Lloyds TSB Bank plc v Markandan & Uddin (a firm)

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
9 February 2012

Case No: A3/2010/3031

Court of Appeal (Civil Division)

[2012] EWCA Civ 65, 2012 WL 382613

Before: Lord Justice Mummery Lord Justice Rimer and Sir Mark Potter

Date: 09/02/2012

On Appeal from the High Court of Justice Chancery Division

Mr Roger Wyand QC sitting as a Deputy High Court Judge

[2010] EWHC 2517 (Ch)

Hearing date: 2 December 2011

Representation

Miss Nicole Sandells (instructed by DLA Piper UK LLP) for the Respondent, Lloyds TSB Bank PLC.
Mr Christopher Aylwin (instructed by Patricks , Solicitors) for the Appellant, Markandan & Uddin.

Judgment

Lord Justice Rimer:

Introduction

1. This appeal is by a firm of solicitors, Markandan & Uddin ('M&U'), the defendant. The claimant/respondent is Lloyds TSB Bank PLC, which sued as the successor to the mortgage lending and deposit taking business of Cheltenham & Gloucester PLC ('C&G'), now a wholly owned subsidiary of Lloyds. No point turns on Lloyds' title to sue. As all the relevant facts relate to the activities of C&G, I shall in this judgment generally refer only to C&G.

2. In August 2007 C&G retained M&U to act for it on a proposed mortgage loan of £742,500 to someone calling himself Victor Davies. The loan was to enable him to buy a freehold property at 35, Claremont Road, Hadleywood. The repayment was to be secured by a first legal charge of the property. In September 2007, upon what they claimed was the completion of Mr Davies' purchase and charge, M&U remitted the loan money to (so they believed) a firm of solicitors acting for the vendors, one they believed was called Deen Solicitors.

3. In the event it turned out that C&G and M&U were the victims of a fraud. Whilst there appear to be some suspicious circumstances surrounding Victor Davies' role in the story, he was not on trial before the judge, who made no findings that he was a villain rather than a victim; and whichever he was makes no difference for the purposes of the appeal. The owners of the property (Gary and Monique Green) had not, however, agreed to sell it to him, or to anyone, and they were ignorant of the fraud that was being carried on. Although there is a genuine and reputable firm of solicitors called Deen Solicitors ('Deen') with offices in Luton, that firm also knew nothing of it. What happened is that one or more individuals pretended to be carrying on practice at a Deen branch office at 43a Stoneleigh Street, Holland Park, London W11, for which they printed some bogus notepaper, whereas in fact Deen had no such office. The fraudsters duped M&U into paying the loan money to them and made off with it. C&G received no legal charge over the property; and, subject only to any recovery that it might make from M&U, the transaction represented a total loss for it.

4. C&G did seek to make recovery from M&U. By proceedings issued in the Chancery Division in April 2008, it (in fact, Lloyds) claimed that M&U were answerable for the full amount of its loss under three alternative heads. First, that in parting with the loan money on the purported completion of the charge, M&U had acted in breach of trust and were liable to reconstitute the trust fund (the loan money) and restore it to C&G. Second, that M&U had parted with the money in breach of its undertakings to C&G. Third, that M&U were answerable to C&G for negligence and breach of contract.

5. In relation to the first alternative, M&U admitted in their Defence that they had held the loan money 'on bare trust for C&G with C&G's authority to pay it away in connection with Mr Davies' purchase of the property'. In light of that, on 26 August 2008 Master Moncaster directed the trial of these preliminary issues: 1(a) had there been a breach of trust by M&U? (b) If 'yes', (i) were M&U entitled to be relieved from liability to C&G under section 61 of the Trustee Act 1925 ; and (ii) could M&U rely in principle on the allegation advanced in their Defence that any loss or damage suffered by C&G was caused or contributed to by C&G's own fault? (c) If the answer to question (a) was 'yes' and that to question (b) was 'no', what was the measure of C&G's loss?

6. Those issues were tried before Mr Roger Wyand QC, sitting as a Deputy High Court judge, on 27 and 28 May 2010. His reserved judgment of 14 October 2010 was favourable to C&G. His consequential order of 23 November 2010 answered 'yes' to question 1(a), 'no' to each of questions 1(b)(i) and (ii) and, as to question 1(c), entered judgment against M&U for £742,500, with interest at 3% from 31 August 2007 until payment, to be compounded annually (the amount due at 23 November 2010 totalled £817,018.13).

7. The judge gave M&U permission to appeal. They produced elaborate grounds but Mr Aylwin's argument was confined to two points. First, that the judge was wrong to find that, in paying away the loan money, M&U committed a breach of trust. Second, if that submission was wrong, that the judge was wrong to find that, as a matter of causation, M&U's breach of trust caused any loss to C&G. There is no appeal against the judge's rejection of M&U's claim for relief under section 61 , nor against his answer to the contributory negligence point raised by issue 1(b)(ii).

The facts

8. On 14 June 2007 Mr Davies submitted to C&G an application for a mortgage loan. He described himself in it as a single 32 year old British national who was 'LW [living with] friends' at 21B Burnley Road, London NW10, as he had been for 11 years. His stated occupation was that of a self-employed commodity broker, as it had been since March 2001. He declared a total gross income of £287,484 for the previous tax year and slightly less for the one before. His firm was V.D. Investments, for which his duties were 'asset management, stock exchange'. He named Business Management Services as his accountants, for whom he gave an address and contact name. He sought a £977,500 loan for a purchase for £1,150,000 of the property (a four-bedroom freehold house) for use as his main residence. That represented a loan to price ratio of 85%. His proposed deposit of £172,500 was said to be 'gifted and savings'. He gave the name of 'Ruth' and a telephone number for use by C&G's

valuers when arranging access for valuation purposes. He named his solicitors as Phoenix Nova Solicitors, for which he gave an address and contact name although in the event that firm was not used.

