

CASE REFERENCE: MCAS NO 000 000

IN THE MATTER OF THE ARBITRATION ACT 1996

IN THE MATTER OF AN ARBITRATION UNDER THE

MORTGAGE CODE ARBITRATION SCHEME

B E T W E E N :

GEORGE EDWARD KING

Claimant

- AND -

JOCKS

A PARTNERSHIP OF SOLICITORS, NOTARIES AND ESTATE AGENTS

Respondent

**FINAL AWARD**

**PREAMBLE**

**WHEREAS**

A The Claimant was seeking to obtain a mortgage on the property at [Morningside],  
Edinburgh, Scotland (“the Property”) and the Respondent was acting as his  
Financial Advisor in arranging the mortgaging of the Property.

- B Thereby the Respondent was acting as a Financial Intermediary within the meaning of the Mortgage Code (the “Mortgage Code”) as published by the Council of Mortgage Lenders and the Mortgage Code Compliance Board.
- C Arising out of the matters cited hereinbefore in Paragraphs A and B, a dispute arose between the Claimant and the Respondent upon the advice and assistance given by the Respondent to the Claimant concerning the mortgaging of the Property.
- D The Parties have agreed that this dispute shall be resolved under the Rules of the Mortgage Code Arbitration Scheme (May 2000 Edition) (“the Rules”), as administered by the Chartered Institute of Arbitrators (“the Institute”) by submitting a Joint Written Application for Arbitration (“the Application for Arbitration”) signed by the Claimant on 10<sup>th</sup> December 2003 and by the Respondent on 18<sup>th</sup> December 2003.
- E In accordance with the Rules, the Institute appointed me, Douglas David Hacking, Barrister and Chartered Arbitrator, to act as Arbitrator and decide the Preliminary Decision, raised by the Respondent. I accepted that Appointment and on 5<sup>th</sup> April 2004 issued my Preliminary Decision in which I dismissed the Respondent’s Application that the Claimant’s Application for Arbitration should be declared

invalid. Subsequently I was appointed Arbitrator to decide the substantive issues between the Parties and accordingly accepted this appointment.

F As the Claimant was receiving advice from the Respondent after the 30<sup>th</sup> April 1998 relating to the mortgaging of the Property, the relevant edition of the Mortgage Code with which the Respondent was obliged to comply, was the Second Edition of April 1998 (as reprinted in April 2001).

G For the purpose of reaching my Preliminary Decision, the Claimant placed before me his Application for Arbitration and his letter of 11<sup>th</sup> January 2004 to which he attached a three page typed statement and an eight page schedule in which he commented upon the letter of 17<sup>th</sup> December 2003 from the Respondent and upon some undated notes prepared by an employee of the Respondent, [Mr Alex Lee] (“[Mr Lee]”). In sending his letter of 11<sup>th</sup> January 2004, the Claimant also put before me copies of various correspondence with the Financial Ombudsman Service, the Respondent and [Bournemouth & Poole plc] (“[Bournemouth & Poole]”). On its side, the Respondent submitted a detailed letter of 17<sup>th</sup> December 2003 to which it attached copies of its correspondence with the Claimant.

H Although the Parties had submitted a number of documents, as identified in Paragraph G above, there were a number of deficiencies. Firstly neither party had given a statement in chronological order setting out the facts upon which it relied.

Secondly there were a number of documents which each party had failed, or failed properly, to bring into this Arbitration. There were no file or attendance notes taken by the Respondent of its meetings with the Claimant. There were no completed mortgage application forms and some documents conspicuously had pages missing. For example the Mortgage Offer of 22<sup>nd</sup> June 2001 only consisted of the first page in which the Mortgage Offer was not fully described. Indeed the first page of this Mortgage Offer contained no information about the fixed period of the mortgage and the Redemption Penalties. Accordingly I also issued, with my Preliminary Decision, Orders for Directions in which I ordered each party to produce a statement setting out in chronological order the facts upon which each of them relied. I also ordered each party to produce copies of all correspondence and other documents in their possession which supported their respective cases in the Arbitration. Finally, and importantly, I ordered that the parties should attend an oral hearing. This was necessary because, on essential issues in the Arbitration, there was a serious conflict of evidence between each party. It was, therefore, only by hearing evidence from the Claimant and [Mr Lee], could the Arbitrator, deciding the substantive issues, decide which account he (or she) should accept.

