

**IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

14 October 2010

Before:

**MR ROGER WYAND QC**  
sitting as a Deputy High Court Judge

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Between:

**LLOYDS TSB BANK PLC**  
**Claimant**  
**- and -**  
**MARKANDAN & UDDIN (a firm)**  
**Defendant**

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**Miss Nicole Sandells (instructed by DLA Piper Rudnick Gray Cary UK LLP) appeared for the Claimant**  
**Mr Christopher Aylwin (instructed by Patricks, Solicitors) appeared for the Defendant**

**Hearing dates: 27 and 28 May 2010**

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**HTML VERSION OF JUDGMENT**

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1. This is the hearing of the trial of preliminary issues in an action for breach of trust or alternatively breach of undertaking and/or contract. The action arises out of a purported transaction for the purchase of a property known as 35 Claremont Road, Barnet, London ["the Property"]. The Claimant is the successor in title to a mortgage lender which offered a mortgage in respect of the property and the Defendant is a firm of solicitors who were instructed to act on behalf of the Claimant on the transaction.
2. It is necessary to set out the facts of the transaction to make sense of the preliminary issues that were ordered to be tried in this case.
3. In June 2007 a Mr Victor Davies applied to Cheltenham & Gloucester plc ("C&G"), the predecessor in title to the Claimant<sup>[1]</sup>, for a mortgage to purchase the Property. A mortgage offer was made to Mr Davies in respect of the Property.
4. Mr Davies instructed the Defendant to act for him and the Defendant was also instructed to act for C&G on the transaction in accordance with the Council of Mortgage Lenders' Handbook for England

and Wales ("the CMLH"). The Defendant was sent C&G's standard form of Certificate of Title to complete. The Certificate of Title includes, inter alia, the following terms:

*(1) If so instructed, we have checked the identity of the Borrower (and anyone else required to sign the mortgage deed or other document connected with the mortgage) by reference to the document or documents precisely specified by you.*

*(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:**

...

*(b) have made or will make such Bankruptcy, Land Registry or Land Charges Searches as may be necessary to justify certificate no. (2) (i) above;*

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

*(i) complete the mortgage;*

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

....

*(iv) effect any other registrations necessary to protect your interests as mortgagee;*

....

*(e) will not part with the mortgage advance (and will return it to you if required) if it shall come to our notice prior to completion that the Property will at completion be occupied in whole or in part otherwise than in accordance with your instructions;*

...

*(g) will not use the mortgage advance until satisfied that prior to or contemporaneously with the transfer of the Property to the mortgagor, there will be discharged (A) any existing mortgage on property the subject of an associated sale of which we are aware and (B) any other mortgages made by a lender identified by you secured against a property located in England or Wales where you have given either an account number or numbers or a property address;*

*(h) will notify you in writing if any matter comes to our attention before completion which would render the certificate given above untrue or inaccurate and, in those circumstances, will defer completion pending your authority to proceed and will return the mortgage advance to you if required.*

5. The Certificate of Title was completed by Mr Markandan, a partner in the Defendant, on the 29<sup>th</sup> August 2007 slating a completion date of 31<sup>st</sup> August 2007. On the 31<sup>st</sup> August 2007 C&G remitted

an advance to the Defendant of £742,500, being 90% of the valuation of the Property by C&G's valuer following an inspection of the property.

