Neutral Citation Number: [2018] EWCA Civ 1082

Case No: A3/2016/3971, A3/2017/0393 & A3/2017/0506

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr David Railton QC : HC 2015 002013
Mr Robin Dicker QC : HC 2014 001212

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 May 2018

Before :

LADY JUSTICE GLOSTER
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE PATTEN
and
LORD JUSTICE FLOYD

- -

Between :

A3/2016/3971

P&P PROPERTY LIMITED

Appellant/Claimant

- and -

(1) OWEN WHITE & CATLIN LLP
(2) CROWNVENT LIMITED

Respondents/Defendants

A3/2017/0393
A3/2017/0506

DREAMVAR (UK) LIMITED

First Respondent (2017/0393)/
Appellant (2017/0506)/Claimant

- and –

(1) MISHCON DE REYA (a firm)

Appellant (2017/0393)/Defendant

(2) MARY MONSON SOLICITORS LIMITED

Second Respondent (2017/0393)/
Respondent (2017/0506)/Defendant

- and -

THE LAW SOCIETY

Intervener

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Gary Blaker QC and **Chris de Beneducci** (instructed by **JPC Law**) appeared for **P & P Property Limited**

Ben Patten QC and **Katie Powell** (instructed by **BLM LLP**) appeared for **Owen White & Catlin and Mary Monson Solicitors Limited**
Ivor Collett (instructed by **Mills & Reeve LLP**) appeared for **Crownvent Limited**
David Halpern QC (instructed by **Healys LLP**) appeared for **Dreamvar (UK) Limited**
Jeremy Cousins QC and **Peter Dodge** (instructed by **DWF LLP**) appeared for **Mishcon de Reya (a firm)**
David Holland QC (instructed by **The Law Society**) provided written submissions on behalf of the **Intervener**

Hearing dates : 27 & 28 February and 1 & 2 March 2018

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Approved Judgment

Lord Justice Patten :

1. These appeals raise common issues about the liability of solicitors and estate agents in cases involving identity fraud. In both cases the fraudster posed as the owner of a registered property in London. He instructed solicitors and agents to act for him on the sale of the property and genuine purchasers were found. The purchasers instructed their own solicitors, and proceeded to exchange of contracts and completion in accordance with the Law Society Code for Completion by Post (2011) ("the Code"). Following completion, but before registration of title, the fraud was discovered but the fraudster and the purchase money have, of course, disappeared.

2. In *P&P Property Ltd v Owen White & Catlin LLP* the purchaser ("P&P") brought a claim not against its own solicitors (Peter Brown & Co) but against the vendor's solicitors ("OWC") relying on breach of warranty of authority; breach of an undertaking; negligence and breach of trust. It also sued the selling agents (Crownvent Limited who trade as Winkworth) for breach of warranty of authority and in negligence. In summary, P&P contend that OWC and Winkworth held themselves out as having the authority of the true owner to conclude the sale of the property; were negligent in not carrying out adequate checks (in accordance with the Anti-Money Laundering Regulations) to establish the identity of their client; and (in the case of OWC) had no authority to disburse the purchase monies to their client other than on the completion of a genuine sale. In *Dreamvar (UK) Ltd v Mishcon de Reya* the purchaser brought proceedings against its own solicitors ("MdR") for negligence and breach of trust and against the vendor's solicitors (Mary Monson Solicitors Ltd ("MMS")) for breach of warranty of authority, breach of an undertaking and breach of trust. It did not allege negligence against MMS but there has been a late application by Dreamvar, which we have heard together with these appeals, for permission to re-amend the particulars of claim to add a claim for damages in negligence.

3. In *P&P* the trial judge (Mr Robin Dicker QC) dismissed all the claims against both OWC and Winkworth: see [2016] EWHC 2276 (Ch). P&P appeals against the judgment on all issues. In *Dreamvar* the judge (Mr David Railton QC) dismissed the claim against MdR for negligence but found that the firm was in breach of trust in releasing the purchase monies in relation to a fraudulent sale: see [2016] EWHC 3316 (Ch). The judge declined to grant MdR relief from the consequences of their breach of trust under s.61 of the Trustee Act 1925. He dismissed all the claims against MMS but indicated that had he found MMS to have been in breach of trust he would have granted relief to MdR (but not to MMS) under s.61. MdR does not appeal the judge's finding that it acted in breach of trust in releasing the purchase monies. But both it and Dreamvar challenge the judge's findings that there was no breach of trust or breach of undertaking by MMS. If successful, MdR will seek relief under s.61 for the same reasons as the judge would have been minded to grant it in such circumstances but Dreamvar opposes this. Dreamvar also appeals against the judge's finding that MdR were not negligent. It contends that MdR should have obtained an undertaking from MMS only to use the purchase money to complete a true sale of the property. This part of the appeal falls away if we conclude (contrary to the judges in both cases) that undertakings to that effect were in fact given by the vendor's solicitors under paragraph 7(i) of the Code.

4. Dreamvar does not appeal against the judge's dismissal of its claim based on breach of warranty of authority. The solicitor at MdR (Ms Curtis-Goulding) accepted in her

evidence that she did not treat MMS as warranting that it had the authority of the true owner to sell the property and did not rely on any such warranty.

The facts

5. There is no challenge to the findings of fact made in the two cases and I need therefore do no more than to summarise the basic facts as found at trial in order to consider the issues of principle which arise. It will, however, be necessary to refer later to some of the more detailed findings when I come to consider issues such as relief under s.61 and the claim that the vendor's solicitors in each case owed the claimant a tortious duty of care.

P&P

6. P&P is a property investment company. On 4 December 2013 it made an offer of £1.03m for a property at 52 Brackenbury Road, London W6 which was shown on the register of title at HM Land Registry as having been owned since 1989 by a Mr Clifford Harper. The property was not occupied by Mr Harper and had been let out to a succession of tenants. In July 2013 it was let to someone claiming to be Mr Mark Armstrong. On 20 November 2013 OWC were telephoned by someone who said that he was Clifford Harper who had a property in Hammersmith with no mortgage which was worth about £1.2m. He wanted to raise a loan of £800,000 on the property by way of bridging finance to enable him to buy another property and he wanted to complete the borrowing within 10 days.

7. The supposed Mr Harper (whom I shall call the vendor) was put through to Ms Joyce Lim. She then emailed to the address he had given her various documents including an anti-money laundering ("AML") leaflet and informed him she would need to take steps to verify his ID and address. It was evident from the telephone numbers on the client questionnaire form that the vendor either lived or worked abroad. On 26 November he contacted Ms Lim and told her that he would be coming back to the UK at the end of that week and would come to her office. She opened a file in the name of Clifford Harper and told him to bring his passport and two recent utility bills.

8. An appointment was arranged for Friday 29 November. By then Ms Lim had spoken to a solicitor (Mr Neiland) at Bradley & Jeffries who was instructed by Funding 365 Limited, the proposed lender. At the meeting the vendor gave Ms Lim a business card and his passport which indicated that he was born on 25 May 1966. He also provided a partially completed ID verification form giving the property as his current address and stating that he had lived there for 10 years even though it was apparent that he was now working abroad. The office copy entries for the property also, as I have said, indicated that it had been purchased by Mr Harper back in 1989. The vendor produced only one utility bill showing proof of address but said that he would arrange for his bank statements to be couriered to her.

9. On 2 December the vendor emailed Ms Lim (purportedly from Dubai) and told her he wanted to complete by Friday 6 December. By then the lender (Funding 365) had been pressing the vendor to produce evidence of his residence in Dubai including his contract of employment and bank statements but the vendor then told Ms Lim that, instead of obtaining the bridging loan, he now wished to sell the property.

10. On 2 December the vendor also telephoned a Mr Hunt at Winkworth and told him that he needed to complete the purchase of another property by 15 December and therefore needed to find a cash buyer quickly for his London property. On the same day Ms Lim received the results of her AML search which came back as "Referred" because it was not possible to "uniquely identify the applicant at his address". It was also impossible to verify his date of birth from the available databases including the electoral roll. Notwithstanding this Ms Lim made no further attempts to verify the vendor's identity and accepted him as a client.

11. To obtain a rapid sale Winkworth (on the vendor's instructions) marketed the property for £1m which represented a discount of 25% on its current value. The agents were given a mobile number, an email address and an address in Dubai for the vendor but relied on Ms Lim to carry out the necessary AML checks instead of doing that for themselves as required by the AML Regulations. The judge rejected Mr Hunt's evidence that he had been told by Ms Lim that Winkworth could rely on the AML checks which she had carried out.

12. The bank statements were provided to Ms Lim on 3 December. They were not full copies of the statements but only the front pages. What was disclosed indicated that the vendor was often in the UK and the judge considered that the contents of the statements should have prompted Ms Lim to make further enquiries. On 4 December P&P made its offer to purchase the property and the vendor was advised by Winkworth to accept it. They then prepared a memorandum of sale giving the vendor's address as in Dubai. Ms Lim received a copy of the memorandum but did not query the address. Nor were any further steps taken by OWC to verify the vendor's identity.

13. The vendor signed and returned to OWC the TA10 (Law Society Fittings and Contents Form) and TA6 (Law Society Property Information Form) but neither signature on examination corresponds to the signature on the passport. In the TA6 form the vendor confirmed that he did not live at the property but Ms Lim made no further enquiries as to where he did live when he was in the UK. On 6 December she emailed to him a copy of the transfer and asked him to take it to a local solicitor in order to witness his signature. The vendor confirmed to her that he was happy for her to sign the contract on his behalf and contracts were exchanged at 16:55 on 6 December. The deposit of £103,000 continued to be held by P&P's solicitor as stakeholder under the contract.