- I In compliance to my Orders for Directions, each party took considerable trouble. The Claimant produced, attached to his Statement of Claim Form, a careful summary of his case and a detailed chronology stretching over eleven pages. To

this chronology the Claimant attached a large number of documents upon which he has sought to rely. On its side the Respondent took equal trouble and produced a four page statement to which it attached a number of documents taken from its files. Finally the Claimant commented upon the Submissions and documents of the Respondent in a thirteen page detailed commentary. As I stated at the oral hearing, I am very grateful to each party for all the time and trouble which each took in preparing the documents in this Arbitration.

J I conducted the oral hearing at the premises of the Chartered Institute of Arbitrators in Bloomsbury Square on 15<sup>th</sup> September 2004. The Claimant appeared for himself and the Respondent was represented by [Mr Lee]. There were also in attendance at the oral hearing, by consent of the parties, two young internees who were gaining work experience at the Chartered Institute.

K While I would have wished to be issuing this Award much earlier – and I apologise to both parties for the delay since the oral hearing – I am able comfortably to do so on the detailed written submissions and the host of documents on which I place particular reliance on those that were created in May, June and July 2001 and which are, one way or the other, contemporaneous documents to the important events then occurring between the parties. In preparing this Award I have also been greatly assisted by the detailed notes which

I made at the hearing and the detailed notes helpfully supplied to me by the two internees. It is on the culmination of all of this material that I base this Award.

### **AWARD AND REASONS**

1. Throughout the professional contact, between the Respondent and the Claimant, Mr Lee acted for the Respondent. Although I have read letters and submissions from Mr Brian Jones and Mr Bruce Smith of the Respondent, the principal evidence comes exclusively from [Mr. Lee]. On his side, although [Mr. King] refers to his sister, the principal evidence comes from him.
2. At the start of the oral hearing we had to deal with a Preliminary matter. As set out in Part 4 of the Mortgage Code, the Code only applies to loans, mortgages etc. which are “secured on the home” which the “customer [personally] own and occupy...”. Specifically it is stated in the Mortgage Guide (second edition of January 1999) that the Mortgage Code does not apply to “individuals purchasing to rent”.
3. From the outset the Claimant was seeking to purchase the Property in order to let it to his sister and other students at Edinburgh University. In the parlance, therefore, of the mortgage industry, this was a ‘buy to let’. Thus prima facie, the Mortgage Code and the Mortgage Code Arbitration Scheme did not apply to this Arbitration. On the other hand when writing to the Claimant on 30<sup>th</sup> July 2001,

the Respondent, fully knowing that the transaction, in which Claimant was involved, was a 'buy to let' transaction specifically stated that it, and hence its relationship with the Claimant, was covered by the Mortgage Code.

4. Having invited [Mr. King] to address me on this matter, [Mr. Lee], when I turned to him, agreed that it was the wish of the Respondent to have this dispute resolved under the Mortgage Code and consequently [Mr. Lee], on behalf of the Respondent, waived any objections to this Arbitration continuing under the Mortgage Code. I said I would record this waiver on the Respondent's behalf in the Award and I now do so. Therefore, by consent of both parties, this Arbitration has continued to be conducted under the Mortgage Code and the Mortgage Code Arbitration Scheme.
5. This Arbitration arises out of the purchase by the Claimant of a penthouse flat in [Morningside], Edinburgh. The flat was being offered for sale at £187,500 and on 4<sup>th</sup> June 2001 the Vendor accepted the Claimant's offer of £183,500. The Application for Arbitration was submitted on 4<sup>th</sup> June 2001, the Mortgage Offer was received on 22<sup>nd</sup> June 2001 and Completion took place on 29<sup>th</sup> June 2001.
6. The Claimant makes five principal allegations against the Respondent. He alleges that the Respondent:-

- (i) against his instructions and without his knowledge, obtained the wrong mortgage product being a five year fixed term mortgage instead of a three year fixed term mortgage;
- (ii) delayed in informing him of its error and wrongly attached blame on the lenders, [Bournemouth & Poole];
- (iii) forced him to accept a mortgage product (a five year fixed term mortgage) in circumstances in which it was not possible, due to time constraints, to go back into the market and get the right mortgage product;
- (iv) caused him to engage in a “lengthy and wasteful investigation” with the [Bournemouth & Poole] by wrongly holding that these lenders were to blame;
- (v) caused him to take up considerable amount of time, money and effort arising out of its failure, in breach of the Mortgage Code, to act properly in handling the Claimant’s Mortgage Application.