9. Mr Davies' application form was submitted for him by a mortgage broker called M. Solutions & Financial Limited ('S&F') (some S&F documents use 'Solution' in the singular), which itself completed part of the form and provided independent verification of his identity. The individual acting for S&F was Victor Strong. The verification included a photograph of Mr Davies and copies of his driving licence and of an EDF Energy letter addressed to him at Flat B 21–25 Burnley Road bearing an account number and explaining his nectar points entitlement. Mr Strong also provided C&G with copies of Mr Davies' accounts prepared by Logical Consultant & Co (not the firm named in the mortgage application).

10. C&G's valuers valued the property on 16 July 2007 at £825,000 and provided C&G with their valuation. There is no suggestion that they were involved in the fraud. At the material times the owners of the property (Mr and Mrs Green) were resident in the USA and the property was purportedly occupied by tenants under a tenancy agreement of 1 June 2007. On 23 July 2007 C&G advised S&F that the valuation showed the loan to value ratio to be 119% and asked it to 'contact the customer and advise and update Caseflow by amending either the loan amount or product chosen and the valuation figure as per the report.' S&F's prompt response was to request C&G to 'proceed with the mortgage with the purchase price of £825000 @ 90% loan to value'. That was a request for a mortgage loan of £742,500.

11. C&G did not apparently regard as odd the vendors' willingness promptly to drop the purchase price by £325,000 to the precise amount of the valuation. On 7 August 2007 C&G offered Mr Davies a mortgage loan of £742,500, plus £18,592 for fees to be added to the loan. The total amount to be advanced was therefore £761,092 and was to enable the purchase of the property at the revised price of £825,000. The offer assumed that the mortgage would start on 1 November 2007. The loan was to be repaid by monthly payments over 25 years. Mr Davies accepted the offer on 24 August 2007.

12. On 7 August 2007 (the date of its offer) C&G sent written instructions to M&U to act for it on grant of the proposed mortgage. Mr Davies also instructed M&U to act for him on his proposed purchase. Their offices were at Thamil House, 720 Romford Road, London E12.

13. C&G's instructions to M&U did not include a copy of Mr Davies' mortgage application and did not inform them of the drop in price. They made no reference to the mortgage offer of 7 August, although I infer that they must have included a copy as otherwise M&U would not have known the amount of the loan; and M&U's later letter to C&G of 17 December 2007 M&U shows that they did have a copy. The letter of instructions included the following:

> 'C&G has adopted the CML [Council of Mortgage Lenders] Lenders' Handbook for England and Wales (the "Handbook") and we therefore require you to act in accordance with the instructions contained in it. General instructions and guidance are contained in Part 1 of the Handbook and provisions which are specific to C&G, including details of who you should contact with any queries, are contained in Part 2.
>
> We would draw your attention to the following points:
>
> > bull; <u>You</u> are required to ensure that the signed Mortgage Loan Agreement to the full value of the advance is in your possession BEFORE COMPLETION.

> bull; It is essential to ensure that the title documents, Mortgage Loan Agreement and Mortgage Deed are all in the same names.
>
> bull; Following registration you should send ONLY the documents detailed in the Completion Advice. ALL OTHER DOCUMENTS MUST BE GIVEN TO THE BORROWER(S) (or subsequent mortgagee if appropriate).

The specific instructions to this loan are listed below.'

14. Beyond saying that C&G believed the purchase price to be £825,000, no further instructions were given in the letter. It did, however, explain that C&G was transferring its mortgage lending and deposit taking business to Lloyds: that is how Lloyds became the claimant. The relevant scheme was sanctioned by an order of the Chancery Division dated 20 September 2007.

The Handbook

15. Certain of the provisions of the Handbook are material and I should refer to them:

> **5.4 'Good and Marketable Title**
>
> '5.4.1 The title to the property must be good and marketable free of any restrictions, covenants, easements, charges or encumbrances which, at the time of completion, might reasonably be expected to materially adversely affect the value of the property or its future marketability (but excluding any matters covered by indemnity insurance) and which may be accepted by us for mortgage purposes. Our requirements in respect of indemnity insurance are set out in paragraph 9. You must also take reasonable steps to ensure that, on completion, the property will be vested in the borrower….
>
> 5.4.3.1 A title based on adverse possession or possessory title will be acceptable if the seller is or on completion the borrower will be registered at the Land Registry as registered proprietor of a possessory title ….
>
> **5.8 First Legal Charge**
>
> 5.8 On completion, we require a fully enforceable first charge by way of legal mortgage over the property executed by all owners of the legal estate. All existing charges must be redeemed on or before completion, unless we agree that an existing charge must be postponed to rank after our mortgage. Our standard deed of form of postponement must be used. …
>
> **10. The Loan and Certificate of Title**
>
> 10.1 You should not submit your certificate of title unless it is unqualified or we have authorised you in writing to proceed notwithstanding any issues you have raised with us.

10.2 We shall treat the submission by you of the certificate as a request for us to release the mortgage advance to you. …

> 10.3.1 You are only authorised to release the loan when you hold sufficient funds to complete the purchase of the property and pay all stamp duty land tax and registration fees to perfect the security as a first legal mortgage or, if you do not have them, you accept responsibility to pay them yourself.
>
> 10.3.2 Before releasing the loan when the borrower is purchasing the property you must either hold a properly completed and executed stamp duty land tax form or you must hold an appropriate authority from the borrower allowing you to file the necessary stamp duty land tax return(s) on completion.
>
> 10.3.3 You must ensure that all stamp duty land tax returns are completed and submitted to allow registration of the charge to take place in the priority period afforded by the search.
>
> 10.3.4 You must hold the loan on trust for us until completion. If completion is delayed, you must return it to us when and how we tell you (see part 2)….
>
> 10.3.5 If, after you have requested the mortgage advance, completion is delayed you must telephone or fax us immediately after you are aware of the delay and you must inform us of the new date for completion (see part 2).

10.6 See part 2 for details of how long you can hold the mortgage advance before returning it to us. If completion is delayed for longer than that period, you must return the mortgage advance to us. If you do not, we reserve the right to require you to pay interest on the amount of the mortgage advance (see part 2).