14. The vendor produced a document signed by a Peter Lazarus of Winterhill Largo in Dubai purporting to confirm the identity of the vendor with an address in Dubai. Ms Lim did not check the credentials of Mr Lazarus or Winterhill Largo but it later transpired that Mr Lazarus had been suspended from practice in 2010 and that Winterhill Largo was a debt recovery business. Ms Lim produced a completion statement and asked the vendor to provide a forwarding address. At the same time the vendor continued to press for a rapid completion on the basis that he needed the money to complete his other purchase. To facilitate an early completion, it was arranged that the solicitors acting for P&P's mortgage lenders would transfer the balance of the purchase price (£927,000) directly to OWC but, before this could be done, OWC (on 11 December) served a notice to complete on P&P.

15. On 12 December the deposit of £103,000 and a further sum of £327,000 provided by the mortgagees were transferred to OWC. On the basis of a request from Ms Lim that the vendor should be able to use the money to complete the purchase of another property in Dubai, P&P's solicitors agreed that the £430,000 should be held by OWC as the vendor's agent rather than as stakeholders. The remaining £600,000 was transferred to OWC at 12:49 on 12 December. The £430,000 was sent to the vendor that afternoon followed by the sum of £581,410 which represented the balance of the £600,000 after deduction of legal costs and other disbursements.

16. The fraud was discovered on 17 January 2014 following an application to register P&P's title.

Dreamvar

17. Dreamvar is a small residential development company which had instructed MdR in relation to other property transactions. On about 1 September 2014 the director of Dreamvar (Mr Vardar) was contacted by Douglas & Gordon ("D&G"), the estate agents, and told that they had a client who was looking for a quick sale of a property at 8 Old Manor Yard, Earl's Court, London SW5. Mr Vardar was told that the vendor was getting divorced and was seeking to complete the sale in 3 days. D&G had been asked to contact developer clients who might be interested. The sale price was £1.1m.

18. Mr Vardar inspected the property on 1 September. It was unoccupied. He made an offer of £1m to D&G. They said that another developer had already offered £1.1m and was in a position to proceed. Mr Vardar increased his offer to £1.1m and confirmed he had the funds to complete the purchase. His offer was accepted. He then instructed Ms Curtis-Goulding of MdR to act for Dreamvar on the purchase. He told Ms Curtis-Goulding that he knew there would not be sufficient time in which to carry out all the necessary searches before completion but he was willing to take that risk. He asked MdR to advise him if this was possible and the risks which could be involved.

19. The following day D&G sent to MdR a memorandum of sale giving the name of the vendor as Mr David Haeems and stating that his solicitors were MMS. On 3 September Ms Curtis-Goulding confirmed to Ms Slater of MMS that she was instructed to act for Dreamvar on the purchase and was told that MMS had not yet received proof of the vendor's ID or formal instructions on the sale. She was not therefore able to send MdR a contract pack.

20. On the same day Ms Curtis-Goulding sent to Dreamvar a retainer letter relating to the purchase. MdR was to carry out a full review of the contract and title and would prepare a full report explaining all the title and other matters relating to the purchase. The retainer letter did not deal expressly with the terms on which MdR would hold and be authorised to release the purchase monies to the vendor or his solicitors.

21. Nothing further was heard from MMS until 11 September when MdR received a draft contract, office copy entries and the TA6 and TA10 forms, each of which appeared to have been signed by Mr Haeems on 6 September. The proprietorship register showed that the property was unencumbered and that Mr Haeems had been the registered proprietor since 19 January 2000. The register gave the address of the property as

Mr Haeems's address but on the draft contract his address was given as a flat in Broadfield Road, London SE6.

22. Prior to 10 September MMS had asked the vendor to verify his identity and address. He had produced copies of a driving licence and TV licence which had been verified on the face as a true likeness of the originals by Mr Faroq Zoi, a solicitor. It later transpired that Mr Zoi had been asked to verify the documents by the vendor when they met by chance in the waiting room of another firm of solicitors, Dennings. The driving licence had been issued only shortly before (on 28 August) and was valid for only 3 years but it did give the Broadfield Road address for the holder. The TV licence is a document which, according to the Law Society's AML Practice Note, is not identified as suitable for the verification of UK based clients. The judge found that no other steps were ever taken to verify the vendor's identity and that no one from MMS ever met him. Prior to the trial MMS accepted that it had not acted competently in accepting the driving and the TV licences as proof of identity but should have insisted on meeting the client and obtaining from him proper proof of identity and of his address.

23. Ms Curtis-Goulding received the draft contract, made some minor amendments and raised further enquiries about the property. Replies were received from MMS on 15 September when they also sent to MdR the Completion Information and Undertaking document signed by MMS on behalf of the vendor. The document indicated that completion would take place in accordance with the Code.

24. On 16 September MdR sent to MMS the draft transfer together with requisitions on title concerning rights of way over the property. MMS offered to provide indemnity insurance. The transfer was approved and MMS indicated to Ms Curtis-Goulding that it and the contract had been sent to the vendor for signature. Simultaneous exchange and completion were to take place, if possible, the following day.

25. Ms Curtis-Goulding sent to Dreamvar her report on title in which she noted that only the local authority searches remained outstanding. Mr Vardar was willing to proceed without them. The report did not mention the risk of identity fraud on the part of the vendor. Mr Vardar told MdR that he wanted, if possible, to exchange contracts that day (16 September) even if completion could not take place. He attended at MdR's offices to sign the contract and the transfer. Mr Vardar asked Ms Curtis-Goulding if there was any risk of the vendor's wife being able to register an interest against the title and was told that there was no such risk He did not ask for and was given no other assurances.

26. MMS's client (also on 16 September) asked MMS to transfer the purchase monies to another firm of solicitors (again Dennings) who were also acting for the vendor. This request came shortly after MMS had asked the vendor for details of the bank account to which the purchase monies should be transferred. MMS (rightly) considered that the request was unusual but were prepared to act on the instructions after receiving an email from a solicitor at Dennings (subsequently confirmed in writing) that they were acting for the vendor in another matter in connection with the purchase of machinery and equipment from China.

27. The purchase monies were sent by MdR to MMS on 17 September on terms that MMS obtained indemnity insurance to cover the risk that there were adverse rights of

way over the property. The monies were to be held to MdR's order until the policy was agreed. This took place later that day and exchange and completion took place simultaneously by telephone that afternoon.

28. Dreamvar commenced work to the property but, after receiving the application to register Dreamvar's title, the Land Registry managed to contact the real Mr Haeems and the fraud was discovered.

Breach of warranty of authority

29. Neither the purchasers nor their solicitors had or were intended to have direct access to the vendor for the purposes of verifying his identity. The Money Laundering Regulations 2007 (2007 No. 2157) ("MLR") were the regulations in force at the relevant time. They have now been replaced by the Money Laundering Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 with effect from 26 June 2017 but, for ease of exposition, I shall refer to the application of the 2007 regulations in the present tense. The MLR impose an obligation on solicitors and estate agents together with the other classes of relevant persons defined in regulation 3 to apply customer due diligence measures when establishing a business relationship or carrying out an occasional transaction: see regulation 7(1). This obligation applies irrespective of whether the relevant person has any reason to suspect that his client is involved in money laundering or to doubt the veracity of any documentary or other information relied on by the customer for the purposes of identification. Customer due diligence includes identifying the customer and verifying his or her identity on the basis of documents, data or information obtained from a reliable and independent source: see regulation 5.

30. Where the customer is not physically present for identification purposes the relevant person must take additional measures to compensate for the higher risk. These include requiring the identity of the customer to be established by additional documents and information and for the documents supplied to be appropriately verified: see regulation 14. This applied to MMS and to Winkworth neither of which firms ever had personal contact with their vendor clients.

31. Failure to comply with these requirements renders the relevant person liable to a civil penalty and is also a criminal offence: see regulations 42 and 45. The MLR are designed to implement the European directives (see 2005/60/EC) by preventing the use of the financial system for the purpose of money laundering and the financing of terrorism. They operate by requiring professionals and financial institutions to identify and verify the identification of their clients on the basis that those relevant persons can be relied upon to carry out their duties under the regulations honestly and diligently and that the transparency which this will bring to the transaction will be sufficient to deter and prevent criminal activity. The MLR do not, however (and are not intended to), create a statutory liability on the part of solicitors and estate agents towards innocent third parties such as the purchasers in the present cases who are the victims of fraud. Although the carrying out of the necessary AML checks in the present cases may have deterred or prevented the frauds from taking place, that is not the purpose behind the MLR and any civil liability which attaches to the solicitors and agents who act for the fraudster must therefore be established under the general law. The existence of the MLR and the obligations they impose may, however, be important background features in determining what liability (if any) should be

imposed on solicitors and agents who undertake the sale of property on behalf of a client who turns out to be an imposter.

32. An agent who represents to a third party that he has authority to act on behalf of someone else is treated as warranting that he has such authority and is liable for any loss caused to the third party in reliance on the representation. In *Collen v Wright* (1857) 8 El. & Bl. 647 a land agent who acted for the owner of a farm entered into an agreement with the plaintiff to grant him a lease of the farm. The contract was signed by the agent as agent for the owner. The owner of the farm denied that he had given the agent authority to grant the lease and refused to execute it. The lack of authority was admitted and the plaintiff sued the agent's estate to recover the costs of his unsuccessful action against the landowner for specific performance of the agreement. The Court of Appeal affirmed the decision of the Queen's Bench that the agent's estate was liable for the costs. Willes J (delivering the majority judgment) said (at page 657):

> "It appears to me that the judgment of the Court of Queen's Bench ought in all respects to be affirmed. I am of opinion that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. This is not the case of a bare misstatement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise."