7. Based upon these allegations the Claimant is claiming against the Respondent £12,000 – earlier the Claimant was claiming £11,000 but, with my consent, raised his claim to £12,000.

8. It is important, at the outset, to identify the characteristics of the mortgage products which were then available for 'buy to let' mortgages. They had two features which were of some importance. Firstly 'buy to let' mortgages had written in to them a "default rate". This provided the basic calculation for achieving a monthly mortgage payment which was less than the anticipated monthly rent that could be obtained on the property being let. This calculation goes as follows. The proposed mortgage loan is multiplied by the default rate and then by one hundred and twenty five percent. If, therefore, the default rate is correctly set, the monthly mortgage interest payment should be safely lower than the anticipated monthly rental payment. For this exercise the monthly rent is estimated by a surveyor in order to provide the comparison with the proposed monthly mortgage payment.
9. The other important characteristic of 'buy to let' mortgages is that (as with other mortgages) there has to be a maximum 'loan to value' test. Thus the total monies being loaned under the mortgage are calculated at a percentage of the value of the property. In this case the proposed 'loan to value' varied between seventy-five percent and eighty-five percent of the value of the Property.
10. Initially the parties in this Arbitration looked at mortgage products being offered by [Bournemouth & Poole] which were for a three year fixed period. It is not quite plain which mortgage product was being identified by the Respondent but it

was either [Bournemouth & Poole] Mortgage Product “13V” or “26V”. In the former no arrangement fee was being charged but in the latter an arrangement fee of £399. The estimated rent by the surveyors Shepherd & Co, was, in the first place, set at £800 per month but later raised to £1,100 per month. Therefore the default rate calculations had to bring out a monthly mortgage interest payment of initially less than £800 and later less than £1,100.

11. The other mortgage product which was being considered, at least by the Respondent, was a five year fixed period mortgage which carried the product number of “25V” and had an arrangement fee of £399. Not surprisingly it was much easier to get this mortgage product into line with the default rate and ‘loan to value’ calculations. Nonetheless the Claimant was insistent that he wanted a three-year fixed period mortgage and, as he told me at the oral hearing, he was prepared to “bridge the gap” in order to bring down the amount of monies needed to be mortgaged so that at the lower level of loan both the default rate and ‘loan to value’ calculations could be made to fit the fixed three-year period mortgage product.

12. The Claimant bases his case on the following facts. He says that in May 2001 he decided to purchase a ‘buy to let’ property in Edinburgh. There were two reasons. Firstly his sister was studying in Edinburgh and wanted accommodation for her and her friends. Secondly he saw a greater opportunity in Edinburgh for capital

growth in the property market. He therefore instructed the Respondent to act as his solicitor in purchasing a property in Edinburgh and, at the same time, to advise and assist him in obtaining a mortgage. On 28<sup>th</sup> May 2001 he states he met [Mr. Lee] of the Respondent and, on [Mr Lee's] advice, decided to go for a mortgage with [Bournemouth & Poole] with a three year fixed period of interest at 6.09%. [Mr. King] says his sister was also present at this meeting and could confirm that the agreement was to obtain a mortgage on the basis of a three year fixed term. (In fact [Mr. King] has not put any statement before me from his sister providing this confirmation). This was the only meeting in person between [Mr. King] and [Mr. Lee] and, since [Mr. King] lived in Basingstoke, it was agreed that the Mortgage Application Form should be partly completed and signed and dated (28.5.01) by [Mr. King]. The further agreement was that [Mr. Lee] would further complete the application form, when the mortgage arrangements fell into place, and submit it. At about the time of the meeting the Respondent prepared and gave to [Mr. King] a mortgage illustration for a fixed term interest at 6.09%. Coupled to the three year fixed mortgage interest was the redemption penalty, covering the same period to 30<sup>th</sup> June 2004, set at 5% of the loan. Since it is expressly stated in this mortgage illustration that there would be no arrangement fee, it appears that [Mr. Lee] and [Mr. King] were focussing on Mortgage Product 13V as set out in [Bournemouth & Poole's] list of available mortgages as at 10<sup>th</sup> May 2001.