10.7 If the mortgage advance is not returned to us within the period set out in part 2, we will assume that the mortgage has been completed, and we will charge the borrower interest under the mortgage. …

14. After Completion

Registration

14.1.1.1 You must register our mortgage as a first legal charge at the Land Registry. Before making your Land Registry application for registration, you must place a copy of the results of the Official Search on your file together with certified copies of the transfer, mortgage deed and any discharges or releases from a previous mortgagee. …

14.1.4 The application for registration must be received by the Land Registry during the priority period afforded by your original Land Registry search made before completion and, in any event, in the case of an application for first registration, within two months of completion. …

More facts

16. M&U was a firm in which Mr Markandan was a partner and which had some five fee earners, including Mr Mahendran who had the day to day handling of this transaction, with Mr Markandan being in overall charge.

17. On 24 August the bogus Holland Park 'branch' of Deen (which I shall call 'HPD') contacted M&U to inform them that they were acting for the owners of the property, the Greens, on the proposed sale to Mr Davies. The HPD notepaper bore a 'Deen Solicitors' letterhead and gave an address in Holland Park. The bottom of the letter gave the Luton address of the genuine Deen firm, describing it as the head office. The HPD reference was 'JSD/1921/Green', a purported reference to the person named at the bottom of the page as 'Jagtar S. Dhuphar LLB (Hons).' Mr Duphar is a solicitor on the Law Society records as practising with Deen in Luton. His name had been appropriated for the purposes of the fraud, of which he was ignorant. At some point, a fraudster pretending to be him attended M&U's offices.

18. M&U sent HPD their requisitions on title on 28 August 2007. They described the property, the vendors and the purchaser. They enquired as to the arrangements for giving vacant possession on completion; asked for a list of documents to be handed over on completion; asked, if completion was to take place by post, for confirmation that HPD would adopt the current Law Society's Code for Completion by Post; asked for the 'exact amount' of money payable on completion and details of the bank and account to which it was to be sent; and, by requisition 6, headed 'Undertakings', asked:

> 'The reply to this requisition is treated as an undertaking. Great care must be taken answering this requisition.
>
> 6.1 Please list the mortgages or charges secured on the property which you undertake to redeem or discharge to the extent that they relate to the property on or before completion (this includes repayment of any discount under the Housing Acts).
>
> 6.2 Do you undertake to redeem or discharge the mortgages and charges listed in reply to 6.1 on completion and to send to us Forms DS1 or the receipted charges as soon as you receive them? Alternatively will you notify us as soon as you made aware that an END [electronic notification of discharge] has been sent to HMLR?
>
> 6.3 If you agree to adopt the current Law Society's Code for Completion by Post, please confirm that you are the duly authorised agent for the proprietor of every mortgage or charge on the property which you have undertaken in reply to 6.2 to redeem or discharge.'

19. On 29 August Mr Markandan signed M&U's certificate of title for the property and sent it to C&G. It gave the property's address and title number and M&U's bank account details (for the purposes of receiving the loan money) and said the completion date was 31 August. The certificate (by referential incorporation) certified in the terms of the Appendix to Rule 6(3) of the Solicitors' Practi . There is no need to set out those terms in full but they included the following:

> 'WE THE CONVEYANCERS NAMED ABOVE CERTIFY as follows:

(1) …

(2) Except as otherwise disclosed to you in writing:

(i) we have investigated the title to the Property, we are not aware of any other financial charges secured on the Property which will affect the Property after completion of the mortgage and, upon completion of the mortgage, both you and the mortgagor (whose identity has been checked in accordance with paragraph (1) above) will have a good and marketable title to the Property and to appurtenant rights free from prior mortgages or charges and from onerous encumbrances which title will be registered with absolute title. …

WE:

(a) undertake, prior to use of the mortgage advance, to obtain in the form required by you the execution of a mortgage …

(c) will within the period of protection afforded by the searches referred to in paragraph (b) above:

(i) complete the mortgage;

(ii) arrange for the issue of a stamp duty land tax certificate if appropriate;

(iii) deliver to the Land Registry the documents necessary to register the mortgage in your favour and any relevant prior dealings; …'.

20. On 31 August C&G remitted loan money totalling £742,500 by CHAPS transfer to M&U's client account. On the same day, HPD wrote to M&U saying they had received the deposit money from Mr Davies and undertaking to pay M&U's legal costs. That information was of a type that should have put M&U on notice of the possibility that the transaction was a suspicious one.

21. HPD replied to M&U's requisitions on 3 September, by fax and by post. That was four days after M&U had given their certificate of title. As for vacant possession, HPD said that 'our client' would hand over the keys to Mr Davies on completion and would vacate the property as soon as completion had taken place. The documents to be handed over on completion would be the transfer, the certificate of discharge of the current mortgage, the charge certificate and the vendors' part of the contract. They confirmed that they wished to complete the transaction by post and undertook to adopt the current Law Society Code. The response to the request for the 'exact amount' of money payable on completion was 'balance purchase price of £742,500 less your firms legal costs, Stamp duty, Land Registry fees and disbursements as per our undertaking'. That was less than exact although no point has turned on it. Details of the requested bank account were given (at a NatWest branch in Hornchurch, Essex). As to requisition 6, HPD identified the only charge to be redeemed (one in favour of the Bank of Scotland, to which the property was subject) and gave the requested undertakings.

22. M&U's position is that both a telephone exchange of contracts and completion took place on 4 September. Our documents include a copy of the part of the contract signed by Mr Davies, although it does not name him as the buyer. It is undated, and leaves blank the completion date, the deposit paid or payable, and the balance due on completion. It incorporates the Standard Conditions of Sale (Fourth Edition). There is no attendance note of relevant telephone conversation(s) on 4 September, nor was there any evidence as to their content. There is complete documentary silence between HPD's letter of 3 September enclosing the replies to the requisitions and a letter of 11 September to which I shall come. On 4 September M&U remitted from their client account £707,613.25 to an HPD account number at NatWest. The difference between the amount remitted

and the £742,500 paid by C&G to M&U on 31 August represented the deductions that HPD had invited M&U to make. The payee account was of course not a genuine Deen account: it was connected with the individuals pretending to operate from the bogus HPD office.