33. In *P&P* Ms Lim signed the contract "on behalf of the Seller". "Seller" is a defined term under the contract and as appears on its first page means "Clifford Michael Phillip Harper of 52 Brackenbury Road London W6 OBB". The obligation of the "Seller" under the contract was to transfer "the Property" which was the property at 52 Brackenbury Road. The purchaser relies on the contract and other documentation passing between OWC and Peter Brown & Co in which OWC indicated that they had instructions to act for the seller of the property. In relation to Winkworth, P&P relies on the memorandum of sale sent to the director of P&P on 4 December 2013 in which Clifford Harper is named as the vendor of the property at Brackenbury Road and is referred to in the covering letter as "our client". P&P contends that the representation made in each case was that the solicitors and the selling agents had authority to act on behalf of the true owner of the property and not merely the person who gave them

their instructions. This is said to be consistent with the obligation imposed on OWC and Winkworth by the MLR to verify the identity of their client and the inability of the purchaser or those advising it to do so. It would, they say, have been unrealistic to expect the purchasers to have carried out identity checks and, in the context of contractual negotiations, they had no access to the vendor or his personal details that could allow them to do so. It was for the vendor's solicitors to carry out the "Know Your Client" procedures and the AML checks are requirements imposed on them precisely because they are the persons with direct access to the vendor client and his documents: see *Patel v Freddy's Limited* [2017] EWHC 73 (Ch).

34. The defendants' position is that they are not guarantors of the vendor's identity to the purchasers. The MLR does not, as I have explained, impose any such liability on them and their obligations under the MLR are not such as to make it reasonable to construe the acceptance of instructions by a client whom they believe is genuine as a representation or promise that they have authority to act on behalf of the person their client purports to be. The position in this case is no different from what it would have been had the solicitors carried out thorough AML checks on Mr Harper but he still turned out to be a fraud. Some support for this is to be found in the evidence of Ms Curtis-Goulding in the *Dreamvar* case who said that she had never considered that a solicitor who was instructed by a client in a transaction was warranting the client's identity.

35. Because the liability of the agent is contractual he becomes the guarantor of his authority to act and his liability (like any other contractual liability) is strict. But, as with any other contract, the court is required to construe its terms. The fact that this is a unilateral contract makes no difference for that purpose. The representation which the agent makes to the effect that he is authorised by "the vendor" or by "x as vendor" to enter into the contract with the third party has to be understood and interpreted in the context in which it is given having regard (on conventional principles) to what the informed but objective bystander with all the relevant background information available to the parties would have understood it to mean. In a simple case like *Collen v Wright* where no question of identity arose nor any issue about the ability of the landowner to grant the lease and the sole issue was whether the agent had the authority of the landowner for whom he purported to act, there is little room for argument about the terms of the warranty which the agent has given. But where, as in the present cases, a solicitor or agent acts for a real person who turns out to be an imposter it is necessary to consider whether the solicitor or estate agent has held himself out as acting for the client he has or for the person that client purports to be. In other words (using the test in *Collen v Wright*), who is the other person for whom Ms Lim purported to contract and Winkworth to act?

36. In *P&P* both defendants had the actual authority of the fraudster to act for him in the transaction and the judge concluded that neither OWC nor Winkworth warranted that they were acting for the true owner. The representation by OWC that they were acting for the "seller" should not be construed, he held, as meaning that they acted for the Clifford Harper who owned the property at 52 Brackenbury Road but rather the person who had given them instructions to sell that property. In the case of Winkworth, the memorandum of sale which simply informed P&P that the name of the person selling the property was Clifford Harper should not be construed as a warranty by them that their client was also the true owner.

37. In reaching this conclusion the judge reviewed a number of the authorities since *Collen v Wright* and referred to an article by Francis Reynolds ([2012] LMCLQ 189), one of the editors of *Bowstead and Reynolds on Agency*, which contains a helpful discussion of what is warranted in cases of this kind. But I want to begin with the authorities.

38. The principle of liability established in *Collen v Wright* depends, as I have explained, upon the agent being held responsible for the truth of what he represents. In the present case, the issue is to identify who OWC and Winkworth purported to act for: their actual client or the true owner? In *Collen v Wright* it was unnecessary to analyse the warranty in this way because there was no sub-issue about identity. The difficulty for the agent in that case was that he had no authority at all from the landowner or any one else to enter into the contract for the lease. The only representation which the agent made was that he had the authority of the landowner which was untrue. That was therefore enough to establish liability. In *P&P* the solicitors did have a client who did give them authority to act in the sale. But he was not the owner. The background circumstances are therefore different from the situation in *Collen v Wright* but Mr Blaker QC says this makes no difference. The solicitors should be taken to have warranted that they acted for the true owner of the property whose name appears on the contract and not merely for the person who gave them their instructions. Most cases of breach of warranty of authority, like *Collen v Wright*, are ones where the agent purports to act for the vendor or the party with whom the claimant contracts. But the cases are not limited to circumstances where the claimant is induced to contract with the principal. In *Firbank's Executors v Humphreys* (1886) 18 QBD 54 directors of a company which issued debenture stock as security for a debt were held to have warranted that they had authority to issue valid stock on behalf of the company even though, unbeknown to them, the company had already issued all the stock it was authorised to and the stock issued to the creditor was therefore invalid. Similarly in *Starkey v Bank of England* [1903] AC 114 a broker who applied to the Bank for the transfer of Consols to a purchaser on the authority of a power of attorney issued by the stockholder which turned out to be forged was held to have given an implied warranty to the purchaser that he had the necessary authority. The presentation of the power of attorney to the Bank was treated as an "undertaking on the part of the agent that the thing which he represented to be genuine was genuine": see per Lord Halsbury LC at page 118.

39. The terms and content of the representation or warranty are obviously fact-dependent and will vary according to the circumstances. In each of the cases I have referred to the issue was the relatively straightforward one of whether the agent had the authority which was implicit in and necessary in order for the transaction to be binding on his disclosed principal. *Firbank's Executors* comes slightly closer to the present case in that the authority of the directors depended upon the company not having issued all the authorised stock. But the identity of the principal was not in issue in any of the cases. Another example of the extended application of the liability of an agent for breach of warranty of authority where identity can become an issue is in relation to litigation where a solicitor issues proceedings or takes some procedural step on behalf of a client who has either given no authority or is incapable of doing so. In *Yonge v Toynbee* [1910] 1 KB 215 solicitors who were instructed to defend proceedings on behalf of a client entered an appearance for him and served a defence in the action in ignorance that he had been certified as mentally unfit. They were held to have

warranted that they had the authority to take these steps on behalf of the client and were ordered to pay the costs. The liability under the implied warranty was, as I have mentioned, strict but, as Buckley LJ pointed out, the contract could be excluded by the circumstances of the case:

> "This implied contract may, of course, be excluded by the facts of the particular case. If, for instance, the agent proved that at the relevant time he told the party with whom he was contracting that he did not know whether the warrant of attorney under which he was acting was genuine or not, and would not warrant its validity, or that his principal was abroad and he did not know whether he was still living, there will have been no representation upon which the implied contract will arise."

40. In the present case it cannot be and is not suggested that the purchaser or its solicitors could have discovered the fact that they were dealing with an imposter. They would at least have known (regardless of whether they in fact relied upon this) that the obligation to carry out the requisite AML checks lay with the vendor's solicitors and agents and they had no reason to suppose that those checks had not been carried out. It is therefore material to consider in the present case whether the fact that the vendor's solicitor has the obligation to carry out the AML checks and has the access necessary for that purpose is enough in itself to make the warranty of authority which he gives one that extends beyond the mere fact that he is authorised by the person who in fact instructs him.

41. In *Nelson v Nelson* [1997] 1 WLR 233 solicitors had been instructed by a client who failed to disclose that he was an undischarged bankrupt. They brought proceedings in his name and obtained an injunction to prevent the sale of property in which he alleged that he had an interest. When the fact of his bankruptcy was discovered the injunction was discharged and the solicitors were ordered to pay the costs. The Court of Appeal reversed the decision of the judge. Peter Gibson LJ (at page 237) said:

> "For my part, I have considerable doubt whether the mere fact of a solicitor's client becoming bankrupt automatically operates to discharge the solicitor's retainer. Of the three reasons given in *Halsbury*, the first raises the question of what authority a solicitor does have when he accepts a retainer to bring proceedings for a client and what warranty he gives by bringing the proceedings in the client's name. Prima facie his authority is to bring the proceedings in the name of the client and I do not see that he warrants more than that he has a retainer from the client who exists and has authorised the proceedings and against whom a costs order can be made. He does not warrant that the client has a good cause of action or that the client is solvent. Whether the client has made representations to the solicitor as to his ability to pay for future services and disbursements depends on the facts of the particular case. It is of course true that the relationship of solicitor and client is confidential and fiduciary and that the solicitor is hardly likely to have agreed to act for the trustee in bankruptcy, but that does

> not in itself entail the automatic discharge by the bankruptcy of the retainer. Accordingly I am not persuaded by the reasoning in *Halsbury* . In any event the present case is not one relating to the termination of an existing retainer but one which raises the question whether a retainer ever came into being.
>
> For the reasons given, in my judgment the retainer did come into being. The bankrupt had the legal capacity to retain a solicitor and he gave authority to the solicitors by instructing them to bring the proceedings in his name."

42. McCowan LJ put the matter slightly differently by saying (at page 235):

> "I see nothing in these authorities to contradict the contention of [counsel] for the solicitors, that a solicitor who lends his name to the commencement of proceedings is saying (1) that he has a client, (2) that the client bears the name of the party to the proceedings and (3) that the client has authorised the proceedings. He does not represent that the client has a good cause of action. What the plaintiff in the present case was lacking was a good cause of action since any action in respect of [the] claim … was vested in his trustee in bankruptcy.
>
> In my judgment in commencing these proceedings the solicitors had authority from the plaintiff to do so and warranted no more than that. In particular they are not to be taken to be warranting that the plaintiff had a good cause of action vested in him."