6. On the 24<sup>th</sup> of August the Defendant had been contacted by the Holland Park office of Deen Solicitors ("Deen"), a firm with a head office in Luton, informing the Defendant that they were acting for Mr and Mrs Green, the owners of the Property.
7. The Defendant, having received Replies to Requisitions on Title from Deen remitted the sum of £707,613.25 to the account nominated by Deen on the 4<sup>th</sup> September 2007. That sum was the advance from C&G less the Defendant's legal fees, costs, stamp duty, land registry fees and disbursements. That sum was treated as the entire outstanding balance of the purchase price with no further monies being paid by Mr Davies through the Defendant.
8. Although that money was paid on the 4<sup>th</sup> September no signed contract was obtained from the vendor on that date. On the 11<sup>th</sup> September the Defendant wrote to Deen requesting the signed contract, transfer and discharge certificates. They were not received. On the 25<sup>th</sup> September Deen returned the sum they had received on the 4<sup>th</sup> September, less £5,000, and requested the Defendant send that money back to a different account.
9. The Defendant still had not received the necessary documentation for completion and raised a number of reasons why it would not comply with Deen's request. On the 28<sup>th</sup> September Deen wrote excusing their conduct and asking for the funds. The Defendant complied with that request the same day although it still had not received any of the documentation.
10. Deen then disappeared. Although there is a firm of that name based in Luton registered with the Law Society it does not have an office in Holland Park. The registered owners of the property, which was let at the time, deny all knowledge of the transaction and the money has disappeared. It appears that the whole transaction was a fraud. The Defendant has produced newspaper articles concerning a court case involving someone using the name Victor Davies in similar frauds although in those frauds the solicitor acting for "Mr Davies" would seem to have been involved in the fraud. In this case there is no allegation that the Defendant was involved in the fraud and there is certainly no evidence before me of any such involvement.
11. On the 26<sup>th</sup> of August 2008 Master Moncaster ordered the trial of the following preliminary issue:
  - a. Given the admission in Paragraph 13 of the Defence, has there been a breach of trust by the Defendant?
  - b. If the answer to (a) is yes:
    - i. Is the Defendant entitled to relief under Section 61 (of the Trustee Act 1925)??
    - ii. Can the Defendant rely in principle on the allegation in the Defence that any loss or damage suffered by the Claimant was caused or contributed to by the Claimant's own fault?
  - c. If the answer to question (a) is yes and to question (b) is no:
    - i. What is the Claimant's measure of loss, including but not limited to answering the question whether its loss is limited to the amount it would have received had it repossessed and sold the Property in reliance upon the first legal charge thereon?
    - ii. Is the Claimant entitled to recover that loss?

**Question (a)**

12. Paragraph 13 of the Defence states: *It is admitted that whilst it held the Advance, the Defendant held it on bare trust for [the Claimant] with (the Claimant's) authority to pay it away in connection with Mr Davies' purchase of the property.*

13. The Claimant says that its case is a straightforward breach of trust. It says that the money was given to the Defendant firm subject to the provisions of the CMLH. Clause 10.3.4 of the CMLH provides: *"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."* The Claimant says that completion has never occurred and, as a result, it is entitled to repayment of the money. The advantage to the Claimant of this approach is that, it says, it does not need to show any negligence or fault on the part of the Defendant and there can be no issue of contributory negligence.
14. The Claimant also argues that the onus is on the Defendant to establish the facts required to engage Section 61 of the Trustee Act 1925 and that the Defendant has failed to do so in this case.
15. So far as the quantum is concerned, the Claimant says that it is entitled to a sum equal to the trust fund that the Defendant wrongly paid away together with the interest that it would have received under the mortgage deed, alternatively if claims compound interest at the rate of 4%.
16. The Defendant accepts that it was instructed to act on behalf of C&G in the transaction subject to the terms and conditions set out in the CMLH subject to paragraph 6.3(c) of the Solicitors' Practice Rules 1990, the relevant part of which relied upon by the Defendant is:

"A solicitor acting for both lender and borrower in a standard mortgage may only accept or act on instructions from the lender which are limited to the following matters: ...checking that the seller's solicitors ...[if unknown to the solicitor) appear in a current legal directory or hold practising certificates issued by their professional body."
17. The Defendant further relies on the fact that the Certificate of Title is, strictly, only paragraphs (1) and (2) of the document and that the rest of the document following the word **"We"** is not actually part of the certificate as is borne out by the use of the phrase "the certificate given above" in (h).
18. The Defendant'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 the Claimant 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 the Defendant on trust.
19. Mr Aylwin, on behalf of the Defendant submitted that the mortgage had been "completed" since Mr Davies had signed the mortgage documents. Miss Sandells, on behalf of the Claimant, 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)).
20. I heard evidence on behalf of the Claimant from Mrs Simner who was the manager of C&G's mortgage processing department at the relevant time and on behalf of the Defendant from Mr Markandan the principal of the Defendant. I found that both witnesses were doing their best to help the court. Mrs Simner's knowledge of the transaction was naturally limited to what could be derived from the disclosure documents. She had no knowledge of the fraud itself, nor of the newspaper articles which suggested that "Mr Davies" had been responsible for similar frauds against C&G, nor of the court case to which the articles referred. Mr Markandan was, of course, personally involved. Nevertheless, I felt that Mr Markandan answered the questions put to him fairly and honestly. He was not an evasive witness. In the end, this case turns essentially on the law and not the facts but having heard the evidence I would summarise the more salient points that emerged from the evidence as follows:
  - a. If the money had not been paid away by the Defendant it would have been available to lend to another customer but C&G had no shortage of funds at that time;
  - b. The original purchase price was to be £1,150,000 and the loan applied for was 90% of the purchase price;