23. As completion had been agreed in writing to be by post, the then applicable Law Society's code for completion by post applied. Paragraphs 3 to 7 inclusive are in a section headed 'Before completion'. Under paragraph 4 the seller's solicitor undertakes (i) to have the seller's authority to receive the purchase money on completion; and (ii) on completion to have the authority of the proprietor of each mortgage or charge specified under paragraph 3 to receive the sum intended to repay it (in this case, the Bank of Scotland charge). Further material provisions are as follows:

> '5. Before the completion date, the buyer's solicitor will send the seller's solicitor instructions as to any of the following which apply:
>
> (i) documents to be examined and marked;
>
> (ii) memoranda to be endorsed;
>
> (iii) undertakings to be given;
>
> (iv) deeds, documents (including any relevant undertakings) and authorities relating to rents, deposits, keys, etc, to be sent to the buyer's solicitor following completion; and
>
> (v) other relevant matters.
>
> In default of instructions, the seller's solicitor is under no duty to examine, mark or endorse any documents.
>
> 6. The buyer's solicitor will remit to the seller's solicitor the sum required to complete, as notified in writing on the seller's solicitor's completion statement or otherwise, or in default of notification as shown by the contract. If the funds are remitted by transfer between banks, the seller's solicitor will instruct the receiving bank to telephone to report immediately the funds have been received. Pending completion, the seller's solicitor will hold the funds to the buyer's solicitor's order.
>
> 7. If by the agreed date and time for completion the seller's solicitor has not received the authorities specified in paragraph 4, instructions under paragraph 5 and the sum specified in paragraph 6, the seller's solicitor will forthwith notify the buyer's solicitor and request further instructions.
>
> **Completion**
>
> 8. The seller's solicitor will complete forthwith on receiving the sum specified in paragraph 6, or at a later time agreed with the buyer's solicitor.
>
> 9. When completing, the seller's solicitor undertakes:
>
> (i) to comply with the instructions given under paragraph 5; and
>
> (ii) to redeem or obtain discharges for every mortgage or charge so far as it relates to the property specified under paragraph 3 which has not already been redeemed or discharged.
>
> **After completion**

> 10. The seller's solicitor undertakes:
>
> (i) immediately completion has taken place to hold to the buyer's solicitor's order every item referred to in (iv) of paragraph 5 and not to exercise a lien over any such item;
>
> (ii) as soon as possible after completion, and in any event on the same day,
>
> (a) to confirm to the buyer's solicitor by telephone or fax that completion has taken place; and
>
> (b) to send written confirmation and, at the risk of the buyer's solicitor, the items listed in (iv) of paragraph 5 to the buyer's solicitor by first class post or document exchange.'

24. Under that code, M&U ought therefore to have received from HPD on 5 September (in the post or document exchange) the signed part of the vendors' contract, the executed transfer, the DS1 certificate of discharge in respect of the Bank of Scotland charge and the charge certificate. In fact they received nothing. The next disclosed document is a mildly worded letter of 11 September from Mr Mahendran of M&U to HPD referring to 'the completion of last week, [and saying that] we are still waiting to receive your client's signed part of the contract and the transfer'. The letter also asked for the 'necessary discharge certificate/s as per to your undertakings'.

25. HPD's response of 18 September referred to telephone conversations of 10 and 18 September and recorded that 'there was an issue with the lender which has now been resolved'. The writer said that he was 'sending to you the funds for you to forward to our client Holding Account please find details below', the details being of a Royal Bank of Scotland account in the name of 'A. Holdings'. HPD undertook to pay all M&U's transfer charges. By their reply of 20 September M&U said that they could not comply with the request without further clarification and could not understand why HPD could not make the required transfer itself. They expressed concern as to a possible breach of the money laundering regulations if they paid the money to an account other than that of the vendors' solicitors.

26. HPD did not reply to that letter. They simply returned part of the money that M&U had earlier remitted: on 25 September there was credited to M&U's client account a payment of £702,613.25, purportedly from 'Deen-Law Llp' (£5,000 less than M&U had remitted on 4 September). That led to a telephone conversation on 27 September and a follow up letter from M&U, of which the material part is as follows:

> 'The matter was completed and your client still has not handed over the possession of the property yet. We also keep you liable for any interest payable on this amount to the lender and for the damages caused to our client by not handing over the premises to our client.
>
> However, as discussed this afternoon, we will transfer the funds to your NatWest client account as in the replies to requisition as soon as we receive the transfer and our client is given the access to the property.
>
> Please be advised that (a) if we do not receive the executed TR1 [the transfer] and (b) our client is not given access to the above property before 4 pm tomorrow (28/09/2007), we have no other alternative but to report this matter to Solicitor's Regulation Authority.
>
> Please forward the TR1 immediately and advise your client to handover the keys to the above premises to our client without further delay.'

> Please reply immediately'.

27. A reply, by fax on the same day, read:

> 'Please refer to our telephone conversation of yesterday regarding the TR1. My clients are away until the 10th October 2007 and I undertake to forward you the duly signed TR1 on their return. Kindly remit the funds so that I may complete this transaction and forward you the DS1 soon as I receive it.
>
> I can confirm that I have today spoken with my clients and they have agreed to let your client have possession today and the keys are to be collected from our offices.'

28. Apparently satisfied by that, on 28 September M&U remitted from their client account the identical sum of £702,613.25 back to another HPD account at NatWest. Why they were so satisfied is obscure. Their understanding must have been that HPD had no executed transfer in their possession on 4 September, still did not have one and would not have one until the return of their clients. Nor did they have a discharge certificate for the Bank of Scotland charge. Nor had possession been given. It was therefore, or ought to have been, apparent to M&U that the purported completion of 4 September had been a non-event in that HPD had failed to honour their undertakings and were still unable to perform them. HPD had not even vouchsafed an explanation. Nothing further was heard from HPD, which disappeared, and the next piece of correspondence was a letter of 23 November from M&U advising HPD that unless they received the transfer and discharge certificate by 26 November, they would refer the matter to the Solicitors Regulation Authority ('the SRA').

