The period of recovery can not bypass the date of sale of the property in possession either.
- 4 **Interest on damages** – whilst simple interest is generally recoverable from the date of the advance, this presupposes that the loan exceeded the property's true value at the date the advance was made. Payments made by the borrower coupled with a lower loan to value ratio could push forward the start date for assessing interest by some considerable margin.

– this is common where the property has been down valued and/or where there is a change of lender/ alteration of the loan to value ratio. The successful transaction distinction should have a positive impact on the level of recoverable damages as it not only reduces the advance which remains exposed but most of the additional losses fall away as these would have been incurred following repossession of the property in any event.

**Conclusion**

Whilst lenders may be quick to pursue a recovery based on an alleged over-valuation of a property, there are many ways to reduce the value of the claims, even those where liability is indisputable. It is important that lenders are asked to provide all information and documentation to enable all of the above issues to be investigated and assessed at the very outset. This should include a full copy of the lending criteria, underwriting file as well as the repossession, marketing and resale files. If not volunteered, then copies should be sought as part of the pre-action protocol procedure.

The above examples typically make up a very significant element of the loss schedules and when in fact deducted the actual recoverable losses may well fall to a sum below the lender's claimed diminution in any event. A further benefit is that any contributory negligence and failure to mitigate by the lender can also be taken off these losses whereas it is almost impossible to make additional reductions from the diminution in value figure.

We are defending a broad range of lender overvaluation claims both from the traditional lenders and from the sub-prime lending market.

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Should you require any further information, please contact Louisa Robbins or Vicky Hardy.

**Successful transaction cases**

Re-mortgages pave the way for arguing that the lender would still have made an advance to the borrower – albeit a smaller loan. It can be difficult for lenders to challenge successful transaction cases where it is clear that a lower loan would have produced a capital surplus after paying off the borrower's earlier mortgage(s). Evidence for this often lies in the mortgage application form itself. The telltale signs include manuscript changes by the borrower or broker to the level of advance applied for

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**We can put together a seminar/talk or panel discussion on the issue above, or any of the issues featured in our publications to be held at any of our offices, or yours. If you are interested, please contact any one of our lawyers or **David Simon** at [david.simon@robinsimonllp.com](mailto:david.simon@robinsimonllp.com).**

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