- c. C&G had the property valued and their valuer placed a value of £825,000 on the Property;
  - d. C&G therefore offered a mortgage of £742,500
  - e. When the purchaser was informed he came back the same day to say that the vendor had agreed a purchase price of £825,000;
  - f. The fact that the purchase price was reduced by £325,000 immediately did not trigger alarm bells with C&G;
  - g. A Mr Mahendra, an employee of the Defendant, had conduct of the transaction and Mr Markandan was in overall charge;
  - h. Mr Markandan checked the Register of Solicitors and found that the Luton branch of Deen appeared but not the Holland Park branch;
  - i. Mr Markandan contacted the Holland Park branch and a man claiming to be Mr Duphar of the firm of Deen brought round to the Defendant's offices a copy of a letter addressed to him from the Solicitors Regulation Authority. This letter acknowledged receipt from Mr Duphar of an application to register a new branch at the Holland Park address and asked for certain details in order that it could be added to the database. Mr Duphar is the name of a solicitor on the Law Society records as practising from the Luton office of Deen. Mr Markandan accepted this letter as sufficient confirmation of the identity of the Holland Park branch of Deen;
  - j. The Defendant did not have the Requisitions on Title nor did it have an undertaking to discharge the existing mortgage on the property when the Certificate of Title was signed;
  - k. The Defendant had file notes indicating that Mr Mahendran of the Defendant had called C&G to inform them that he had been instructed that the deposit and the legal costs of the purchaser would be paid by the vendor and that subsequently C&G had called back to authorise completion. No one was called to confirm the truth of these notes and Mrs Sumner had no knowledge of these telephone calls.
21. Mr Aylwin submitted that it is important to distinguish between the terms of the trust which was clearly created and the contractual terms between C&G and the Defendant. The first preliminary issue is solely concerned with breach of trust and not with breach of contract or negligence. I believe that Mr Aylwin is correct. The issue as to whether the Defendant made sufficient checks as to the identity of the solicitors purportedly acting on behalf of the vendors of the Property is not one of breach of trust.
22. I have been referred to a number of cases during the course of argument. In *Patel v Daybells* [2002] PNLR 6 the purchasers' solicitor had paid the purchase price to the vendor's solicitor on the solicitor's undertaking that the existing mortgage would be discharged. Due to no fault of the vendor's solicitor, the mortgage was not discharged. The purchasers sued their solicitor for negligence and failed. The Court of Appeal held that it was not negligent to rely on a solicitor's undertaking to discharge a mortgage apart from in exception circumstances. The court referred to the Privy Council case of *Wong v Johnson Stokes & Masters* [1984] AC 296 in which the Privy Council had held that, in the circumstances of that case it had been negligent to rely on a solicitor's undertaking. The *Patel* case is interesting background as to the importance of the fact that it is the undertaking of a solicitor that is being relied on with the consequential availability of procedures for enforcing such an undertaking. It does not assist me in determining whether or not there has been a breach of trust in the present case.
23. *Target Holdings v Redfern* [1996] 1 AC 421 was a case in the House of Lords. The Defendant solicitors, acting for both the purchaser and the finance company, had paid the mortgage advance that they had received from the Claimant finance company to a different entity than the identified vendor. Unbeknown to the Claimant, the transaction was going through two intermediate companies rather than straight from the vendor to the purchaser. By this means, the purchase price was being

more than doubled. The solicitors were aware of this fact but did not inform the finance company. It was common ground that the solicitors had acted in breach of trust.

24. The issue before the House of Lords was the quantum of damage for the breach of trust. However, in the speech of Lord Browne-Wilkinson, he said that although the case was redolent of fraud and negligence such wrongdoing must be put to one side. He was considering the judgment of the Court of Appeal whereby they had held that even if there is no causal link between the breach of trust and the actual loss suffered, the trustee is liable to bear, at least in part, the loss suffered. He then said:

*"If the law as stated by the Court of Appeal is correct it applies to cases where the breach of trust involves no suspicion of fraud or negligence. For example, say an advance is made by a lender to an honest borrower in reliance on an entirely honest and accurate valuation. The sum to be advanced is paid into the client account of the lender's solicitors. Due to an honest and non-negligent error (e.g. an unforeseeable failure in the solicitors' computer) the moneys in client account are transferred by the solicitors to the borrower one day before the mortgage is executed. That is a breach of trust. ..."*