13. Thereafter [Mr. King] is quite clear that there were no discussions between him and [Mr. Lee] on changing the mortgage product to a five year fixed term or indeed to any other mortgage product. [Mr. King] also asserts that he never saw again the Mortgage Application Form except page six of it relating to buildings insurance. In a letter dated 11<sup>th</sup> June 2001, and sent to [Mr. King] in Basingstoke, [Mr. Lee] asked [Mr. King] to date and sign page six of the Mortgage Application Form to confirm that he was not taking out buildings insurance. There is before me a copy of this page of the Mortgage Application Form which appears to have been signed and dated by [Mr. King] on 14<sup>th</sup> June 2001.
  
14. As [Mr. King] points out the evidence is that the Mortgage Application Form was submitted to [Bournemouth & Poole] whose agent, assigned to this mortgage, appeared to sign it on 7<sup>th</sup> June 2001. As also appears from the copies of this Mortgage Application Form before me the requested mortgage from [Bournemouth & Poole] was for the five year fixed period. I draw that conclusion because the loan amount requested was the same figure (£157,250) as contained in the mortgage illustration and the 'Loan to Value' was written in as 85% (altered in another handwritten entry in the same page to 86%) which again fits into [Bournemouth & Poole] Product 25V for a five year fixed interest period.
  
15. Not having seen this Mortgage Application Form, the next information received by [Mr. King] was in his telephone call from [Mr. Lee] on 22<sup>nd</sup> June 2001. In that

telephone conversation [Mr. King] states that [Mr. Lee] told him that [Bournemouth & Poole] had withdrawn its three year fixed interest product but [Mr. Lee] had been able to arrange an alternative loan, with a five year fixed interest period, with [Bournemouth & Poole]. [Mr. King] then received the mortgage offer from [Bournemouth & Poole], dated 22<sup>nd</sup> June 2001, when he returned from attending a funeral in Ireland on either 24<sup>th</sup> or 26<sup>th</sup> June 2001. This mortgage offer was for the five year fixed interest period at an interest of 6.49%.

16. [Mr. King] states that he was very upset that, according to [Mr. Lee], [Bournemouth & Poole] had withdrawn a three year fixed period interest mortgage and would have wished to go back into the mortgage market to find another three year fixed period interest mortgage. However, at that stage time, was too short. The completion date had been fixed for 29<sup>th</sup> June 2001 and [Mr. King] had committed himself to tenancy agreements with his sister and four of her friends. Accordingly, with considerable reluctance, [Mr. King] accepted the mortgage offer by signing and dating it on 26<sup>th</sup> June 2001.

17. By a letter dated 4<sup>th</sup> July 2001 Mr Brian Jones of the Respondent confirmed that purchase of the Property had been successfully completed and, it appears, sent a Completion Statement with this letter. Mr Brian Jones also made a reference to “great difficulty with [Bournemouth & Poole]” to such a point that he had

“advised [Alex Lee] that we should not use them again in the future despite their product being streets ahead of other Buy to Let Products on the market”.

18. Believing that the [Bournemouth & Poole] was at fault in withdrawing their three year fixed interest mortgage product from the market, [Mr. King] thereafter vigorously pursued [Bournemouth & Poole] until he had evidence from them, in a letter dated 13<sup>th</sup> May 2003, that firstly the Respondent in the Mortgage Application Form, as received by [Bournemouth & Poole], applied for a five year fixed period mortgage and secondly that the three year fixed period mortgage product was not withdrawn by [Bournemouth & Poole] until 13<sup>th</sup> June 2001. It was only in receiving this information from [Bournemouth & Poole] that [Mr. King] reached the conclusion that the fault lay with the Respondent and not with the Lender.

19. Finally [Mr. King] makes the point that it was only four weeks after completion had taken place on the Property that he received from the Respondent, in a letter dated 30<sup>th</sup> July 2001, their written advice under the Mortgage Code.

20. The Respondent places a different set of facts before me. It states that at the initial meeting between [Mr. King] and [Mr. Lee] (presumably taking place on 28<sup>th</sup> May 2001) it was agreed that a fixed interest rate mortgage would be suitable for the Property which [Mr. King] intended to let on a ‘short assured tenancy’.