43. It was not necessary for the Court in *Nelson v Nelson* to consider any question of identity or the name used by the solicitor's client for the purpose of the proceedings. The only issue that arose for decision was whether the bankrupt's solicitors should be taken as warranting that their client had a good cause of action. What McCowan LJ said about warranting the name of the client was therefore, strictly speaking, *obiter*. But in *SEB Trygg Liv Holding AB v Manches* [2006] 1 WLR 2276 Gloster J (as she then was) held solicitors liable for having conducted an arbitration not without authority but by using the wrong name. Her decision on this point was reversed by the Court of Appeal. Having considered the judgments in *Nelson v Nelson* it held that a solicitor in litigation gives no warranty about the accuracy of his instructions. Buxton LJ said:

> "64. Nevertheless, *Nelson v Nelson* is helpful as to what a solicitor conducting proceedings does not warrant, even though we do not think it deals directly with the question we have to decide. As a matter of principle, therefore, is a warranty as to name justified?
>
> 65. Mr Matthews for SEB says it is. Such a warranty, he submits, should be considered as part of the warranty of authority or something akin to it. The opposing party is entitled to be told the correct name of the client from whom the solicitor has authority and entitled to rely on the name put

> forward in the proceedings. This is the basis on which litigation or arbitration is conducted. It should not be difficult for a solicitor to ascertain the correct name of his client. The opposing party on the other hand has no right or obligation to do so.
>
> 66. In considering these submissions it is important to bear in mind that generally a solicitor conducting proceedings does not warrant what he says or does on behalf of his client. Thus he does not warrant that his client, the named party to the proceedings, has title to sue, is solvent, has a good cause of action or defence or has any other attribute asserted on his behalf. The solicitor relies upon his client's instructions for all these things, as he will normally do for naming his client correctly. As he gives no warranty as to the accuracy of his instructions generally, it is difficult to see why the naming of his client should be treated as an exception. Why should this be any different, for example, from the naming of a client who has no title to sue? There is an obvious distinction between such matters and the solicitor's own authority to act because the solicitor will usually know whether he has such authority or not. The imposition of strict liability on a solicitor for breach of warranty of authority is justified because otherwise the opposing party will be left without remedy against his supposed client.
>
> 67. The warranty which a solicitor gives is that he has a client who has instructed him to assert or deny the claims made in the proceedings against the opposing party. We do not think he warrants that the client has the name by which he appears in the proceedings. As a matter of principle it would not be right to impose strict liability upon a solicitor for incorrectly naming his client. Otherwise solicitors could be made liable for any case of misnomer including, for example, typographical errors or change of corporate name without a change of rights."

44. Although this statement of principle is concerned with the scope of warranty of authority given in the particular context of litigation, it provides confirmation of the need I referred to earlier for caution in identifying the precise scope and content of the warranty. The solicitor who accepts instructions to litigate on behalf of a client has the same level of direct access as if instructed in a transaction. But in *SEB* the issue again was not strictly one of identity in the sense of there being two possible persons on whose behalf the solicitor represented that he acted. The case was concerned with the narrower question whether the solicitor who commences the litigation for his client warrants that the name which that client uses is correct. It was never suggested that the solicitor by using that name purported to act for a completely different person or that such a person in fact existed. I am not sure that *SEB* therefore provides a sound or sufficient basis for resolving the question of construction which arises in the present case.

45. Turning again to the transactional cases, I can conveniently begin with the decision of this Court in *Penn v Bristol and West Building Society* [1997] 1 WLR 1356. A husband sought to obtain money to pay off his business debts by fraudulently purporting to sell his house to his business partner who would purchase it with a mortgage loan which would be used to pay off the debts. The house was jointly owned by the husband and his wife and the solicitor, whom the husband instructed, mistakenly believed that he was also instructed by the wife. The husband forged his wife's signature on the contract. On completion the purchaser's solicitors (who also acted for the mortgagee building society) advanced the mortgage monies which were used to discharge the existing mortgage on the property and to pay off the business debts. The wife brought successful proceedings against the building society and the purchaser for a declaration that the charge over the property and the transfer to the purchaser were null and void. The building society counterclaimed against the solicitor for breach of warranty of authority. The Court of Appeal dismissed the solicitor's appeal. Part of the appeal was concerned with an issue of causation but on liability the Court applied the contractual analysis set out in *Collen v Wright* and held that the building society had been induced to advance the loan by the solicitor's representation that he had authority to act on behalf of both the husband and the wife.

46. The case is therefore factually similar to *Collen v Wright* in that the solicitor has held himself out as having the authority of the wife to sell the property on her behalf in circumstances where he believes he has been given that authority. As in *Collen v Wright*, there was no alternative client or principal for whom the agent could have or did purport to act. It was a case of authority to act for the wife or of having no authority at all. In *Bristol and West Building Society v Fancy and Jackson (a firm)* [1997] 4 All ER 582 which was also concerned with various types of mortgage fraud Chadwick J rejected the submission that the mortgage lender's solicitors had a duty to investigate and confirm the veracity of the wife's signature on a mortgage deed:

> "If there were nothing irregular on the face of the document the lender's solicitor would be entitled to accept it without question. He would not be required to inquire into the circumstances in which it was executed. But—and this is, of course, an important safeguard—the lender would have the benefit of the implied warranty of authority given by the borrowers' solicitor that he has the authority of the borrowers to complete the mortgage by delivering the mortgage deed—see the judgments in the Court of Appeal in *Penn v Bristol and West Building Society* [1997] 3 All ER 470, [1997] 1 WLR 1356.
>
> I can see no reason why the position should be different in the circumstances that the same solicitor acts for both lender and borrowers. I do not hold that the duty of the solicitor, as solicitor for the lender, is increased by the fact that he acts also for the borrowers; but, equally, I can see no reason why, as solicitor for the borrowers, he should not be taken to warrant to the lender that he is acting for them in the transaction with their authority. That does not, necessarily, mean that he is warranting that the signature on the mortgage deed is authentic; but it has

> much the same effect. Mr Borsay must be taken to have warranted to the society that the mortgage deed which he delivered on completion as solicitor for the borrowers was delivered with the authority of both Mr and Mrs Barton."

47. In *Zwebner v The Mortgage Corporation Ltd* (1998) PNLR 769 Robert Walker LJ (in another case involving the forging of a wife's signature on a mortgage deed) described as a general rule the principle that a solicitor who holds himself out as acting for both husband and wife in mortgage transactions warrants that he has the authority of the wife to complete the transaction. But neither of these cases required the Court to consider whether the scope and content of the representation is different if the solicitor has a client who pretends to be the relevant owner or mortgagee.

48. The issue we have to decide did, however, arise in *Excel Securities PLC v Masood* [2010] Lloyd's Rep PN 165, a decision of Judge Hegarty QC (sitting as a High Court judge). The case concerned a fraud (not dissimilar to the present one) in which someone posing as the true owner of a property applied for a loan secured on the property. The offer of the loan was conditional on satisfactory proof of identity and residence and various documents were provided to the lender for that purpose. The solicitors instructed by the borrower wrote to the lender's solicitors setting out the name of their client as being the owner of the property with that address and stating that "we are instructed by the above-named client". It later transpired that the person giving them instructions was an imposter and not the owner of the property. The lender sued the solicitors for breach of warranty of authority and applied for summary judgment on the claim. The judge held that there were triable issues about the identity of the client and reliance and did not therefore have to decide whether the solicitors had warranted that they were acting for the true owner of the property. But in a long and careful judgment Judge Hegarty did address this issue.

49. The judge rejected the argument that some kind of hard and fast distinction could be made between authority and identity for the purpose of determining the scope of the contractual warranty. Although an agent would not normally be taken to warrant particular attributes of the principal (including his name), the analysis of the terms of the warranty needed to be conducted by reference to the particular facts:

> "96. For my part, I do not think that questions of this kind can be answered in the abstract or at a high level of generality. A warranty of authority is an implied obligation arising as a matter of contract in appropriate circumstances. Whilst the core nature of the warranty is well established, its precise limits in any particular case must, in my judgment, be determined by reference to the specific circumstances which have given rise to the warranty. That is an objective question to be determined by reference to the circumstances prevailing and known to the parties at the time when the warranty is deemed to have arisen and not in the light of subsequent developments. It is in this context that considerations similar to those expressed by the Court of Appeal in Midland Bank plc v Cox McQueen [1999] PNLR 593 are likely to be of considerable relevance, particularly since the Court is dealing with the extent of an

> implied obligation rather than with the construction of a written document."

50. Judge Hegarty considered it relevant that the borrower's solicitors had carried out their identity checks with reasonable care and were entitled to assume that the lender, Excel, had done the same. The matter had proceeded, he said, as an ordinary conveyancing transaction in which both sides mistakenly believed that the borrower was the owner of the property to be mortgaged. Excel had never asked the solicitors to give an express warranty as to his identity. In these circumstances the implied warranty they had given extended no further than to guarantee they had the authority of the individual who had instructed them.

51. The decision in *Excel* has been followed and accepted to be good law in Scotland by the decision of the Inner House in *Cheshire Mortgage Corporation Ltd v Grandison* [2013] PNLR 3 which also concerned a fraudulent application for a loan by someone posing as the owner of the mortgage property. Lord Clarke (at [30]) said:

> "We accept that a warranty may be given by a solicitor, or other agent, expressly to a third party as to a particular attribute or attributes of the solicitor's or agent's client. We consider it more appropriate in such discussions to talk of attributes of clients rather than the identity of a client. The identity of a person is made up from a bundle of qualities or attributes. In particular there is nothing in principle in the law of contract to prevent an agent from guaranteeing to a third party that he has a principal who is the same person as appears on property registers, for example, as the owner of a specific property. As Judge Hegarty observes in his judgment (p 103) however: 'It is … almost inconceivable that an agent would agree to this'. But, in any event, where, as here, no such express warranty was asked for, or given, matters must rest on the implied warranty of authority to be implied as a matter of law, the extent and nature of which was defined correctly in the *Excel* case."