25. Later on Lord Browne-Wilkinson said:

*"In the case of moneys paid to a solicitor by a client as part of a conveyancing transaction, the purpose of that transaction is to achieve the commercial objective of the client be it the acquisition of property or the lending of money on security. The depositing of money with the solicitor is but one aspect of the arrangements between the parties, such arrangements being for the most part contractual. Thus, the circumstances under which the solicitor can part with money from client account are regulated by the instruction given by the client: they are not part of the trusts on which the property is held. I do not intend to cast any doubt on the fact that moneys held by solicitors on client account are trust moneys or that the basic equitable principles apply to any breach of such trust by solicitors. But 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. I have no doubt that until the underlying commercial transaction has been completed, the solicitor can be required to restore to client account moneys wrongly paid a way. ... In my judgment once a conveyancing transaction has been completed the*

*client has no right to have the solicitor's client account reconstituted as a "trust fund"."*

26. Miss Sandells relies on these two passages which clearly show that Lord Browne-Wilkinson considered that any payment away by the solicitors that did not immediately result in the completion of the transaction would be a breach of trust. I would add two notes of caution. The first is that these passages are not a necessary part of the decision since breach of trust had been admitted. The second is that Lord Browne-Wilkinson expressly recognised that the circumstances under which the solicitor can part with the money are regulated by the instructions given by the client. Nevertheless, I accept that these comments are a powerful indication as to the likely terms of the bare trust created under the circumstances in issue.
27. As Mr Aylwin submitted, it is necessary to separate the trust issues from the contractual issues. Any payment away by the Defendant which is not within the terms of its authority to pay away will be a breach of trust. On the other hand, any failure to make proper inquiries concerning the vendor's solicitors may be a breach of contract but not a breach of trust.
28. The position is made plain by the judgment of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1. In that case the solicitor had unwittingly misled the claimant by telling the claimant that the purchasers were providing the balance of the purchase price themselves without recourse to further borrowing when he knew that they were using an overdraft to obtain further funding. Millett LJ said:

*"It is not disputed that from the time of its receipt by the defendant the mortgage money was trust money. It was client's money which belonged to the society and was properly paid into a client account. The defendant never claimed any beneficial interest in the money which remained throughout the property of the society in equity. The defendant held it in trust for the society but with the society's authority (and instructions) to apply if in the completion of the transaction of purchase*

and mortgage of the property. Those instructions were revocable but unless previously revoked, the defendant was entitled and bound to act in accordance with them.

....

*"The society's standing instructions did not clearly make the defendant's authority to complete conditional on having complied with his instructions.*

*Whether they did so or not is, of course, a question of construction, and it is possible that the society could adopt instructions which would have this effect But it would in my judgment require very clear wording to produce so inconvenient and impractical a result. No solicitor could safely accept such instructions, for he could never be certain that he was entitled to complete. "In my judgment the defendant's authority to apply the mortgage money in the completion of the purchase was not conditional on his having first complied with his contractual obligations to the society, was not vitiated by the misrepresentation for which he was responsible but of which he was unaware, had not been revoked, and was effective to prevent his payment being a breach of trust. Given his state of knowledge (and, more importantly, that his authority had not been revoked), he had no choice but to complete."*

29. In the present case Miss Sandells' argument is very simple. It is that the Defendant 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 the Defendant 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 the Defendant 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 the Defendant paid the money without receiving the requisite documents and without receiving a solicitor's undertaking to provide such documents. Accordingly the Defendant was in breach of the trust by paying the money in the circumstances in which the money was paid.
32. The answer to question (a), posed in the Order of Master Moncaster is "Yes".

#### **Question (b)**

33. Question (b)(i) is whether the Defendant is entitled to relief under Section 61 of the Trustee Act 1925. Section 61 provides (so far as is relevant):

*If it appears to the court that a trustee... is or may be personally liable for any breach of trust... but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust... then the court may relieve him either wholly or partly from personal liability for the same.*

34. It is for the trustee to establish that it acted honestly and reasonably before the discretion of the court is engaged. There is no challenge to the honesty of the Defendant's actions in the present case but there is a challenge to the reasonableness of the Defendant's actions.
35. The Defendant submits that the circumstances of the loan application were unusual and ought to have put C&G on enquiry and that C&G approved the making of the loan in haste without having made proper enquiry. It is suggested that this was, by inference, in a bid to increase its share of the loan market at a time when property values were thought to be booming. Having decided to make the loan, C&G gave none of the information to the Defendant which put, or should have put, the Claimant on enquiry and, by its actions, if placed the Defendant in a position of danger without giving it any warning.