[Mr. Lee] states that he recommended [Bournemouth & Poole] “as mortgage provider as they had a strong buy-to-let range”. If they did not have the [Bournemouth & Poole] list of 10.5.01 before them, [Mr. Lee] is sure that they had an open discussion between available [Bournemouth & Poole] mortgages for a three year fixed interest term and a five year fixed interest term. The choice of the product would depend upon a number of factors: for example the purchase price of the property, the loan to value and the estimated rental income. At this stage of the initial meeting between [Mr. King] and [Mr. Lee], the Respondent asserts that there was “insufficient detail to determine which fixed rate deal” would best suit. In the circumstances it was only possible to partly fill in the Mortgage Application Form which [Mr. Lee] would complete when more information was available. As an example of the “degree to which [Mr. King] relied on [Mr. Lee]’s best efforts” can be shown in the letter from [Mr. King] of 15<sup>th</sup> June 2001 in which he enclosed two versions of a letter to be sent to [Bournemouth & Poole] asking [Mr. Lee] to “feel free to use whichever you judge will best achieve the result we want”. [Mr. Lee] emphatically denies that [Mr. King] was stipulating only a mortgage product with a three year fixed interest rate or that he ever agreed just to obtain this mortgage product.

21. After the purchase price of the Property had been agreed at £183,500, on 4<sup>th</sup> June 2001, [Mr. Lee] continued to consider the options and was concerned about the need to have a high enough estimate for the anticipated rental income. At that

stage it appeared that a three year fixed interest mortgage would require a significantly higher rental income estimate and that, at a loan to value of 75%, [Mr. King] would be required to put up a 25% deposit. The Respondent, therefore, goes on to assert that it agreed with [Mr. King] that the application would be for a five year fixed interest period mortgage. Even with a five year fixed term mortgage interest mortgage, it appeared from letter of 8<sup>th</sup> June 2001 from [Bournemouth & Poole], the estimated monthly rental income of £800 was too low. It was, therefore, only when Shepherd and Co gave the second estimate of £1,100 per month for the rental income that the taking up of the five year fixed interest mortgage became viable. In summary the Respondent asserts:-

“Although [Mr. King] might have preferred a three year fixed, the valuations would not back this up. Had [Mr. Lee] applied for a three year fix he would have run the risk that the five year product would be withdrawn during the application process”.

At this stage I should comment, from the calculations which I have made, this assertion of the Respondent appears to be fully justified.

22. Taking the Lender's product 25V for a five year fixed interest period the loan to value calculation at 85% on the sale price of the Property of £183,500 comes to £155,975 – the amount of the loan obtained for the Claimant. On the other hand the loan to let calculation for the Lenders product 26V for the three year fixed interest period at 75% of £183,500 only comes to £137,625 – a loan figure

considerably lower than the Claimant wanted to achieve. Similarly the default rate calculations worked for the Lender's product 25V for the five year fixed interest period mortgage and not for the Lender's product 26V for the three year fixed period mortgage. This calculation for product 25V appears to be as follows:-

£155,975 (being the LTV figure for this mortgage product) times 7.5% (the default rate: see [Mr. Lee]'s notes: enclosure 6 to Respondent's letter of 17.12.03) times 125% divided by twelve months equals £974.84 per month – this being a figure beneath the estimated rental income of £1,100 and a figure beneath the rent, which according to his evidence to me on 15th September 2004, [Mr. King] was actually achieving on the Property at £1,109 per month.

On the other hand the default rate interest calculation on the Lender's product 26V for the three year fixed period interest period mortgage appears to come out as:-

£137,625 (being the LTV figure for this product) times 9% (the default rate: see the Respondent's letter of 29.10.03) times 125% divided by twelve months equals £1,290.23 – a figure above both the Shepherd and Co estimated rental income of £1,100 per month and the actual rent achieved on the Property at £1,109 per month.

23. Finally the Respondent denies that [Mr. Lee] “lied” to [Mr. King] in the telephone conversation of 22<sup>nd</sup> June 2001. On this point the Respondent asserts that “[Mr. Lee] had no reason to make up stories about applying for three-year fix when this had never been available in the circumstances”. When questioned at the hearing on 15th September 2004 [Mr. Lee] said he was unable to recall this telephone conversation on 22<sup>nd</sup> June 2001.
24. The starting point, in the conclusions which I have to draw in this Award, has to be the Mortgage Code. As already noted it was not until four weeks after completion on the Property that the Respondent sent the ‘reasons why’ letter under the Mortgage Code. In doing so it did not identify the level of service under Section 3.1 of the Code that it had provided to the Claimant. Moreover in referring to its advice on the choice of mortgage it gave the sparsest of details making no mention whatever to the choice of products (a three year fixed interest mortgage, a five year fixed interest mortgage etc) which had been available to the Claimant - let alone giving any advice on the options to be considered in selecting the right mortgage product.
25. Taking into account the dependence, as pointed out by the Respondent in the Claimant’s letter to them of 15<sup>th</sup> June 2001, that the Claimant was placing upon the advice and assistance of the Respondent in setting up of the mortgage arrangements on the Property, I have to conclude that the level of service being

provided to the Claimant in these mortgage arrangements was the level of service as described in Section 3.1 (a) of the Mortgage Code. I quote this paragraph:

**“advice and recommendation... When giving advice, we will take care to help you to select a mortgage to fit your needs by asking for relevant information about your circumstances and objectives. Our advice will also depend on your particular requirements and on the market conditions at the time. The reasons for the recommendation will be given to you in writing before you complete your mortgage”.**

26. On any view the Respondent was in gross breach of this section of the Mortgage Code. It gave no advice whatever in writing to the Claimant before completion on the Property - choosing to give the sparsest of advice four weeks later. When asked about this at the hearing on 15<sup>th</sup> September 2004 [Mr. Lee] candidly stated that “the reasons why letter was overlooked – I take responsibility”.

27. In the light of this gross breach of the Mortgage Code by the Respondent, it seems to me that, in deciding whose account I should accept on the evidence before me, I should lean in favour of the Claimant. It was the duty of the Respondent to give proper advice, in the proper form, to the Claimant and it patently did not.

28. While I could, in my view, fall back onto this base line, there are separate reasons why I think I should find in favour of the Claimant on the crucial issue whether he was stipulating that only a three year fixed interest mortgage should be obtained. Firstly the only mortgage quotation put before me was a mortgage quotation for a three year fixed period mortgage. Secondly I found [Mr. King] very clear and precise in his evidence. At the oral hearing he was quite sure that he only was seeking a three year fixed interest mortgage and had specific reasons for so doing – the principal one being that a three year fixed period mortgage fitted into the remaining three years, while his sister was at Edinburgh University, which made sense on two grounds: one, this was the remaining period when she would be in Edinburgh and two, as a fellow occupant in the flat she was in an excellent position to ensure that it was properly looked after – the Claimant being resident in the south of England in Basingstoke. On the issue of what took place during the telephone discussion of 22<sup>nd</sup> June there is evidence in favour of the Claimant in the letter of 4<sup>th</sup> July from Mr Brian Jones of the Respondent. If [Bournemouth & Poole] had withdrawn the three year fixed period interest mortgage during the time the Respondent was trying to obtain it from them, there would be indeed grounds to complain against [Bournemouth & Poole] – as [Mr. King] subsequently did – but if, as is the case here, the Respondent was only seeking a five year fixed interest mortgage - and [Bournemouth & Poole] provided it - there does not appear to be a basis for complaint against this Lender. On balance, therefore, I conclude that [Mr. Lee] did erroneously tell [Mr. King] in this

telephone discussion 22<sup>nd</sup> June 2001 that [Bournemouth & Poole] had withdrawn the three year fixed period mortgage at the time when Respondent, on behalf of the Claimant, was applying for it.

29. In reaching this conclusion I do not think that [Mr. Lee] was deliberately seeking to mislead [Mr. King]. Before me [Mr. Lee] gave his evidence openly with the appearance of honesty. Indeed, as earlier recorded, he simply told me that he could not remember his telephone conversation of 22<sup>nd</sup> June which took place over three years before the hearing on 15<sup>th</sup> September 2004. I think the truth is that [Mr. Lee] was exceptionally burdened with a great number of mortgage applications. He told me that, at about this time, he was handling about forty-five mortgage applications per month and, on average, he handled about three hundred and fifty mortgage applications per year. With this quantity of mortgage applications it is understandable that he got confused and erroneously thought the three year fixed interest mortgage had been withdrawn at the time he was applying for it when, all the while, he was in fact applying for the five year fixed rate interest mortgage.