52. The decisions in *Collen v Wright* and *Penn v Bristol and West Building Society* are relied on by P&P for the general proposition that in the case of a named principal the agent warrants that he has the authority of the person so named. In *Knight Frank LLP v Aston Du Haney* [2011] EWCA Civ 404 a desktop valuation of a development site was commissioned by the defendant on behalf of a BVI company which was described variously as Morecambe Investments or Morecombe Investments Ltd. The fee for the valuation was not paid and the claimant valuers sued the defendant for breach of warranty of authority on the basis that there was no BVI company with either of the above names. There was, however, a BVI company called Morecambe Investment Co Ltd which was negotiating to purchase the site and on whose behalf the defendant had acted in commissioning the valuation. The Court of Appeal held that the defendant was not in breach of his warranty of authority because he had authority from that company to act on its behalf and his warranty did not extend to guaranteeing the accuracy of its name. Tomlinson LJ said at [13]:

> "In my view the dispute can in fact be resolved without reference to the further findings made by the judge as to the

> state of mind of Mr Mackay and the Respondent. The Respondent made it very clear that he was acting as agent only. The Respondent did not contract as a principal in his own right. The Respondent warranted that he was acting on behalf of the entity that was negotiating to purchase the site. As appears hereafter he was, or at any rate there is no reason to believe that he was not. It has not therefore been demonstrated that the Respondent was in breach of his warranty of authority. That is the end of the case. It is true that the Respondent represented that the name of his principal was, firstly, Morecambe Investment Ltd and, secondly, Morecombe Investments Ltd but he did not on either occasion warrant the accuracy of the name given in the sense that he effectively guaranteed that it was correct. For the avoidance of doubt the same would be true if his only representation on this topic had been that made by virtue of his countersigning and returning the letter "For and on behalf of Morecombe Investments Ltd". The warranty which the Respondent gave was as to the fact of his agency, not as to the precise accuracy of the name which he attributed to his principal."

53. The decision in the *Knight Frank* case is hardly surprising given that the warranty which the claimants were seeking to construct was that the agent had commissioned the valuation on behalf of a non-existent client. The defendant had merely misstated the name of his client to the valuers by using the name of a company which did not exist. But there was a real client with a similar name which had authorised the valuation and against whom the valuers had a contractual claim. It would have been wrong in these circumstances to have construed the contract as a warranty that the agent acted for anyone but his actual principal. The differences in the names used were in the circumstances immaterial. By contrast in the present case, the disclosed principal named in the contract of course existed but the solicitors did not act for him. But if Ms Lim's signature of the contract "on behalf of the Seller" is to be construed in the same way as amounting to a representation merely of the existence or fact of the agency and nothing more then the claim cannot succeed.

54. It is convenient at this stage to step away from the cases involving claims for breach of warranty of authority and to look more generally at the question of construction which arises in this case. In the *Excel* case Judge Hegarty placed some emphasis on the fact, as he saw it, that the vendor's solicitor is unlikely to have been willing to give a warranty as to the identity of his client. But it is equally clear that the purchaser in relation to a written contract for the sale of land negotiated and made at a distance through the formal machinery of exchange and then completion contracts only with the person whose name and identity appears on the contract and not with the actual individual with whom the sale has been negotiated and agreed. A written contract entered into with a fraudster is treated on an objective analysis of the words used as one with the person he purported to be as identified in the contract itself. In *Shogun Finance Ltd v Hudson* [2004] 1 AC 919 Lord Hobhouse of Woodborough (and the majority in the House of Lords) considered that the construction of the written document admitted of only one possible construction so that the contract was void rather than merely voidable for deception. There was *no consensus ad idem*.

The majority of the Appellate Committee rejected the application to a written contract of what some of them referred to as the face to face principle which was that the description of the purchaser (in that case) by name could at a matter of construction be treated as a reference to the actual person who agreed to buy at least where some element of personal negotiation took place. At [153]-[154] Lord Phillips of Worth Matravers said:

> "153. The difficulty in applying a test of *intention* to the identification of the parties to a contract arises, so it seems to me, only where the parties conduct their dealings in some form of inter-personal contact, and where one purports to have the identity of a third party. There the innocent party will have in mind, when considering with whom he is contracting, both the person with whom he is in contact and the third party whom he imagines that person to be.
>
> 154. The same problem will not normally arise where the dealings are carried out exclusively in writing. The process of construction of the written instruments, making appropriate use of extrinsic evidence, will normally enable the court to reach a firm conclusion as to the person with whom a party intends to contract. This was the position in *Boulton v Jones* 27 LJ Ex 117, *Cundy v Lindsay* 3 App Cas 459 and *King's Norton Metal Co Ltd v Edridge, Merrett & Co Ltd* 14 TLR 98. There is a substantial body of authority that demonstrates that the identity of a party to a contract in writing falls to be determined by a process of construction of the putative contract itself."

55. Neither OWC nor Winkworth were of course parties to the contract of sale but Ms Lim executed and exchanged the contract on behalf of her client and in doing so adopted the terminology of the contract to describe the person she was acting for. Although I accept that were the matter entirely at large there are contextual considerations which might point to the solicitor or other agent doing no more (as in *Knight Frank*) than to warrant that he had the authority of the client who gave him his instructions, this seems to me to have little relevance when the solicitor has in terms represented that she has signed and exchanged contracts on behalf of the person who is named in the document itself as the "Seller". This was not the fraudster but rather the Clifford Harper who owned 52 Brackenbury Road. The case is no different from *Collen v Wright* where the agent signed the agreement as "Robert Wright, agent to William Dunn Gardner Esquire, Lessor".

56. It seems to me that the deputy judge was therefore wrong to construe the warranty inherent in Ms Lim's signature of the contract as no more than a guarantee that she had the authority of the client who had instructed her to handle the sale of the property on his behalf. This was not a situation such as in *SEB* where the form and content of the warranty was not governed by any particular form of words and depended on an implication based on all the relevant circumstances. Nor in my view is this a matter of apportioning liability as between innocent parties in a fraud or determining where the risk should lie. Rather it depends on a consideration of Ms Lim's actions in their proper context having regard to her representation that she acted for the seller who was named as Clifford Harper with the address of the property to be sold. The

situation is no different from that in *Penn* or *Collen v Wright* because in these cases the only meaning available to be given to the representation that the agent acted for the wife or the landowner was that he had the authority of that person. The existence of an additional factor in the form of the person instructing the solicitors or agents does not override the clear terms of the representation that was made. Accordingly, I would hold that Ms Lim did indeed give a warranty that she was authorised to act on behalf of the actual Clifford Harper who owned Brackenbury Road.

57. The same conclusion does not, I think, follow in relation to Winkworth. The memorandum of sale which they prepared was based on the particulars which the purported seller had given them and records that they acted for a vendor called Clifford Harper with an address in the UAE. Whilst it can be said that they should have carried out proper AML checks rather than relying on what Ms Lim had done, that does not provide a sufficient basis for imposing on them a liability based on a guarantee of their client's identity. The memorandum must bear the same meaning regardless of how thorough or not the AML checks were. It seems to me that, reasonably read, it is no more than a statement of the details which they had been given by the fraudster in respect of the sale of the property. It pre-dates the contract and contains nothing to indicate in terms that they had received the instructions summarised in the memorandum. I do not consider that the objective bystander would regard this as a statement or warranty by the selling agent that they had been given those instructions by the real Clifford Harper. In that regard, their position is different, I think, from that of Ms Lim.

58. That leaves the question whether the purchaser in fact relied on the warranty which OWC gave. The judge found that there had been no such reliance. He said:

> "132. I do not accept that, assuming such representations to have been made, P&P Property relied on them. Mr Robinson does not appear to have thought such a representation was being made by Owen White. His evidence was to the effect that he relied not on such a representation, but on Owen White having *"done all of the correct due diligence required by them to establish the identity of their client as being the true owner of the Property"*, and Mr Polycarpou's evidence in relation to Winkworth was to similar effect."

59. This assumes that reliance is a necessary condition of liability but P&P challenge that. The traditional view is that liability depends upon the representee being induced to act in reliance on the warranty because (as with any other unilateral contract) that constitutes the acceptance and consideration for the guarantee which the agent gives. This appears in the statement of principle in the passage from *Collen v Wright* quoted earlier. For there to be inducement by the warranty it must be relied upon. Mr Blaker referred us to the judgment of Tuckey LJ in *Donsland Ltd v Hoogstraten* [2002] EWCA Civ 253 where he says (at [14]) that the issue might not be settled law but the trend in all the more recent cases has been to regard reliance as an essential feature or condition of the cause of action for the reasons I have given and Mr Blaker has provided no reason in principle for us not to adopt that as the correct view: see the discussion in *Zoya Ltd v Sheikh Nasir Ahmed (trading as Property Mart) (No 2)* [2016] EWHC 2249 (Ch) at [36].

60. The issue of reliance in this case turns on the evidence of Mr Robinson. Mr Blaker submitted that the judge was wrong to have drawn the inference that the warranty of authority implicit in Ms Lim's signature of the contract on behalf of the seller had no material impact in terms of inducing P&P (through Mr Robinson) to enter into the contract. Mr Blaker accepts that there is a factual difference between relying on the solicitor having carried out the requisite AML checks and relying on the warranty of authority that was given. But he says that the evidence of Mr Robinson did support a finding that there was reliance on the warranty.

61. Mr Robinson says nothing about these matters in his two witness statements but he was cross-examined by Mr Patten QC about the agreement that the £430,000 should be held by OWC as the vendor's agent rather than as stakeholders. His evidence was that he agreed to this because he believed he was dealing with a reputable firm of solicitors who would have carried out due diligence on their vendor client. But he did not in terms mention the warranty of authority or suggest that contracts had been exchanged on the basis that the solicitors had confirmed or undertaken in some way that they were acting for the real Clifford Harper. In these circumstances, it was in my view open to the judge to make the finding that there was no material reliance on the warranty as such and that what induced Mr Robinson to allow his client to exchange contracts was his belief that the necessary due diligence had been carried out. As the judge's finding was open to him on the evidence, there is no basis on which this Court can interfere with it. The judge was right in my view to dismiss the claim against OWC based on breach of warranty of authority.

