The Entire Story

Legal Quest

Mortgage Challenge

Arranging a mortgage

1. A typical Borrower wants a mortgage of £100,000 on a property valued at say £120,000 and makes an application either direct or via an Independent Financial Advisor (IFA) to a lender e.g. Santander. Santander after review, credit checks and a valuation of the property at the Borrower's expense will then make an Offer of Advance for say £100,000 which for the example herein, it is agreed to be an Interest & Principle mortgage @ 5% interest p.a. for a 25 year term.
2. The Borrower is required to sign the Acceptance documentation which will incorporate all the Terms & Conditions, as stated in the Offer and Acceptance, and may include or refer to Standard T & C's, or Special T & C's, which may be printed in separate booklets or documents and may be attached and/or are alternatively referred to as available on the lender's website etc., **ALL of the T&C's forming the mortgage contract or agreement**.
3. It is Legal Quest's formal statement that, to date, **ALL** mortgage contracts or agreements which have been reviewed, contain two specific aspects which **ARE** included within the Terms & Conditions, firstly the rights for the lender to sell, transfer or assign the mortgage or benefits together with any underlying security, (usually without the further knowledge and consent of the borrower), and secondly the actual presence of a formal Power of Attorney or implied terms of same.
4. The actual security for the loan is the **mortgage**, granted by the Borrower to the Lender NOT the other way round, in the example at 1) above the security has a 'value' of £225,000 (Principal + Interest x 25 years), however the underlying security which is agreed as part of the 'mortgage' is a yet to be a registered interest in the land and property being purchased, with the charge to be recorded at HM Land Registry.

   To ensure that this is correctly registered, the conveyancing solicitor must have the new borrower's consent and agreement to the mortgage and charge, (as the new Title Holder on the Deeds), and as is required by certain overlapping legislation, the charge MUST be registered and delivered as a 'deed' by the borrower.
5. The charge is only valid if the documentation is correctly filed and recorded, and under normal circumstances the charge remains in full force and effect until the lender has received full payment for the liability to which is was attached, what many Borrowers do not know is that the charge may also cover any other outstanding debt, such as overdrafts or credit card accounts the borrower may have with the lender.
6. **Remember, the security for the loan was the 'mortgage' not the property which in most cases, had not yet been purchased!**

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Funding the Advance

1. What is unlikely to be well known, is the actual method used by the lender to source or obtain the mortgage advance funds. The widespread belief is that upon receipt of the signed mortgage contract or agreement, the lender will use funds which were 'deposited' by other clients at a nominal % of interest and, that these funds are then loaned out to new borrowers, with a higher interest % being charged.

   <u>This is NOT the case</u>. <u>What actually occurs is beyond belief in most circles</u>!

   The lender takes the mortgage contract/agreement and effectively treats the document as a financial instrument, (which by definition in law it is considered to be a 'Promissory Note'), and using standard present value ("PV") calculations the 'Note' which on the above example is calculated to show a forward value of £100,000 plus £125,000 interest = £225,000 over 25 year term.

2. Although the PV will vary based on market interest rates it is reasonable to state that this gives an approximate present value (PV) of £128,000, and the lender now 'purchases' the security and enters this instrument and value on the asset side of their current T1 balance sheet.

3. An immediate ledger 'credit' is effectively created (magically from thin air!) by the lender as is permitted by the banking regulations as authorised by the Bank of England. (See: "Money Creation in the Modern Economy – Bank of England Q1 Bulletin") and this newly created 'money' is then used to 'purchase' the security and provide the Borrower with the loan/mortgage funds needed to purchase the property via the conveyancing solicitors.

   Basically, until the Borrower agreed to borrow the 'money' it did NOT exist, and did not come from anywhere else the lender simply created it!

4. The 'value' of the asset side of the lenders balance sheet is now 'out of balance' with the newly created 'liability' of the Borrower's loan/mortgage, and it is standard practice to set off or sweep the surplus to the reserves and capital adequacy account area of their accounts, thus providing a 'balanced' book at close of business each day.