30. The next question is whether the three year fixed interest mortgage could have gone ahead on the figures which [Mr. King], or [Mr. Lee] on his behalf, was putting forward. The answer, on the figures which I have calculated in Paragraph 21 above is plainly 'no'. At the hearing on 15<sup>th</sup> September 2004, [Mr. King]

accepted this. He said, however, if he had been given the opportunity, he could have “bridged the gap” by putting forward the necessary capital so that the amount of the loan would have been lowered to a point when the default rate and loan to value calculations met the criteria of the Lenders. His other point was that, if there had been an opportunity, he could have gone out into the market place to find other three year fixed rate interest mortgages. On this point I certainly accept that [Mr. King] on 22<sup>nd</sup> June 2001 was effectively “forced” to take up the five year fixed interest mortgage with completion on the Property taking place in a matter of days and with [Mr. King]’s commitments to rent the flat to his sister and four of her friends.

31. It follows, therefore, I find that the Respondent was in breach of the Mortgage Code, that it failed to give the proper level of advice to the Claimant and that the Claimant was deprived of the opportunity of obtaining a three year interest rate mortgage. There are, however, difficulties in calculating what were [Mr. King]’s losses. His basic loss was having to pay mortgage interest at a higher rate by 0.4% between the three year fixed interest of 6.09% and the five year fixed interest of 6.49%. However if he had obtained the three year fixed interest mortgage he *could only* have done so, according to my calculations, by putting up about £40,000 capital of his own. While the loan to value calculation, as illustrated above in paragraph 21 above, would have permitted [Mr. King] to obtain a loan of about £137,625, the default rate calculations would have only

brought the monthly interest rates down beneath the level of £1,100 per month on a loan in the region of £120,000 and £110,000. Taking, therefore, the maximum loan available to [Mr. King] for the three year fixed interest period mortgage at £115,000, the mortgage interest loss of [Mr. King], calculated at 0.4% only comes to £460 per annum. More than that he can only truly say that he suffered this annual interest loss for three years because he could have at the end of the three year fixed interest mortgage, gone out into the market and found another mortgage. This means that [Mr. King's] gross interest loss for the three year period comes to £1,380.00. On top of this it is possible, but not entirely clear, that (dependent upon getting the Lenders' 13V product) he lost the benefit of not having to pay an arrangement fee of £399 (say £400) and a valuation fee of £300 and suffered all the lost time and stress, particularly chasing erroneously [Bournemouth & Poole], arising out of the Respondent's breach of the Mortgage Code.

32. However against these figures I have to bring into account other factors such as the cost to [Mr. King] for having to find another £40,000 as the deposit on a three year fixed interest mortgage and the earlier cost of re-mortgaging the property after three years. I do not have to bring into account any loss of a Redemption Penalty because [Mr. King] has clearly stated to me, both in his written submissions and in his oral evidence, he has no plans to surrender the mortgage during the five year penalty period. However overall the question, which has to

be asked, is whether Mr. Spencer would have been able *at all* to find in May/June 2001 a satisfactory three year fixed interest mortgage. Therefore doing the best I can, I cannot find that [Mr. King] has been able to prove losses greater than £1,500.00. In reaching this figure I bring into account the statutory interest to which [Mr. King] is entitled under the Arbitration Act 1996.

33. Turning to the costs in this Arbitration, I have power under Rule 5.4 of the Rules to Order “one Party to pay any or any part of or all of the other’s costs where the former has, in [my] view... acted unreasonably and caused the other party unnecessary expense”. I have to say that I think the Respondent did behave “unreasonably” and thus caused the Claimant “unnecessary expense” by bringing the Application for the Claimant’s Application for Arbitration to be declared invalid and therefore I award the nominal sum to the Claimant of £500. Other than seeking to get, in the Preliminary Decision, the Claimant’s claim struck out, I do not find that the Respondent has otherwise acted unreasonably in the conduct of this arbitration.

**ACCORDINGLY I MAKE AND PUBLISH THIS, MY FINAL AWARD, AS FOLLOWS:**

- (1) THAT THE CLAIMANT IS AWARDED THE SUM OF £1,500 IN FULL AND FINAL SETTLEMENT OF HIS CLAIM AGAINST THE RESPONDENT;**
  
- (2) THAT THE CLAIMANT IS AWARDED COSTS IN THE SUM OF £500 AGAINST THE RESPONDENT; AND**
  
- (3) THAT THE RESPONDENT IS ORDERED TO PAY THE SAID SUMS OF £1,500 AND £500 TO THE CLAIMANT WITHIN TWENTY-ONE DAYS OF THE ISSUE OF THIS AWARD.**

**MADE AND PUBLISHED IN LONDON, ENGLAND BEING THE SEAT OF THIS ARBITRATION.**

**DAVID HACKING  
ARBITRATOR**

**January 2005**