29. M&U did not explain the problem to C&G even though they had parted with £702,613.25 of the loan money and had received in exchange nothing enabling them to register a transfer and charge. They did not even have a fully completed charge of the property executed by Mr Davies, although there was no reason why they could not have ensured that they at least had such a document in their possession by 4 September. All they had was a form of C&G charge executed by Mr Davies in blank, his signature being witnessed by Mr Markandan. It did not identify the property to be charged or give its title number. Miss Sandells' submission was that it was a worthless piece of paper. We had no argument on whether it would lawfully and properly have been open to M&U to complete it, or whether to do so they would have needed an authority from Mr Davies by deed. The worth, if any, of this document was not, however, central to the argument and so I shall say no more about it.

30. If M&U did not tell C&G about the problem, C&G soon learnt of it. On 13 December it wrote to M&U referring to the certificate of title of 29 August and advising M&U that its search of HM Land Registry showed that Mr Davies was yet to be registered as proprietor of the property and that the bank's mortgage was also to be registered; that M&U had not lodged an application for registration; and that the only protection that the bank appeared to have was a search with priority lodged by 'Markandan & Sharma' on 10 December. C&G sought an explanation of the name difference, an explanation of why the mortgage had not been registered and copies of Mr Davies' executed mortgage, of the mortgage loan agreement signed by him and of the executed transfer signed by the Greens. It also sought confirmation that M&U had sent a stamp duty land tax ('SDLT') form and payment to HMRC in respect of the stamp duty payable and had received confirmation from the vendors' solicitors that the Bank of Scotland charge had been redeemed. The SDLT point was important: a purchaser's/chargee's solicitor cannot obtain the registration of the transfer and charge at HM Land Registry without submitting to the

registry the SDLT certificate issued by HMRC following receipt of the return. The letter also advised M&U that they had been suspended from C&G's panel.

31. C&G's note on the same day of a telephone call from Mr Markandan recorded that he had a signed mortgage and loan agreement and would provide copies. The delay was said to be with the vendors' solicitors, who had not provided an executed transfer or a form DS1 in respect of the Bank of Scotland mortgage. He had been and was chasing them and was going to complain to the SRA. On the same day M&U sent C&G copies of (i) the complaint to the SRA, (ii) the mortgage deed executed by Mr Davies, (iii) the signed loan agreement, (iv) the SDLT certificate, (v) the priority search up to 23 January 2008, and (vi) M&U's letter to their insurers. I presume that document (ii) was a copy of the document executed in blank to which I have referred. Document (iii) was, I presume, the mortgage offer of 7 August that Mr Davies accepted on 24 August.

32. There were further exchanges on 17 December that it is unnecessary to detail. On 18 December C&G wrote asking for evidence that Mr Davies had put M&U in funds for the deposit of £82,500; why only £707,613.25 was remitted to Deen on 4 September; why they returned only £702,613.25 on 25 September; and why on 28 September M&U returned only that amount to them. M&U replied that Mr Davies had paid the deposit direct to the vendors and that they could not explain the £5,000 discrepancy.

33. In about February 2008 Mr and Mrs Green redeemed the Bank of Scotland charge and re-charged the property to a different bank. There had in practice never been any prospect of C&G obtaining a registered charge over the property and that re-financing transaction effectively brought the conveyancing story to an end. The transaction had been a disaster for C&G.

The judge's judgment

34. Question 1(a) for the judge arose out of M&U's admission in their Defence that ‘whilst it held the Advance, [M&U] held it on bare trust for C&G with C&G's authority to pay it away in connection with Mr Davies' purchase of the property’. On that admission, question 1(a) asked whether there had been a breach of trust by M&U. The judge, correctly in my view, recognised it as important in answering this question to distinguish between C&G's claim against M&U for breach of trust and its alternative claims based on breach of contract and/or negligence. Thus, for example, to the extent that it was in issue whether M&U had made sufficient checks on the identity and genuineness of HDP, that was not material to the breach of trust claim but was material to the alternative claims.

35. As for the breach of trust claim, the judge summarised the rival arguments and his reasons for answering ‘yes’ to question 1(a) as follows:

> ‘18. [M&U's] case is that it held the mortgage monies on a bare trust for C&G with C&G's authority to pay away the mortgage monies in connection with the purchase by Mr Davies. This is a much more limited trust than that argued for by [C&G] which is that the money is held on trust “until completion”, that is that if there is no completion then the money is still held by [M&U] on trust.
>
> 19. Mr Aylwin, on behalf of [M&U] submitted that the mortgage had been “completed” since Mr Davies had signed the mortgage documents. Miss Sandells, on behalf of [C&G], suggested that technically, there was no completion until the transaction was registered. I cannot accept that argument. Paragraph (c) of the Certificate of Title clearly distinguishes between completing the mortgage (sub paragraph (i)) and delivering the documents to the Land Registry to register the mortgage (sub paragraph (iii))….

29. In the present case Miss Sandells' argument is very simple. It is that [M&U] did not have authority to pay away the moneys except to achieve completion and completion was never achieved. Mr Aylwin, on the other hand argues that the authority was to pay away in connection with the purchase of the Property by Mr Davies and this was what [M&U] did.

30. I cannot accept Miss Sandells' construction, particularly when she submits that it means that payment can only be made when completion has been achieved. However, Mr Aylwin's construction would allow payment to be made well in advance of completion provided that the purpose was to further the purchase of the Property. In my view, the proper construction of the instructions is somewhere between these two extremes. The authority entitled [M&U] to pay away on receipt of the documents necessary to register title or, if paying away before that stage, on receipt of a solicitor's undertaking to provide such documents.

31. In the present case [M&U] paid the money without receiving the requisite documents and without receiving a solicitor's undertaking to provide such documents. Accordingly [M&U] was in breach of the trust by paying the money in the circumstances in which the money was paid.