36. It is submitted by the Claimant that the Defendant was in breach of the CMLH in a number of respects. That may well be the case but, in any event, I do not believe that the Defendant's conduct was reasonable in a number of respects. The Defendant paid the money to what Mr Markandan believed was the firm of solicitors acting on behalf of the vendors of the Property although it had not received the signed contract, transfer and discharge certificates. The money, less £5,000, was paid back to the Defendant with a request to the Defendant to pay it to a different account. Even though the Defendant's requests for the necessary documentation had not been complied with, the Defendant paid the money again to the purported solicitors for the vendor. Combined with the failure to establish properly that the firm Deen actually had an office in Holland Park, something specifically required by section A3.2 of the CMLH, this conduct cannot be said to be reasonable. Even if the Defendant is correct in saying that C&G approved the loan in haste and failed to inform the Defendant of suspicious circumstances, that cannot make the Defendant's conduct reasonable.
37. The answer to question (b) (i) is "No".
38. Question (b)(ii) is whether the Defendant can rely in principle on the allegation in the Defence that any loss or damage suffered by the Claimant was caused or contributed to by the Claimant's own fault.
39. This question arises out of the pleading in paragraph 34 of the Defence which claims to reduce any liability for breach of trust on the following bases:
- a. Because breach of trust remedies are equitable and should reflect the extent to which the Claimant's own fault caused or contributed to such loss or damage as it may have suffered;
  - b. The Claimant is not entitled to any sum in excess of that which it could have claimed had it alleged negligence or want of care;
  - c. By analogy with the Law Reform (Contributory Negligence) Act 1945.
40. Mr Aylwin relied on the decisions in *Vesta v Butcher* [1989] 1 AC 8 whereby it was held that a defendant to an allegation of breach of contract was entitled to a defence of contributory negligence if his position as a contract breaker was, by reason of the agreement between the parties, the same as his position as a common law tortfeasor.
41. Mr Aylwin contended that there was no reason in precedent or principle why, if a trustee who is alleged to be in breach of trust is in a like position as regards his duty of care as a tortfeasor or as a trustee, he should not also be entitled to a defence of contributory negligence.
42. It is not enough that there is no reason in precedent or principle why that should not be the case. Rather, if it is necessary to establish that there is a reason why that should be the case. It is clear that the Court of Appeal in *Vesta v Butcher* outlined the limited categories where a defence under the Law Reform Act could be relied on in contractual cases. There is nothing in that decision which can be relied upon to extend the principle to cases of breach of trust. Section 61 of the Trustee Act gives limited relief to trustees where the trustees have acted reasonably and honestly. It could have provided for the conduct of the beneficiary to be taken into account as the Defendant here wishes. It did not and it is not for the Court to extend the law in a way that was not done by the legislature.
43. The answer to question (b)(ii) is "No".

**Question (c)**

44. The final issue to be determined, given the answers I have found to the previous questions, is:
- (i) *What is the Claimant's measure of loss, including but not limited to answering the question whether its loss is limited to the amount it would have received had it repossessed and sold the Property in reliance upon the first legal charge thereon?*
  - (ii) *Is the Claimant entitled to recover that loss?*



45. There was no dispute before me that the recoverable loss is the entire advance made by C&G for the purpose of the purchase of the Property. No reason has been put forward for disentitling the Claimant to recover that sum, other than the matters which I have dealt with above.
46. Neither counsel addressed me on the issue of interest however it was addressed in the Claimant's skeleton argument. The Claimant claims interest at the contractual mortgage rate. It relies on Clause 10.6 of the CML which states:

*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).*

47. If this were a claim in contract then it might be that the Claimant would be entitled to this rate of interest. However, since this is a claim for breach of trust, I do not think that this provision of the CMLH is relevant to the rate of interest to which the Claimant is entitled.
48. In cross-examination Mr Aylwin established that C&G at the relevant time was not short of funds for lending. In the alternative the Claimant asks for "compound interest at 4% or such other rate as the Court shall determine".
49. As I have stated, neither party addressed me on the issue of interest. In the absence of such submissions I would hold that the Claimant is entitled to interest at the rate of 4%, but not compound. In the circumstances, if either party wishes to ask for a different order as regards the level of interest they may put in written submissions which I will consider.

Note 1 There is a pleaded issue that the Claimant is not entitled to enforce such rights as C&G possessed prior to the Claimant's succession to C&G but this does not form part of the preliminary issue and was not argued before me. [\[Back\]](#)