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Mortgage Securitisation

1. Under normal circumstances that would be the end of the matter, and as long as the Borrower continues to make the repayments on time the lender will receive a total of £225,000 using the example figures for what in reality was a 'figment of reality', with the lender not in any way at risk, they merely created the illusion of risk and everyone believes them.

2. The lender will however have to wait for up to 25 years to recover all of their 'newly created money' and resultant profits from interest. Alternatively, if the Borrower either sells the property and moves or re-mortgages the property, at which time the lender will then receive a 'windfall benefit' of early repayment of the principal amount of the loan/mortgage.

   The liability (mortgage loan balance) is then written off, in accord with the GAAP and IAS accounting standards, with the original liability balance showing on their T1 balance sheet as owed by the Borrower, is cancelled as fully repaid.

3. Approximately 40 years ago, the banking community developed a novel and financially beneficial (to them) way to add value to the lending process and they created a series of 'derivatives', which are widely known as collateralised debt obligations ("CDO's") which include Mortgage Backed Securities ("MBS") and these can be residential or commercially based, with a new area of banking business emerging.

4. These collateralised debt obligations are sold using a complex and somewhat confusing mechanism called 'Securitisation', this is reasonably explained in many forums (for a reasonably succinct version See: "What is Securitisation?" – Finance & Development Sept. 2008 produced by the IMF – Monetary & Capital Markets Dept."), however, the whole purpose of Securitisation has one specific and reasonable justification – to remove debt from the originator's balance sheet and, create further liquidity or capital adequacy by reducing direct obligations and extinguishing the original loan/mortgage liability entries.

5. Legal Quest have no issues with the concept, however, in their opinion there are some glaring errors and omissions which appear to have been completely overlooked by the lenders, their professional advisors, and to a large extent by the regulators.

6. All issues being relative to the possible breach of legislation or regulations already in place in the United Kingdom, where one comment from a legal professional on an internet forum stated *'they (the lenders) appear to pay scant regard for the laws of the Realm'*, which appears to be the case.

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Potential Redress - Choses in Action or Possession

1. Although there are many areas which Legal Quest believe there are valid reasons or 'choses in action' or 'choses in possession' (these being the legal terms for such matters), all of which may need to be proven in a court and/or adjudicated by a tribunal or arbitration body.

2. There is however, one specific and glaring issue which is the main focus of Legal Quest's attention and advice to borrowers and one which Legal Quest believe will be more probably agreed by way of a 'drop hands' settlement agreement.

3. This is simply to pose the question to the lender(s) ***"Do they (the lender) still retain the legal and equitable rights to the 'mortgage/benefits/security' to a particular mortgage, if their 'interests' have been sold/transferred or assigned, and valuable consideration was received by the lender for the sale/transfer etc.?"***

4. It is Legal Quests strong belief and opinion, which is supported by numerous publications, (including the Bank of England), confirming that the answer to the above question is conclusively that the lender **cannot** retain the legal and equitable rights, when a securitisation takes place.

5. As a result, the moment a mortgage or its benefits have been disposed of, and the valuable consideration is received by the originating lender, the original mortgage contract/agreement must therefore be deemed as settled, and as such the original contract is legally fulfilled and the liability is extinguished.

6. This is also based on the common-sense view, as the only reason for carrying out the 'sale' was to remove the debt from the current balance sheet and to 'post' any surplus as a transaction profit.

7. The process of Securitisation, has in Legal Quest's view, created a conundrum with three specific issues. It is believed the lenders should have implemented them to avoid this action! Legal Quest's opinion is such that if the following had been actioned correctly it would have prevented this whole issue being raised.
   The actions/queries were:
   a) Why did the lender not inform the borrower of its intent to securitise the mortgage in a clear, fair and not misleading manner? (**It should be noted that failure to do so could potentially leave the lender or its agents (IFA's) open for a claim for 'mis-selling' of the mortgage product**);
   b) If and when the lender securitised the mortgage, why was the borrower not advised of the transfer as a simple matter of course? and finally;

c) Why did the 'new' party to whom the original loan/mortgage debt was 'sold', fail to register their interest in the land and property, or at the very least agree for the original lender to amend the charge to read 'ABC Lender for and on behalf of SPV or Others'?

