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Five “takeaways” in claims against mortgage brokers following Taylor v Legal & General Partnership Services Ltd [2022] EWHC 2475 (Ch)

Claims arising from interest-only mortgages have been farmed in volume. Many such claims to date have sought to drive a narrative that interest-only mortgages are an inherently toxic product and brokers were negligent simply for suggesting them. Taylor is a helpful recalibration, focussing instead on what the monies raised by the mortgage product were being used for and whether the client understood the inherent risks.

09 November 2022 Jonathan Newbold and Rachael Murphy

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The facts were as follows. The claimants approached the broker with a request for a mortgage on their residential home, to raise capital for investment in an offshore off-plan property development with Harlequin Hotels and Resorts and to redeem a small existing interest-only endowment mortgage. They communicated their intention to pay off the mortgage via the sale or refinance of the investment properties or alternative savings if the investment went wrong, so the broker recommended an interest-only mortgage. When the offshore property investment failed the claimants sought to recover their loss from the mortgage broker.

The claim failed. The key points to note from the judgment relevant to the defence of such claims are as follows:

1. **Scope of duty** – The claimants’ case was that a reasonably competent mortgage broker should comply with the requirements of Mortgages and Home Finance: Conduct of Business sourcebook (MCOB) when advising. They argued that given that duty, the broker should not have recommended any mortgage products unless and until the claimants had obtained independent financial advice as to the risks of the underlying investment they were raising the money for. They argued that if such advice had been taken, they would not have proceeded at all.

   The court concluded that the scope of a mortgage broker’s duty of care, which is informed by MCOB, is far narrower than that argued for by the claimants – its scope did not extend to consideration of whether the borrower intended to apply the monies in a financially prudent way. However, the broker did tell the claimants that if they were unsure about the investment they should take independent financial advice on it - that informed the court’s decision that the broker in this case had discharged its duty of care.

   To restrict the claimants’ autonomy as consumers, by requiring independent financial advice to be taken, which the claimants did not consider necessary at the time, would have been unreasonable. In any event Mr Taylor had accepted that even if he had been advised of the risks of investing in an off-plan purchase, it was likely that they would have proceeded in any event, although perhaps with a capital repayment mortgage. No loss was claimed for that formulation of the claim, and it is difficult to see how more than modest losses would arise in those circumstances (see point 4 below).

2. **Documentary evidence** – It is clear from the court’s findings on duty that cases in this area will be heavily fact-specific and thus the availability of thorough contemporaneous notes will be key. In *Taylor* there was heavy reliance on the broker’s file from 2007, which withstood the claimants’ claims notwithstanding that the individual mortgage broker was not called as a witness. Crucially, the

documentation clearly recorded the broker had advised the claimants to take financial advice on the investment if they were uncertain as to the level of guarantee it offered.

3. **Choice of expert** – Instructing the right expert is vital, including ensuring the expert has experience of the factual scenario that is the basis of the claim. The broker's expert was preferred as he had experience in mortgage broking, whereas the claimants' expert's experience was predominantly from the banking sector and limited to mortgages from the lenders' perspective.
4. **Approach to loss** – The judge (on an academic basis, given there was no breach of duty) applied the scope of duty test in *Manchester Building Society v Grant Thornton* [2021] UKSC 20 such that loss would not be measured by reference to the capital lost in the underlying property investment. The measure of loss following an allegation that the broker should have recommended and arranged a repayment mortgage rather than an interest-only mortgage would be very modest. To demonstrate a substantial loss required a finding that the mortgage would not have been taken out at all and the investment would not have been made but for the broker's allegedly negligent act.
5. **Limitation** – As the loan was made in March 2007, any contract claim was significantly out of time. The claim could only be pursued in tort with reliance on the latent damage provisions of section 14A Limitation Act 1980. For those purposes, the crucial date was March 2017 (3 years prior to the date of a standstill agreement). The Judge was satisfied that prior to March 2017, the claimants were aware there was "a very real risk" that their investment would be lost. They then had sufficient knowledge such that they should have sought legal advice as to the duties owed to them by their mortgage broker, which triggered the constructive knowledge test for s.14A rendering the tort claim out of time.

In *Taylor* the claimants' claim was dismissed on all grounds. It illustrates that in the defence of these types of claim there is a need to keep the focus on what the client's aims were, which in the case of an investor usually amount to (1) using the mortgage funds as an investment tool, seeking to minimise payments to the lender throughout the life of the mortgage term in order to maximise returns, and (2) exit at the end of the life of the product, which would usually take the form of a further refinance, sale of the asset (in either case, with the hope the investment would have significantly increased in value over the life of the mortgage) or use of capital from other investment assets or savings to redeem the loan. *Taylor* makes the successful prosecution of interest-only mortgage claims even more challenging.

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