Negligence

62. I want to turn next to the question whether the solicitors and agents who acted for the vendor owed any duty of care in negligence to the purchaser. In *P&P* this arises as an appeal by the purchaser against the judge's ruling that neither OWC nor Winkworth owed any duty to P&P to take reasonable care to carry out the AML checks and to ascertain the identity of their client. In *Dreamvar* the point arises as a result of the claimant's late application for permission to amend in order to make the same claim. There is a separate appeal in *Dreamvar* about the liability in negligence of the purchaser's own solicitors, MdR. But, as I explained earlier, this turns in part on whether the vendor's solicitors, MMS, have given an undertaking only to use the purchase money to complete a genuine sale of the property and I shall return to this issue when I come to consider the arguments on the proper construction of the paragraph 7(i) undertaking. For the moment, I propose to concentrate on the position of the vendor's solicitors.

63. The judge rejected the existence of a duty of care primarily because he considered himself bound to follow the decision of Sir Donald Nicholls V-C in *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560 and there were no special circumstances in the context of the particular transaction to justify the imposition of a duty of care in favour of the claimant who was not OWC's client and was the counter-party to the transaction with its own solicitors.

64. In *Gran Gelato* the solicitors acting for the vendor on the sale of leasehold premises gave an incorrect reply to an inquiry before contract about the existence of adverse terms in the head lease. The Vice-Chancellor held that the vendor was liable for damages in negligence and under the Misrepresentation Act but that its solicitors

owed the purchaser no duty of care. Adopting the tests of proximity and whether it was fair, just and reasonable to impose the duty, both of which are derived from the decision of the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, the Vice-Chancellor accepted that the test of proximity was established in that the vendor's solicitors must be taken to have known and intended that the purchaser would rely on the accuracy of the answers to its inquiries. Nor did the fact that the solicitors making the representation were acting for a known principal necessarily exclude personal liability on their part. But he went on:

> "That was in the context of agents generally. In the particular context of inquiries before contract in a normal conveyancing transaction, Morritt J. expressed a different view in *Cemp Properties (UK) Ltd. v. Dentsply Research & Development Corporation* [1989] 2 E.G.L.R. 205, 207. He observed that it would be absurd if the solicitor for one party to the transaction owed a duty of care to another party as well as to his own client.
>
> In my view, in normal conveyancing transactions solicitors who are acting for a seller do not in general owe to the would-be buyer a duty of care when answering inquiries before contract or the like. In reaching the conclusion that the law should not generally import a duty of care in such circumstances, three factors have weighed with me. The first lies in the context in which such representations are made. The context is a contract for sale of an interest in land. The buyer is formally seeking information from the seller about the land and his title to it. The answers given by the solicitor are given on behalf of the seller. The buyer relies upon those answers as answers given on behalf of the seller, although the confidence of the buyer and his solicitors in the reliability of the answers may be increased when they see the answers have been given by a solicitor in the ordinary way. They will expect the seller's solicitor, as a professional acting on behalf of his client, to have got the answers right. I venture to think that in these circumstances one would expect to find that the law provides the buyer with a remedy against the seller if the answers were given without due care. I am far from persuaded that the fair and reasonable reaction to these facts is that there ought also to be a remedy against the other party's solicitor personally.
>
> Secondly, what one finds is that the law does indeed provide the buyer with a remedy against the seller in respect of any misrepresentation in the answers given on his behalf. As already noted, the seller himself owes a duty of care to the buyer. When, as is usual, the answers are given by the seller's solicitor, the seller will be as much liable for any carelessness of his solicitor as he would be for his own personal carelessness. He will be so liable, because in the ordinary way the solicitor has implied authority from the seller to answer on

> his behalf the traditional inquiries before contract made on behalf of the buyer. In providing the answers the solicitor is acting within the scope of his authority. Some of the inquiries will raise questions of fact. Others will raise legal, conveyancing points which the client cannot answer himself.
>
> The client leaves all these matters to the solicitor to handle for him, after seeking instructions where appropriate from the client on any particular points on which the client may be expected to have relevant information. Thus, the purchaser to whom incorrect answers are given is not without a remedy even if the fault was that of the seller's solicitor and not the seller himself. Whoever was at fault, the buyer has a remedy for damages at common law against the seller. (This, I interpose, is to be contrasted with a case such as *Smith v. Eric S. Bush* [1990] 1 A.C. 831. There the mortgagor would have been without remedy if he did not have one against the valuer personally or his employer.)
>
> Thirdly, at the forefront of his submissions, Mr. Jackson presented an argument that to impose a duty of care on solicitors would be to expose them to conflicting duties, with one duty owed to their clients, and another different duty owed to the buyer. I am not persuaded that this would be so. The duty to the buyer would be to take reasonable care to see that the answers provided were accurate. That duty would march hand in hand with a duty to the same effect owed by the solicitor to his own client. There would be no conflict. Nevertheless, and although I am not impressed by this argument based on conflict, it does seem to me that in the field of negligent misrepresentation caution should be exercised before the law takes the step of concluding, in any particular context, that an agent acting within the scope of his authority on behalf of a known principal, himself owes to third parties a duty of care independent of the duty of care he owes to his principal. There will be cases where it is fair, just and reasonable that there should be such a duty. But, in general, in a case where the principal himself owes a duty of care to the third party, the existence of a further duty of care, owed by the agent to the third party, is not necessary for the reasonable protection of the latter. Good reason, therefore, should exist before the law imposes a duty when the agent already owes to his principal a duty which covers the same ground and the principal is responsible to the third party for his agent's shortcomings. I do not think there is good reason for such a duty in normal conveyancing transactions."

65. Although these appeals concern what in form and appearance were ordinary conveyancing transactions, in substance they were not and neither the liability of the vendor for the fraud nor the fact that the purchaser had its own solicitors can

necessarily be regarded as providing the purchaser with adequate protection against the loss caused by the vendor's dishonesty. The fraudster himself is unlikely to be traceable (as the present cases illustrate) and the purchaser's own solicitors will not be in the position to carry out their own due diligence and can reasonably expect the vendor's own solicitors to have carried out the necessary AML checks as they are required to do under the MLR. It can therefore be said that the focus of the claims in these cases is on the duty of the vendor's solicitors to take reasonable care to ensure that the transaction is a genuine one rather than on any duty to ensure that accurate information is given about matters such as title or the physical state of the property to be sold. But the judge in *P&P* considered that the purchaser's solicitor, Mr Robinson, could have protected his client by asking OWC for an undertaking not to release the purchase monies except upon having carried out proper due diligence on their client.

66. Beyond this, the judge said that there had been no assumption of responsibility by Ms Lim to P&P in respect of the carrying out of due diligence and that the imposition of a duty would cut across the contractual position of the parties and the rights and obligations imposed on them by the Code.

67. In relation to Winkworth, the judge found that although the firm had an established relationship with Mr Polycarpou of P&P in the sense that P&P had previously purchased properties marketed by the agents, there was no representation or the giving of advice by Winkworth in this case in relation to anything but the suitability of the property. In particular, they had made no representations about the due diligence carried out in respect of the vendor and P&P's case (as in relation to OWC) was simply that the agents should have foreseen that P&P could rely upon them to have carried out appropriate AML checks on their client's identity. Mr Blaker did not submit to the judge that estate agents owe any general duty of care to prospective purchasers and there was no conduct, he held, which crossed the line in this case so as to found an assumption of responsibility in respect of the AML checks due under the MLR.

68. Mr Blaker submitted that the decision in *Gran Gelato* was either distinguishable for the reasons I have touched on or simply should no longer be followed. It was obvious, he said, that Ms Lim must have realised that P&P and its solicitors would look to her to carry out proper due diligence on the vendor's identity in accordance with the MLR. The *Caparo* test of proximity was therefore established and it was fair, just and reasonable for a duty of care to exist. The due performance of the identity checks was fundamental to the transaction and the duty would not be extended by relying on a general rule about a solicitor having only one client and the need to avoid any conflict of duty. There was, he submitted, no possibility of conflict in the present case because the MLR imposed on OWC a duty to carry out the AML checks before accepting the vendor as a client. The situation was therefore fundamentally different from the one under consideration in *Gran Gelato* where the vendor was genuine and the solicitor's error could be compensated for by the vendor itself.

69. In *White v Jones* [1995] 2 AC 207 the House of Lords held that the failure by a solicitor to carry the instructions of his testator client into effect by ensuring that a new will was executed was actionable by the beneficiaries who would have inherited under the new will. The solicitor assumed a special relationship with the potential beneficiaries whom he knew were economically dependent on his carrying out the

testator's instructions. No conflict of interest existed between the testator and the intended beneficiaries and there was therefore no reason in policy for not giving legal effect to the assumption of responsibility implicit in the proximity between the instructions accepted by the solicitor and those who were intended to benefit under the will.

70. In his speech Lord Goff of Chieveley recognised that the general rule was that a solicitor owed a duty of care only to his client not least because that relationship was invariably contractual. He also accepted that, again as a general rule, a solicitor acting for a vendor on the sale of land will not owe a duty to the buyer. The decision in *Gran Gelato* was cited with approval for what it decided. But it was not necessary in *White v Jones* to consider contracts for the sale of land more generally and so the decision in *Gran Gelato* remains, I think, good authority simply for that general rule.

71. In *McCullagh v Lane Fox & Partners Ltd* [1996] PNLR 205 the estate agents who were marketing a property in Chiswick mis-stated the size of the garden Instead of being "nearly one acre" it in fact measured 0.48 of an acre. The Court of Appeal held that because of a disclaimer in the particulars of sale and the opportunity which the purchaser had to instruct his own surveyors, no duty of care was owed to him by the defendant agents. But Hobhouse LJ in his own judgment expressed reservations about the Vice-Chancellor's reasoning in *Gran Gelato* insofar as it turned on the solicitor providing the answers to the inquiries on behalf of the vendor and on the purchaser having a remedy in tort against the vendor himself:

> "The reasoning of the Vice-Chancellor, unless it is confined to stating a special rule applicable to solicitors in conveyancing transactions, is, in my judgment, inconsistent with the *ratio decidendi* of *Punjab National Bank* and with the general principle of tortious liability where the person doing the relevant act is the agent of another, which the Vice-Chancellor himself recognised in his citation of *Smith v Bush* and *Resolute Maritime*."

