

FROM THE  
INSIDE

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## It's hard to right wrongs

Readers of this newspaper might be familiar with the court case involving Mr and Mrs Burns — a married couple who both have multiple disabilities and were receiving social security payments.

Despite this, they were able to enter into a series of loans so they could speculate on the property market. All of this ended badly. They were left with a loan that was secured by a mortgage against their house that they could not afford to repay.

The matter came to court because the lender was trying to enforce the loan and the mortgage which, if it had been able to do so, would have left the Burns homeless.

The court decided that both the mortgage and the loan were invalid.

Surprisingly, when this matter went to court there was a very real contest about whether the loan and the mortgage were enforceable. There was a very real contest because, for a number of reasons, it is very difficult to get out of a loan even if it seems to be obvious that the loan should never have been made.

The first reason for this is that if you use a mortgage broker to apply for a loan, the bank is not assumed to know what the mortgage broker knows about you.

The Burns used mortgage brokers to apply for loans on their behalf. However, because of complex legal arrangements that had been entered into between the mortgage brokers and the lender, the court decided that the lender was taken to know everything that the mortgage brokers knew about them

The mortgage brokers knew that the Burns had significant disabilities and that they should not have been speculating on the property market. The court found that because of the business relationship that existed between the lender and the mortgage brokers that the lender also knew these things.

The role of mortgage brokers is particularly important where incorrect information has been submitted in a loan application or there is something about the borrower, as was the case with the Burns, such that a loan never should have been made. When this happens, the bank can usually argue that it was entitled to assess the loan solely on the basis of the information that was submitted by the mortgage broker and the bank did not have to take account of what the mortgage broker knew about the borrower.

The second is that a bank has very limited obligations when it assesses a loan. The bank does not have to provide any advice about whether it is a good idea to take out the loan, does not have to assess the capacity of the borrower to repay the loan and does not have to verify the information in the loan application.

Importantly, this is what happens when a claim is made in a court. People in the Burns' position can usually make a complaint to the Financial Ombudsman Service. The FOS has a more flexible jurisdiction in deciding whether a loan is enforceable and can take into account factors such as whether the lender applied its lending criteria properly.

The third is that a court will only declare a loan to be invalid where the court decides that it is unconscionable to allow the bank to enforce the loan. This is a very difficult test to satisfy and requires the borrower to prove that they suffered from a special disadvantage, that they were unable to assess whether the loan was in their best interests, that the bank knew these things and that the bank took advantage of the borrower.

The Burns were able to establish these things but the vast majority of people will struggle to do so. This will particularly be the case where a borrower uses a mortgage broker because the bank can argue that it was not aware of things that would have made it unconscionable to approve the loan.

Overall, the Burns case is a sad and disturbing story that shows both the sort of business practices that happen every day and the limited rights that people actually have when things go wrong.