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Clarity for solicitors acting on mortgages

Georgina Squire discusses a recent Court of Appeal decision on the application of the *Bowerman* duty, and whether this is overridden by the terms of the CML Handbook



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Practitioners will be all too familiar with the argument that the introduction of the Council of Mortgage Lenders (CML) Handbook, some 15 years ago now, codified a solicitor's duty to their lender client and, as a result, the *Bowerman* duty (as set out in *Mortgage Express Ltd v Bowerman and Partners* (a firm) [1996] 2 All ER 836) no longer applies. In *Goldsmith Williams Solicitors v E.surv Ltd* [2015] EWCA Civ 1147, the Court of Appeal finally settled this debate by confirming that where the *Bowerman* duty was not excluded by or inconsistent with the terms of the solicitor's retainer, it will apply.

Contribution claim

The case is unusual as it came about as a contribution claim. E.surv sought a contribution to a payment it had made to a lender from the solicitors on the same

transaction under the Civil Liability (Contribution) Act 1978.

E.surv had been instructed by a lender to value a property to support an application for a mortgage, but the lender sued the company, alleging its valuation was negligent. That claim settled, with E.surv paying the lender damages. It then sought a contribution from Goldsmith Williams, the firm that had acted as solicitors on the same mortgage transaction, on the basis that if the lender had decided to sue the firm, it too would have been found to be in breach of duty and would have had to pay the lender damages.

E.surv argued that the solicitor was under a duty to advise the lender in relation to any facts they discovered while investigating title that a reasonably competent solicitor would realise might have a material bearing on the valuation of the lender's security, or some other ingredient of the lending decision (the '*Bowerman* duty'). The solicitors argued that their retainer was restricted to investigating and reporting on title. They relied on the CML Handbook, arguing it was to be read as a 'comprehensive and exclusive code' setting out the duties of a solicitor to a lender.

The Court of Appeal recognised there might, on occasion, be situations where a solicitor faced a potential conflict of duty. However, no such conflict arose in this case.

The court held that the question of whether the *Bowerman* duty applied depended on whether that duty was specifically excluded by, or was inconsistent with, the terms of the solicitor's retainer. The general *Bowerman* duty is not overridden by the terms of the CML Handbook. The court held that it was 'unable to accept the suggestion... that the provisions of the CML Handbook [were] inconsistent with the *Bowerman* duty'.

Bowerman duties

Following the Court of Appeal's decision, any information that comes into a solicitor's possession during the course of their retainer must be disclosed where:

- A solicitor of ordinary competence would have regarded such information as relevant to a lender's decision; and particularly
- It is information which they consider might adversely affect the lender's decision.

However, Sir Stanley Burnton held: 'This does not mean that a solicitor instructed to act for both lender and borrower must act as a detective or bloodhound.' The *Bowerman* duty is therefore that of an ordinary, competent solicitor.

The application of this decision for solicitors is far reaching. It provides clarity, particularly for those acting on mortgage transactions and for those instructed to pursue or

defend solicitor negligence claims made by mortgage lenders.

While clarity is welcome, lenders pursuing claims against solicitors will still need to evidence a clear failure to disclose information which a solicitor of ordinary competence would have regarded as relevant to a lender's decision.

To avoid falling foul of *Bowerman* duties:

- Practitioners should use common sense when disclosing information to a lender client. Is this information likely to affect the lender's decision to lend? If so, it needs to be reported (providing there is no conflict of duty);
- Practitioners do not need to carry out work outside the scope of their instructions. Only if, while carrying out that work, they come into possession of relevant documents/information does that information have to be reported to the lender;
- Any material change to information arising while acting on a mortgage transaction should be reported to the lender (subject to any conflict of duty). Keep your eyes open; and
- Practitioners and lenders should review their standard retainers because, unless specifically excluded, the *Bowerman* duty will apply. **SJ**