I am far from convinced that on a proper reading of his judgment the Vice-Chancellor intended to lay down a rule that there could be no duty of care owed by an agent where the claimant has an effective remedy against his principal. Such a proposition would, as Hobhouse LJ pointed out, be contrary to earlier authority and wrong in principle. The better view is that the decision in *Gran Gelato* simply establishes the need (as in any other case where liability for economic loss is claimed on the basis of a tortious duty of care) to take all relevant factors into account including that the solicitor is providing the replies on behalf of his client and will often be dependant on the client for the content of those replies. This is why Hobhouse LJ went on to recognise that, in the light of its treatment in *White v Jones*, the exception of a solicitor from owing any duty of care in a conveyancing transaction except to his own client had to be treated as a particular rule of policy applicable to the special role of a solicitor in transactions of that kind.

72. The present appeals are not, of course, cases in which the claim in negligence is based upon any mis-statement which either the solicitors or the agents are said to have made. The particulars of negligence are details of omissions and other alleged failures by the defendants properly to carry out the identity checks required under the

MLR. It follows that any imposition of liability based on the *Caparo* criteria will depend upon placing on the solicitors and agents a duty to the purchasers when carrying out the AML checks even though it is common ground that the MLR do not themselves create any parallel liability to affected third parties based on a breach of statutory duty.

73. There have been cases where (even absent a direct representation) solicitors acting for one party to a transaction have been held liable in negligence to another party whose interests should have been protected had their client's instructions been competently carried out. *Dean v Allin & Watts* [2001] PNLR 39 is such an example where solicitors who acted for borrowers under a private loan failed to create an effective charge over the intended security because there was no written memorandum which satisfied the requirements of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989. Although the solicitors were never instructed by the lender, they were held to owe him a duty of care in tort because the loan agreement had specifically envisaged the creation of a valid charge and no conflict of interest existed between the borrowers and the lenders at the time when the arrangements were put into effect. In these circumstances, the solicitors were taken to have assumed responsibility for their actions to the lender for whose benefit the security was created and who had relied on the solicitors to carry out their client's instructions in an effective and competent manner. Robert Walker LJ (at [69]) said that he regarded the situation as within the type of exceptional case contemplated by the Vice Chancellor in *Gran Gelato*.

74. The imposition of liability in negligence towards a third party who is not the solicitor's client clearly requires something more than it being foreseeable by the solicitor that loss will be caused to the third party by a lack of care on the solicitor's part in carrying out whatever is the relevant task. Nor is it sufficient that the test of proximity is satisfied whether by an actual assumption of responsibility or by the existence of a direct interest on the part of the third party (as in *Dean v Allin & Watts*) in the product of the solicitors' instructions. The incremental approach approved in *Caparo* requires all these and any other relevant factors to be taken into account and globally assessed including any relevant policy considerations. In deciding whether it is just or reasonable to recognise a duty of care, the approach enshrined in the case law requires the Court to take account of the contractual framework and any other factors bearing on liability. In *Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse No. 2* [1998] PNLR 564 at page 582 Neill LJ said:

> "The threefold test and the assumption of responsibility test indicate the criteria which have to be satisfied if liability is to attach. But the authorities also provide some guidance as to the factors which are to be taken into account in deciding whether these criteria are met. These factors will include:
>
> (a) the precise relationship between (to use convenient terms) the adviser and the advisee. This may be a general relationship or a special relationship which has come into existence for the purpose of a particular transaction. But in my opinion counsel for Overseas was correct when he submitted that there may be an important difference between the cases where the adviser and the advisee are

dealing at arm's length and cases where they are acting "on the same side of the fence."

(b) the precise circumstances in which the advice or information or other material came into existence. Any contract or other relationship with a third party will be relevant.

(c) the precise circumstances in which the advice or information or other material was communicated to the advisee, and for what purpose or purposes, and whether the communication was made by the adviser or by a third party. It will be necessary to consider the purpose or purposes of the communication both as seen by the adviser and as seen by the advisee, and the degree of reliance which the adviser intended or should reasonably have anticipated would be placed on its accuracy by the advisee, and the reliance in fact placed on it.

(d) the presence or absence of other advisers on whom the advisee would or could rely. This factor is analogous to the likelihood of intermediate examination in product liability cases.

(e) the opportunity, if any, given to the adviser to issue a disclaimer."

75. The Supreme Court has recently re-affirmed the concept of an assumption of responsibility as the foundation of liability in negligence in cases such as the present appeals: see *Steel v NRAM Ltd* [2018] UKSC 13. There the solicitor acting for a company with a secured loan from NRAM mistakenly prepared documentation which released the relevant charges rather than merely reducing the amount which they secured. The solicitor was not instructed by NRAM and their claim in negligence against her failed because it was not reasonable for NRAM to have relied on what she said and did when it was within their own knowledge that there was no intention to release the entire charge.

76. As Lord Wilson explains in his judgment, the requirement that there should be an assumption of responsibility is to some extent a legal construct in the sense that in many cases the defendant solicitor or other professional will be treated as having assumed responsibility to the third party for his actions by virtue of the proximity between them and the obvious effect which any failure on his part would have on the third party. There will rarely be an actual, conscious and voluntary assumption of responsibility not least because the solicitor or other professional will have a client to whom he is contractually bound. But, on the basis that the Court is deciding whether to treat the defendant as having assumed legal responsibility to the third party, non-client, for his actions, it will be necessary to balance the foreseeability that the third party will rely on the professional to perform their task in a competent manner against any other factors which would make such an imposition of liability unreasonable or unfair.

77. It seems to me that there are a number of such factors to be considered in the present case. As the judge himself observed, there was clearly no actual assumption of responsibility by OWC or by Winkworth in this case. Both sets of professionals were instructed to act for the vendor in an arm's length sale of the property. The same goes for the sale in *Dreamvar*. In both cases the purchasers instructed their own solicitors who were free to raise any inquiries they wished and could, at least in theory, have sought some undertaking from the vendors' solicitors that any necessary AML checks had been carried out. Neither OWC, Winkworth nor MMS were asked for such an undertaking nor did they ever represent that they had completed any necessary checks. The highest it can be put is that the defendants in both actions should have realised that the purchasers would rely on them to carry out the AML checks in a full and competent way.

78. The MLR do not, as I have said, create a statutory duty which if breached gives rise to a cause of action at the suit of the claimants. That is because the statutory duty was imposed for the benefit of society at large and not for any particular class of persons, such as the purchasers in these cases, who are likely to suffer loss if the vendor turns out to be an imposter. In part, this is because the principal purpose of the MLR is to deter money laundering and terrorism rather than to combat identity fraud. The fact that the AML checks may have a deterrent effect on would-be fraudsters is not enough in itself to create a private law right of action for the benefit of a protected class: see *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at page 731.

79. If one adopts the incremental approach starting from the general rule in *Gran Gelato* that a solicitor in a conveyancing transaction does not normally owe a duty of care to anyone but his own client then it seems to me that there is a material distinction between cases like *White v Jones* and *Dean v Allin & Watts* and the situation in the two present appeals. In both those cases the instructions which the solicitor received were intended to benefit both the solicitors' own client and the third party. For that reason there was no conflict of interest between the two parties and an expectation that the arrangements the solicitor was instructed to put in hand would enure for their mutual benefit. The third party was in as proximate a position to the solicitor as he would have been had he been their client. It was what is referred to in some of the cases as a situation equivalent to contract.

80. But in the transactions with which we are concerned the vendors and the purchasers were very much at arm's length and their solicitors owed no duties to anyone but their client when acting in relation to the sales. Mr Blaker made the point I have mentioned about the need for the vendor's solicitors to complete the AML checks before accepting instructions but that does not alter the fact that the checks are carried out in order to satisfy the requirements of the MLR and not as a part of a transaction designed to benefit the purchasers.

81. The solicitors and agents in the present appeals did not voluntarily assume responsibility to the purchasers for the adequacy of the due diligence which they carried out. They were not asked to give undertakings or assurances that they had properly carried out the AML checks and, had they been asked to do so, they would have had the opportunity to refuse or to limit their liability in some way by a suitable disclaimer. Nor is there anything in the nature of the particular transactions (unlike in *Dean v Allin & Watts*) which can be treated as having created a relevant assumption of responsibility or to have made it reasonable in itself for the purchaser to have relied

on the vendor's solicitors and agents to have acted competently in that regard. More particularly, there is nothing in the way that these transactions were conducted which made it objectively reasonable to assume that the AML checks would be complete and that the defendants should be legally accountable to the purchasers for the consequences. I find it difficult to see how the imposition of such liability can be justified in this case where it is common ground that Parliament did not intend a breach of the MLR to create a private law cause of action in favour of the claimants. In *Dreamvar* there was also, as I mentioned earlier, positive evidence that the purchaser's solicitors did not even consider that MMS were warranting that they acted for the true owner.

82. Taking all these matters into account, these are not cases in which it would be fair and reasonable to treat the solicitors and agents as having assumed responsibility to the purchasers for the adequacy of the due diligence performed in relation to their client's identity. The judge was therefore right in *P&P* to dismiss the claim in negligence against OWC and Winkworth. For the same reasons, I would dismiss the application for permission to amend which is made by the claimant in *Dreamvar*.

Breach of Trust

83. The issue in both appeals is whether the vendor's solicitors acted in breach of a trust in favour of the purchaser when they released the purchase monies to their client. It is common ground that the contract between the parties was a nullity in both cases (see *Shogun Finance Ltd v Hudson* supra) and that the contracts were never completed because the vendor was unable to make title. But in both cases the trial judge held that on a true construction of the relevant provisions of the Code, the vendor's solicitors were not liable for breach of trust even though a genuine completion of the sale did not take place. There is a separate issue about relief under s.61 of the Trustee Act 1925 which I will come to later.