32. The answer to question [1(a)] … is "Yes".'

36. The judge then turned to preliminary issue 1(b)(i), which was whether M&U were entitled to relief from liability for their breach of trust under the provisions of section 61 of the Trustee Act 1925 . That section empowered the court to relieve M&U wholly or partly from personal liability if they had 'acted honestly and reasonably, and ought fairly to be excused for the breach of trust …'. No question arose as to M&U's honesty but there was a challenge to the reasonableness of their actions. In [33] to [36] of his judgment, the judge gave his reasons for concluding that their conduct had not been reasonable, against which there is no appeal. Nor is there an appeal against his further conclusion that it was not in principle open to M&U to advance by way of defence to the claim for breach of trust that any loss or damage suffered by C&G was caused or contributed to by its own fault. The only grounds of appeal are (a) that the judge was wrong to find that M&U committed a breach of trust; and (b) that if he was not wrong so to hold, he was wrong to find that such breach caused any loss to C&G.

The appeal

37. There is no dispute that, following C&G's payment of the loan money to M&U on 31 August, M&U held it upon trust for C&G until 'completion'. Clause 10.3.4 of the Handbook so provided expressly although, if it had not, the money would anyway have been held on such a trust: money such as this held by a solicitor on client account is trust money (see in this context Target Holdings Ltd v. Redferns (a Firm) and Another [1996] 1 AC 421 , at 436A to C, per Lord Browne-Wilkinson). The trust was a bare trust under which at any point during its currency it would have been open to C&G to require the repayment of the loan money. It was, however, a term of the instructions upon which C&G retained M&U that M&U were authorised to release the money for the purpose of completing the purchase (see clause 10.3.1 of the Handbook); and upon such release, the trust would come to an end and C&G's right to recall the money would cease. If what happened on 4 September was 'completion' of the purchase, then, whether or not C&G might have any claims against M&U on other grounds, it would have no claim against them for breach of trust in paying away the loan money. (I shall ignore the events of late September: if there was no completion on 4 September, those events could not have amounted to completion either).

38. Miss Sandells' primary position was, however, that it is irrelevant to focus on the events of 4 September because on no basis could or did they amount to the completion of the purchase or, therefore, of the charge that M&U were retained to obtain. That is because there would only have been any relevant completion of the purchase of the property and of the grant of such charge when the transfer of the property and charge were subsequently registered at HM Land Registry, whereas neither such registration happened. The importance of such registration is because section 27 of the Land Registration Act 2002 provides that 'a transfer' and 'the grant of a legal charge' do 'not operate at law' until they have been registered. It

followed, submitted Miss Sandells, that M&U were never discharged from their status as trustees in respect of the loan money and remained accountable to C&G to restore the trust fund to them for having wrongfully paid it away on 4 September (and having, also wrongfully, re-paid away the reduced amount returned to them later in the month).

39. The judge rejected that submission for reasons he expressed in two sentences in [19] of his judgment. I agree with him, although I shall deal with the point more extensively. 'Completion' in a typical domestic sale and purchase transaction of a property with a registered title conventionally refers to the ceremony, or the agreed postal equivalent, at which the vendor and purchaser (or their respective agents) perform the prior contract. Putting it generally, the purchaser pays money to the vendor, which the vendor applies in redeeming the prior charges and satisfying the unpaid balance of the purchase money. The vendor, in exchange, gives vacant possession of the property to the purchaser and delivers to him the transfer and certificates of discharge of the prior charges. It is this exchange of money and documents that is normally referred to as completion. When, as is usual, the contract incorporates formal conditions of sale, they will specify the 'completion date' when these events must be performed (see, for example, in the current (fifth) edition of the Standard Conditions of Sale, conditions 1.1.1(c) and 6.1.1).

40. Completion as described is not, however, the end of the story for the purchaser and any chargee. They also need to be registered at HM Land Registry as proprietors of the property and charge respectively since only then will the transfer and charge 'operate at law'. The documents provided to the purchaser on completion and (when subsequently obtained) the SDLT certificate issued by HMRC, will enable the purchaser to apply to HM Land Registry for the registration of the transfer showing him as the proprietor of the property, an application which he will or should make within the priority period of the official search of the title of the property that he should have made just before completion. If he has bought the property with the assistance of a mortgage loan, he will by the time of completion also have executed a legal charge in favour of the lender; and its provision to HM Land Registry will also enable the charge to be registered showing the chargee as its proprietor.

41. There is, therefore, in practice a time gap between completion and the subsequent registration of transfer and charge. Miss Sandells' submission is, however, that it is wrong to regard what I have described as completion as being the sense of 'completion' in clause 10.3.4 of the Handbook. She submitted that completion in the sense there used occurs only upon the subsequent registration of transfer and charge.

42. There is, first, a practical difficulty with that argument. Let it be assumed that the sale and purchase contract in this case had been a genuine one, with genuine solicitors acting for genuine vendors, and that the contract had provided for completion to be on 4 September. There is no doubt what that would have meant, namely what I have described as completion. On Miss Sandells' submission, however, M&U would not on such completion have been entitled to have released a penny piece of the loan money to the vendors' solicitors: they could only release it upon Mr Davies and C&G being respectively registered as proprietor and chargee. Unless, however, the parties agreed some fundamental re-structuring of the contract in order to accommodate C&G in this respect, such registrations would not have happened. Instead, if the purchaser was unable to pay the balance of the purchase price on completion, he would probably find himself faced with a forfeiture of his deposit and a claim for breach of contract.

43. Despite its obvious practical complications, Miss Sandells' point is not, however, completely novel. Whilst its possible origins were not discussed in argument, a like point was the subject of discussion in the middle of the last century in *The Contract of Sale of Land as Affected by the Legislation of 1925,* 1930, T. Cyprian Williams. The author there engaged, in footnote (s) on page 80, in a discussion as to whether under an *open* contract for the sale and purchase of registered land, the vendor is entitled to insist on payment of the purchase price at any time before the registration of the purchaser as proprietor. The discussion is interesting but not, I consider, of present relevance. The purported contract in this case was not an open contract (that is, an agreement merely as to parties, property and price). It purported to incorporate the National Conditions of Sale. Contracts that incorporate such standard conditions thereby spell out expressly that the obligation to pay the balance of the purchase money is one that falls to be complied with on completion in the conventional sense (see, for example, condition

6.7 of the current Standard Conditions of Sale). A purchaser signing up to such a contract cannot decline to pay the balance until he is registered as proprietor; and a vendor is entitled to complain if he does.