If the lender had effectively carried out the above in a formal manner, any and all of the Legal Quest Challenge concerns would be unfounded and there would be no basis for any action.

After several years of in depth research and review, **Legal Quest were astounded to find that the banking sector simply did not carry out what appear to be basic common sense actions.**

8. The fact remains that the lenders did **NOT** carry out any of the three items mentioned above and, as a result, have created a potential tsunami of liabilities or possible compensation claims, (from any borrower whose mortgage was in fact securitised), on the assumption that the lender(s) can no longer confirm with satisfactory 'proof' that they still retain legal and equitable rights to the mortgage and underlying security.

9. According to the Financial Conduct Authority (FCA) reports, which are based on filings from Bank of England and Council for Mortgage Lenders (CML) and related offering prospectuses, it would appear that, in the region of 82.7% of ALL domestic mortgages were in fact sold or transferred under the securitisation process during the past 10 years.

10. One disturbing fact which has arisen from the review of public records available, is the level of mortgages which exist according to the Bank of England is stated at approximately 12.3 million with a total value of approximately £1.3 Trillion has somehow been 'adjusted' by the banking sector with actual offering prospectuses indicating almost double the number of mortgages and value were sold, transferred or assigned by the mainstream lenders.

    Legal Quest do not have an answer as to how this anomaly can exist, and it brings into question whether the actual offerings were legitimately made or whether errors and 'double counting' took place.

11. Irrespective of the reasons it is Legal Quest view that as a result of their findings, each and every one of the majority of domestic mortgage holders (which probably includes all Buy to Let [BTL] mortgages) may have a potential valid cause to file a Dispute Resolution Submission to their lender and, to ask the simple questions:

"Is my mortgage still held as an open liability on your current balance sheet, or was it sold/transferred or assigned to a pool of mortgages, by you under the process known as mortgage securitisation? " and; ***"If so what are the terms and conditions of the sale/transfer?"***

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Validity of any Chose in Action or Possession?

1. After many years of research and discussion, Legal Quest determined that to be able to submit a valid Dispute Resolution Submission [DRS] which would be able to be reasonably reviewed by the lender as having any validity, the borrower MUST obtain as much 'evidence' as possible, to support their position, using the related statutory rights available under the Data Protection Act 1998 Section 7 [DSAR].

   By doing so the Borrower effectively formally establishes that every effort was taken to deal with this matter 'out of court' and their actions and requests will effectively form the basis for Pre-Action Protocol filings.

2. Based on actual DSAR submissions, it is Legal Quests view that the lenders do not readily provide ALL the requested information, and it may be a requirement for a Motion to Compel Discovery to be filed in the High Court to actually obtain all the 'evidence', if a settlement cannot be agreed.

3. It is Legal Quests position that IF the lender can 'prove' that the mortgage remains on their books, **there is NO chose in action/possession (this being the correct legal term)** and the matter dropped.

4. If however, the lender is not willing, or able to provide satisfactory 'proof', then the only possible outcome for the Borrower to file a Dispute Resolution Submission and require the lender to either, confirm and agree to certain matters without any admission or further liability, or the matter must be adjudicated by a tribunal or court with the same end result.

   It is Legal Quest's belief that the subsequent findings will support the submissions and the lender will simply not provide any evidence that the dispute is unfounded. ("See Santander v Carlin & Hughes [2013] NICh 14 which is the definitive case following similar basis of action).

5. The first matter to be confirmed and agreed between the parties is the fact that the original mortgage was 'settled' by the process of securitisation, and although there may be a third party claim against the Borrower at a future date, that is not nor would it be the lender's action.

6. The second is confirmation that the settlement of the original mortgage debt was recorded on the lenders books, and that as a result no further obligation exists between the borrower and the original lender under the original mortgage contract/agreement, which should therefore release the charge recorded at HM Land Registry and allows it to be removed.

