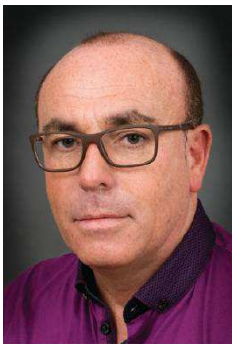
After *Alexander*: money lending and group actions – Part 2

Post *Alexander (as representative of the 'Property118 Action Group') v West Bromwich Mortgage Company Ltd*, **David Bowden** discusses what is next for mortgage lending and group actions.



About the author
David Bowden is a solicitor advocate of David Bowden Law®.

The appeal court's ruling

The Court of Appeal allowed the action group's appeal ([2016] EWCA Civ 496). It held that a mortgage lender could not increase its rates on its tracker mortgages other than by reference to the Bank of England base rate. The lender had encountered liquidity problems, and sought to plug the gap by trying to increase rate margins on tracker mortgages where customers had three or more buy to let mortgages. As a result, the lender has had to pay compensation of £27½m to affected customers. See 'After *Alexander*: money lending and group actions – Part 1', (2017) January CILExJ pp12, 13 and 14.

Non-default termination clauses: the end of the line?

The non-default termination clause is a bit like a dear old great aunt, who everyone has forgotten is still alive in a nursing home. She may have had a few falls and been read the last rites but, somehow, she still manages to cling on for one last Christmas!

The non-default termination clause remains controversial. Here, it was the first item on a list of nine circumstances in which a lender could terminate. Whether the Court of Appeal would have come to the same conclusion if it was the last item on the list (and included 'just in case') we will not know unless or until the court decides another case.

At the hearing, the lender's counsel was asked in what circumstances such a power would be used. The only example he could give was if a lender decided to withdraw from retail mortgage lending and close down its portfolio entirely. This is entirely implausible (because a lender in that situation is more likely to seek to sell on its portfolio) and, fortunately, the Court of Appeal was not persuaded by the assertion.

However, unless lenders – or those advising them – can think of and justify a situation where such a power might be used, it may be better not to include a power unless it may be needed 'just in case' . Counsel for the lender stressed correctly at the hearing that mortgages could stretch out over their full 25-year term and who knows what lies around the corner.

Malcolm Waters QC says that it looks very unlikely, after Alexander, that the courts will be prepared to uphold a provision in a fixed-term mortgage which gives the lender the right to call in the mortgage simply by giving notice to the borrower: the reason being that a power in this form would enable the lender to deprive the borrower of the benefit of the contract. He notes that the Court of Appeal 'did leave open the possibility that it might be possible for the lender to terminate the mortgage otherwise than on an event of default, provided that the circumstances in which this could happen were clear on the face of the offer and carefully circumscribed' . Russell Kelsall agrees:

It is unlikely to mean the end of non-default termination. The issue in this case was that the one-month notice provision conflicted with the terms of the offer letter (which is not always the case). However, particularly in consumer transactions, non-default termination will need careful thought to avoid a risk of such a term being unfair or being susceptible to challenge.

Can lenders future proof 25-year contracts?

Malcolm Waters QC notes that the Court of Appeal recognised in Alexander that it would have been possible for the lender to reserve the power to vary the margin over base rate used to set the tracker rate payable by the borrower, but the power would need to have been made clear in the offer. He says:

In principle, there is no reason why a similar approach could not be taken even with a fixed rate mortgage. However, in cases where the borrower is a consumer, the lender will need to meet the formidable challenge of ensuring that the power of variation passes the fairness test under Consumer Rights Act [CRA] 2015.

What plans does Property 118 have?

Mark Alexander recommends joining his Property118 Action Group if it involves litigation against a mortgage lender or affects landlords more generally. According to the Property118.com website, the action group is considering legal action in the following areas:

- assisting with the funding of a judicial review into the withdrawal of finance cost relief for individual landlords;
- prosecuting agents who abuse their position and use client money to fund their businesses;
- challenging the Bank of Ireland's decision to add a premium to tracker rate mortgage margins; and
- challenging Skipton Building Society in respect of its abandonment of its commitment to cap its standard variable mortgage rates to 3% over the Bank of England base rate.

Mark Alexander anticipates that professional indemnity insurers of mortgage advisers or conveyancing solicitors who helped to arrange these mortgages will step in to fund the legal action. It may be more economical for them to do so than deal with multiple compensation claims for flawed advice based on Financial Ombudsman Service rulings that the lenders have acted fairly.

What is the experience of running a case by a direct access barrister?

It clearly helped in this case that Mark Smith (the borrower's junior counsel) was a former solicitor and has good clienthandling skills. He stresses that this was the largest group action to date handled by a direct access barrister. Carla Morris-Papps , chief executive of Cotswold Barristers, contributed to the effective running of the case and has much previous experience of direct access cases handled in her chambers by her tenants.

What is the difference between a representative (and other forms of) group action?

Representative actions are governed of the Civil Procedure Rules (CPR) 1998 SI No Part 19.6. Representative actions can obtain a declaration but not damages. There needs to be a common interest, a common grievance and a remedy beneficial to all.

Group actions are governed by CPR 19.11, where the court has made a group litigation order. This Order must specify the issues, provide for a group register and nominate a management court. Group actions can obtain damages. Under CPR 48.6, the court has power to order that costs be shared in a group action.

CRA Schedule 8 provides for consumer class actions in cartel and price- fixing cases raising the same, similar or related issues. Global damages can be awarded.