44. C&G was not of course a party to the contract. It retained M&U on the basis of the instructions in the Handbook. The relevant question is, therefore, what that said about the terms of the trust that C&G thereby imposed upon M&U in respect of the loan money. Clause 10.3.4 told M&U that 'You must hold the loan on trust for us until completion'. So what did 'completion' as there used mean?

45. The Handbook comprises 17 headed sections. The provisions of various of them prior to section 14 refer to 'completion', clause 10.3.4 being one example (see [15] above). It is in my view clear beyond reasonable argument that they are using that word in the sense of the conventional meaning of completion. It is possible to argue, as Miss Sandells did, that they might be read as if they were using the word 'completion' synonymously with 'registration', although I found the argument unconvincing. The argument is, however, given its quietus by section 14 , headed ' *After* completion' (my emphasis), of which clause 14.1 imposes upon M&U the obligation to register the mortgage as a first legal charge at HM Land Registry (and see also clause 14.1.4). Section 14 plainly proceeds on the basis that the prior references to completion are to completion in the conventional sense, not to the subsequent registration of title. In addition, as the judge pointed out, paragraphs (2)(c)(i) and (iii) of M&U's certificate of title (in C&G's prescribed form and so in the form of the certificate referred to in section 10 of the Handbook) draw a distinction between (a) completing the mortgage in the conventional sense and (b) the subsequent delivery to the Land Registry of the documents necessary to register it. A like distinction between completion and registration was made in the first and third bullet points of C&G's instructions to M&U (see [13] above).

46. In my view, therefore, the judge was right to hold that 'completion' in clause 10.3.4 did not refer to the successive moments when the transfer and charge were respectively registered. It referred to the prior date when conventional completion occurred. M&U were authorised by C&G to release the loan money to enable such completion to take place. The trust was only destined to subsist until such time as it did.

47. In the present case, M&U claim that such completion took place on 4 September. The real question is whether or not they are right about that. If they are, they would have released the loan money for the purposes of such completion and such release would not have been a breach of trust.

48. The method of completion agreed between M&U and HPD was completion by post in accordance with the Law Society's code. The day fixed for completion was 4 September. To enable it to take place, M&U remitted the required moneys to HDP and expected that in return HDP would, on the same day, honour their undertakings to send them by first class post or the document exchange the documents listed in paragraph 3.2 of HPD's replies to M&U's requisitions on title. That never happened. HPD were not solicitors; they were not acting for the Greens, the purported vendors, who were not in fact selling the property; they had no intention of paying any of the loan money in the redemption of the Bank of Scotland charge; and they had no genuine paragraph 3.2 documents to send to M&U.

49. So did the events of 4 September 2007 amount to completion of the purchase and of the grant of charge such that M&U can claim that they were lawfully authorised to release the advance moneys to HPD? The judge held that it did not, for the reasons he gave in [31] of his judgment. They were that M&U parted with the advance money without receiving either (i) 'the requisite documents' or (ii) a solicitor's undertaking to provide such documents. I am not myself clear what the judge meant by 'requisite documents'. If he meant genuine documents in completion of a genuine sale and purchase, there was no question of that in this case. Any documents in fact produced could only have been forgeries, and I am not clear whether he was suggesting that the production of forged documents would or might have entitled M&U to claim that completion

had occurred. By his observation in (ii), I interpret him as meaning that, although M&U received what they thought were a solicitor's undertakings, in fact they receive no such undertakings at all, because HPD were not solicitors.

50. In my judgment, whatever the right interpretation of the judge's point (i), he was correct to hold that, on the facts of this case, there had been no completion. It is, I consider, unnecessary in relation to the breach of trust issue to consider what the position would have been if, following the remitting of the loan money, M&U had received in return documents that purported to be what they expected to receive but which were forgeries. Since, however, the answer to that question may be material to M&U's alternative ground of appeal in relation to causation, I shall express my view on it. The purported contract was a nullity, since the Greens had not agreed to sell their property to Mr Davies, nor had they authorised anyone to sell it to him in their name; and the purported completion of that nullity by way of the exchange of purchase money for forged documents could not in my view have amounted to completion. Nothing, said Lear, will come of nothing, and so it was here. Completion in the present context must mean the completion of a genuine contract by way of an exchange of real money in payment of the balance of the purchase price for real documents that will give the purchaser the means of registering the transfer of title to the property that he has agreed to buy and to charge. An exchange of real money for worthless forgeries in purported performance of a purported contract that was a nullity is not completion at all. Had that happened in this case, the parting with the loan money would have been a breach of trust.

51. Two points need to be made about this. First, that if any such forgeries had duped the purchaser's solicitors, they might also have duped HM Land Registry, and the outcome might have been that purchaser and chargee would have been respectively registered as proprietors of the property and charge. By statutory magic, that would have given them titles to the property and charge respectively, albeit titles vulnerable to claims by the victims of the fraud to have the register rectified against them (see Schedule 4 to the Land Registration Act 2002). Such claims might or might not succeed. If they did not, then whilst it would have been a breach of trust for the solicitor to have parted with loan money in the circumstances that he did, such breach would or might not in the result have caused damage to the lender.

52. Second, it may be thought to be hard on solicitors who are innocently duped by such a fraud that they should be answerable to the lender as trustees. The answer to that turns on section 61 of the Trustee Act 1925 , to which I shall return below when considering Mr Aylwin's submissions.

53. In this case there was, however, no exchange of money for documents. There was instead a parting of the loan money in exchange for what M&U believed to be the undertakings of Deen, a firm of solicitors. In fact, M&U's belief was wrong and they received no such undertakings. That was because Deen – innocent and ignorant of the fraudulent misappropriation of their firm name – gave none; and HPD, purporting dishonestly to be a Deen branch office, had no authority to give any Deen undertakings. They had no actual authority to do so; Deen had not held them out as having such authority; and they could not clothe themselves with any apparent or ostensible authority by fraudulently holding themselves out as a branch of Deen.