7. Depending on the circumstances of the borrower, due to the fact that there will be a Contingent Fee Agreement (CFA) more commonly called a No Win – No Fee Agreement for 25% + VAT of any 'win' or benefit in kind or otherwise, it is highly probable that the original lender would in all probability be willing to arrange a new mortgage.

   This new mortgage would be for an amount equal to 30% of the original mortgage balance (assuming no other items or costs are agreed including any outstanding matters with HMRC), with full disclosure(s) regarding the Power of Attorney and intent to further securitise the mortgage to avoid similar future actions. The new mortgage being agreed with the existing charge remaining in full force and effect, all matters having been resolved.

8. Whether the lender will be willing to agree to settle on a 'drop hands' basis is still to be determined, however, with the simple fact that if the mortgage was securitised, the lender will have been 'paid in full + a profit' when the mortgage was sold/transferred provides ample justification for a settlement. This is especially probable if the borrower is willing to agree to no further action, the settlement would not cost the lender anything other than a small amount of time and some embarrassment, which will probably be limited by the inclusion of a 'gag' order to avoid further publicity.

9. There is no onward liability to the SPV and others for the lender, as is stated in the various prospectuses the sale, transfer or assignment is without recourse, so it is down to the 'common sense' approach being accepted. If this cannot be agreed Legal Quest and their legal team are prepared to 'see them in court' and let this matter be defined once and for all, with the obvious floodgates being opened if the result is in favour of the claimants.

10. Based on the advice that a 'Class or Group Action' has the highest probability of success, on the basis that a large number of similar claimants can share the costs of a legal action, and have a much louder 'voice' and the issue of legal expenses and ongoing third party liability is able to be indemnified by using standard After the Event and Before the Event Legal Expenses insurance cover, and discussions are underway with providers to arrange this for the borrower's protection providing 100% indemnity for the Borrowers who decide to take the matter forward.

11. To ensure that Legal Quest has the largest possible group of claimants a series of Strategic Alliances with qualified affiliates has been initiated and the Legal Quest Challenge is being carefully rolled out to their clients with correct and professional guidance available from their staff.

12. Remember the **maximum cost** to a Borrower for the Legal Quest help and advice is fully declared with a fixed administration cost of £260.00 (incl. VAT) for the Data Subject Access Request [DSAR] Validation Process aspects, if the Borrower uses one of the Legal Quest Affiliates to register their details onto the Legal Quest systems.

13. Following a confirmed reason to proceed as a result of the DSAR, the Borrower will have at their sole discretion, four options a) Do Nothing; b) Take the Dispute to the Lender on their own, without any professional help; c) Take the DSAR (electronic) file to their own professional who will file an independent Dispute on their behalf of d) Join the Legal Quest Class Action against their particular lender and join at least 1,600 like-minded borrowers each with the same grievance against their particular lender and for their 'voices to be heard' with a much better chance of success based on the fact that 'he who shouts loudest is usually heard!'

    The last option is available from Legal Quest on a No Win – No Fee Contingent Fee Agreement (CFA) basis, **unless their case is won or settled in their favour there is no further commitment of any kind and the entire Dispute Process will cost them nothing until they 'win'.**

14. If the Borrower has used a Legal Quest Affiliate to register their details onto the Legal Quest system, an agreement is in place with Legal Quest allowing them to guide and administer any queries during the Validation Process and Legal Quest pay the Affiliate a fee to carry out the tasks assigned.

    The Borrower does NOT pay them any additional fees or expenses whatsoever, their ONLY cost for the entire process (unless they 'win') is the fixed cost of £260.00 including VAT which would normally cost in excess of £4,500 + VAT.

    Legal Quest have developed and commissioned their Legal Administrative Review System (LARS) which uses the latest modern technology to use 'Robotic Process Automation' where the majority of the review aspects are carried out by their cloud based system and over the 3 – 4 month Validation Process review period only 4 hours of actual time @ a conservative £20.00 per hour is billed with all disbursements, fees, costs and expenses included in the overall fixed fee of £260.00 (incl. VAT) which is due and payable in advance at the time of sign-up and instruction to Legal Quest Limited.

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