54. The result was that M&U parted with the loan money in exchange for undertakings that were not of the nature they thought they were. They were themselves direct victims of the fraud and the relevant events of 4 September were in law a nullity, just as would have been an exchange of money for forged documents. Such a nullity also cannot be characterised as the completion of either the purchase or of the charge that C&G instructed M&U to obtain. It follows in my view that, as the events of 4 September did not amount to completion, M&U had no authority from C&G to release the loan money to HPD. They paid it away in breach of trust for which, subject to obtaining relief under section 61 , they were accountable to C&G.

55. Mr Aylwin did not disagree that the events of 4 September were a nullity. His submission was that that did not, however, resolve the appeal in C&G's favour. Whilst there is no appeal against the judge's holdings (a) that M&U were not entitled to section 61 relief, and (b) that any provable contributory negligence upon C&G's behalf would provide no answer to the breach of trust claim (even if it might to C&G's alternative claims), Mr Aylwin nevertheless based his submissions squarely on

assertions to the effect that the disastrous outcome was materially, if not exclusively, C&G's fault. He did, however, expressly disclaim any attempt to absolve M&U from all responsibility in relation to their handling of the matter.

56. More particularly, Mr Aylwin's point was that this was a case where C&G was, he said, put on clear notice that there was a real question as to the integrity of Mr Davies' original loan application, one underlined by the vendors' apparent readiness to drop their original purchase price from £1,150,000 to £825,000 following the production of the C&G valuation. C&G did not provide the original loan application to M&U, nor did it instruct them as to the drop in price. What it did do was to instruct M&U to act for it in a transaction that proved to be a fraudulent one; and completion in the context of such a transaction must, said Mr Aylwin, mean completion according to the transaction's own fraudulent terms. Although, therefore, the events of 4 September were legally a nullity, they still amounted to completion for the purposes of the dishonest transaction in which M&U were instructed.

57. I regard that submission as a surprising one. Mr Aylwin appeared at times to come close to suggesting that C&G had deliberately set up the potential for the loss that it was itself destined to suffer, which may be thought inherently implausible and is, perhaps needless to say, unsupported by any finding by the judge. There is no basis upon which this court can subscribe to such suggestion and I shall say no more about it. It may perhaps at least be arguable that C&G was *negligent* in looking after its own interests when it agreed to make the advance to Mr Davies. But if it was – and such an issue was not before the judge – there is an unappealed decision that any such negligence affords M&U no defence to the breach of trust claim.

58. I have, therefore, some difficulty in understanding quite what Mr Aylwin's submission amounts to. Its essence, however, appears to me to come down to the proposition that if, in a case such as the present, the lender instructs the solicitors to obtain a charge for it in a transaction which, unbeknown to it, is a fraudulent one, completion in clause 10.3.4 of the Handbook cannot fairly be read as meaning more than ‘purported completion’. That is because it would be unjust to hold a solicitor to be in breach of trust by parting with the loan money on such a purported completion when he was as much a victim of the fraud as the lender.

59. I would unhesitatingly reject that submission. However it may be put, the point amounts to no more than a *cri de coeur* that it is unfair that M&U should have become innocently mixed up in the fraud as they did and then be held accountable as trustees for parting with the loan money in the belief that they were doing so for the purposes of completing a genuine transaction.

60. Put like that, it may at first blush be thought that M&U did suffer a degree of unfairness. That, however, is to ignore that they failed to obtain relief under section 61 ; and that was because the judge found that, although they had acted honestly in relation to the transaction, they had not acted *reasonably* in it and so were not deserving of the merciful exercise by the court of its exculpatory discretion. Their material failings were (i) to establish that Deen actually had an office in Holland Park, which constituted a breach of clause A3.2 of Section 3 (Safeguards) of the Handbook; and (ii) to part for a second time with the money in late September when they knew that HPD had breached their earlier undertakings. Whilst it is impossible not to have sympathy for M&U in becoming enmeshed in the fraud, the judge's conclusion was that, by these two shortcomings, they brought their misfortune upon themselves. If they had instead performed their role as solicitors with exemplary professional care and efficiency, but had still parted with the loan money in circumstances that were objectively reasonable, the decision on the section 61 application might have been different.

61. It is, therefore, the discretionary power under section 61 that provides the key to the claimed unfairness of holding a solicitor liable for breach of trust in circumstances such as the present. The careful, conscientious and thorough solicitor, who conducts the transaction by the book and acts honestly and reasonably in relation to it in all respects but still does not discover the fraud, may still be held to have been in breach of trust for innocently parting with the loan money to a fraudster.

He is, however, likely to be treated mercifully by the court on his section 61 application. M&U's conduct of the transaction was, however, found to fall short of the standard that merited such mercy.

62. I would therefore refuse to set aside the judge's answer to question 1(a). I consider that, on the particular facts of this case, he answered it correctly.

63. Mr Aylwin's alternative submission, which he did not develop orally, was that the causation test for breach of trust purposes is the 'but for' test, for which he referred us to Target Holdings Ltd v. Redferns (a firm) and Another [1996] 1 AC 421 , at 436C, where Lord Browne-Wilkinson said that:

> '… the basic equitable principle applicable to breach of trust is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach'.

His submission was that, had completion in this case taken place by an exchange of money for forged documents, the loss would still have happened.

64. I do not understand what this submission is supposed to show. It amounts simply to the suggestion that, in different circumstances, the purported contract might have been purportedly completed in a different way. For reasons I have given, I consider that such an alternative purported completion would also have involved the payment away of the loan money in breach of trust, although as mentioned in paragraph [51] the measure of loss suffered by C&G might perhaps have been different depending upon what thereafter happened. I consider, however, that the speculative possibility that a purported 'completion' by way of an exchange of money for forged documents might in certain circumstances have yielded either no, or only a lesser, loss to C&G provides no exculpatory answer to the claim for full restitution to which C&G was entitled for the breach of trust that actually happened.

Disposition

65. I would dismiss M&U's appeal.

Sir Mark Potter:

66. I agree.

Lord Justice Mummery:

67. I also agree.