84. The Code was introduced in 1984 in part as a response to the decision of the Privy Council in *Edward Wong v Johnson, Stokes and Master* [1984] AC 296 which had exposed the weaknesses in the system for postal completion then in use in Hong Kong. The Code has gone through various editions but we are concerned with the 2011 edition. So far as material, it provides:

> "3. In complying with the terms of the code, the seller's solicitor acts on completion as the buyer's solicitor's agent without fee or disbursement but this obligation does not require the seller's solicitor to investigate or take responsibility for any breach of the seller's contractual obligations and is expressly limited to completion pursuant to paragraphs 10 to 12.
>
> **Before completion**
>
> **…**
>
> 7. 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, charge or other financial incumbrance which was specified under paragraph 6 but has not then been redeemed or discharged, to receive the sum intended to repay it;

BUT if the seller's solicitor does not have all the necessary authorities then:

(iii) to advise the buyer's solicitor no later than 4pm on the working day before the completion date of the absence of those authorities or immediately if any is withdrawn later; and

(iv) not to complete without the buyer's solicitor's instructions.

8. The buyer's solicitor may send the seller's solicitor instructions as to any other matters required by the buyer's solicitor which may include:

(i) documents to be examined and marked;

(ii) memoranda to be endorsed;

(iii) undertakings to be given;

(iv) deeds or other documents including transfers and any relevant undertakings and authorities relating to rents, deposits, keys, to be sent to the buyer's solicitor following completion;

(v) consents, certificates or other authorities that may be required to deal with any restrictions on any Land Registry title to the property;

(vi) executed Stock Transfer Forms relating to shares in any companies directly related to the conveyancing transaction.

9. 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 in accordance with the contract, including any compensation payable for late completion by reference to the 'contract rate' if the Standard Conditions of Sale are utilised, or in default of notification as shown by the contract. If the funds are remitted by transfer between banks, immediately upon becoming aware of their receipt, the seller's solicitor will report to the buyer's solicitor that the funds have been received.

Completion

10. The seller's solicitor will complete upon becoming aware of the receipt of the sum specified in paragraph 9, or a lesser sum should the buyer's and seller's solicitors so agree, unless –

(i) the buyer's solicitor has notified the seller's solicitor that the funds are to be held to the buyer's solicitor's order; or

(ii) it has previously been agreed that completion takes place at a later time.

Any agreement or notification under this paragraph should if possible be made or confirmed in writing.

11. When completing, the seller's solicitor **undertakes**:

(i) to comply with any agreed completion arrangements and any reasonable instructions given under paragraph 8;

(ii) to redeem or obtain discharges for every mortgage, charge or other financial incumbrance specified under paragraph 6 so far as it relates to the property which has not already been redeemed or discharged;

that the proprietor of each mortgage, charge or other financial incumbrance specified under paragraph 6 has been identified by the seller's solicitor to the extent necessary for the purpose of the buyer's solicitor's application to HM Land Registry.

After completion

12. The seller's solicitor **undertakes**:

(i) immediately completion has taken place to hold to the buyer's solicitor's order every document specified under paragraph 8 and not to exercise a lien over any of them;

(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, fax or email that completion has taken place;

(b) to notify the seller's estate agent or other keyholder that completion has taken place and authorise them to make keys available to the buyer immediately;

(iii) as soon as possible after completion and in any event by the end of the working day following completion to send written confirmation and, at the risk of the buyer's solicitor, the items specified under paragraph 8 to the buyer's solicitor by first class post or document exchange;

> (iv) if the discharge of any mortgage, charge or other financial incumbrance specified under paragraph 6 takes place by electronic means, to notify the buyer's solicitor as soon as confirmation is received from the proprietor of the mortgage, charge or other financial encumbrance that the discharge has taken or is taking place."

85. The ultimate question to be decided is whether at the point when the purchase money is released by the vendor's solicitors to his client the solicitor has the authority of the purchaser to make that payment even if the transaction is not a genuine sale. If the vendor's solicitor does not have the purchaser's authority to make that payment then, subject to any question of relief under s.61, he acts in breach of trust. The purchase money belongs to the purchaser and is held on a bare trust for his benefit and subject to his instructions. Part of the argument on this issue has ventured into questions of whether the money was held by the vendor's solicitors on some kind of *Quistclose* trust (see *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567) but that can only arise as an issue if the money in the hands of the vendor's solicitor would not otherwise be the subject of a trust in favour of the purchaser.

86. The agreed starting point must be that in the hands of its own solicitor the purchase monies were held on a bare trust for the purchaser pending completion: see *Target Holdings Ltd v Redferns* [1996] AC 421 at 436 B-C. The entitlement of the solicitor to part with the money is governed by the instructions he receives from his client. It is not suggested that those instructions permitted the purchaser's own solicitors to release the monies except on completion of a genuine sale and purchase of the property which is why MdR have conceded liability for breach of trust in *Dreamvar*.

87. The Code prescribes the steps which the vendor's solicitor is required to take in order to complete the sale. Subject to any particular instructions which the purchaser's solicitors may give under paragraph 8 of the Code, the vendor's solicitors will receive the sum necessary for completion which (as in these cases) will usually be remitted between solicitors by a bank transfer: see paragraph 9. Under paragraph 3 the vendor's solicitor acts "on completion" as the agent for the purchasers' solicitor for the purpose of complying with the terms of the Code. The Code (including paragraph 3) constitutes the terms upon which the vendor's solicitor receives and agrees to hold the purchase money and the vendor's solicitor as agent is under a fiduciary duty to observe and give effect to those terms: see *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at [76].

88. The authority of the vendor's solicitor to release the monies to his client depends upon there being completion in accordance with paragraph 10. The Code does not include a term expressly providing for the monies to be released but it is implicit in paragraphs 10 and 11 that on completion the money will be at the disposal of the vendor subject to compliance with his solicitor's undertaking under paragraph 11 to discharge any existing mortgages and to comply with any other reasonable instructions given by the purchaser's solicitors under paragraph 8. Mr Cousins QC for MdR submits that "completion" for these purposes must mean a genuine completion of a genuine sale of the relevant property. In that he has the support of the decision of this Court in *Lloyds TSB Bank v Markandan* [2012] EWCA Civ 65 where the authority of the defendant solicitor to release the monies provided by its mortgage lender client to finance the purchase of a house depended upon the funds being used

on the "completion" of the mortgage loan agreement and purchase in accordance with clause 10.3.4 of the Council of Mortgage Lenders' Handbook. The solicitors parted with the money but the documents provided by the vendors were forgeries.

89. Rimer LJ (at [50]) said:

> "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."

90. In *Santander UK plc v RA Legal Solicitors* [2014] EWCA Civ 183 the defendant solicitors acted for the proposed purchaser and mortgagee of a property. Their instructions required them to hold the mortgage monies on trust until completion and to obtain on completion a fully enforceable first charge. The purported sale was a fraud by the solicitor acting for the vendor who had no instructions or authority from the owner to sell the property. This Court followed the decision in *Markandan* by holding that in the absence of a genuine completion the defendants had no authority to release the mortgage monies and were in breach of trust. The principal issue was one of timing: that is whether the breach of trust occurred when the purchaser's solicitors transferred the money to the account of the solicitors purportedly acting for the vendor or when the money was transferred from that account the next day on what purported to be completion. Briggs LJ said:

> "[12] Mr Thomas Grant QC for Abbey (who, like Mr Pooles, did not appear below) advanced one short and one longer argument in support of a conclusion that the transfer on 28 July was a breach of trust. The short one was that RA Legal had no authority under the terms of the trust upon which they held

> Abbey's money to release it to Sovereign, even on terms that Sovereign was to hold it to RA Legal's order, because Sovereign was not acting for the owner and supposed vendor of the Property, and was neither able nor intending to complete the transaction. Sovereign was, of course, a firm of solicitors, and the money was transferred into Sovereign's client account. But, said Mr Grant, Abbey appointed RA Legal, and no-one else nor any other solicitor, as its trustee for the custody of the money pending completion. It had no authority to transfer custody to another person, even another solicitor, any more than a trustee of another's money or property can simply delegate custody to anyone of its choosing.
>
> …..
>
> [15] In my judgment Mr Grant's short submission is correct. Where an intending lender transfers the loan money to an intending purchaser's solicitors on terms that they hold the money on trust until completion, I accept of course that the purchaser's solicitors have authority to deposit it in a bank of their choosing, in client account, and if necessary to move it to a client account of theirs in some other respectable bank than the bank to which the lender originally transferred the money. I also accept that the purchaser's solicitors have the lender's implied authority to transfer the money to the client account of solicitors acting for the vendor prior to completion, to hold to the purchaser's solicitors' order pending completion. That is an ordinary incident of residential conveyancing in the modern world with which institutional lenders may be taken to be familiar.
>
> [16] But it by no means follows that the purchaser's solicitors have the lender's implied authority to transfer the trust money pending completion to the client account of any other solicitor than the firm which is in fact acting for the owner and intending vendor of the Property upon which the lender is to obtain a charge on completion. In the present case, Sovereign did not fit that description. It was not acting for the owner of the Property, had no instructions either to contract for or complete its sale to Mr Vadika, and had not the slightest intention of using any part of the money transferred to its client account for the purpose of discharging the existing first mortgage on the Property. For that simple reason I consider that the transfer of the money to Sovereign's client account on 28 July was a breach of trust."

91. We are not concerned on this appeal with the position of MdR because, as already explained, they have conceded liability for breach of trust based on their own release of the purchase price to MMS. But MMS and OWC rely on the Code (and, in particular, paragraph 3) as providing them with the necessary authority to hold and release the money to their client free of any liability to the purchaser. If the Code had had no application to MMS or OWC then they would have received the purchase

money as agents for MdR and Peter Brown & Co and with knowledge that the money belonged to the purchaser. On that hypothesis, they would have had no authority to release the monies except with the express authority of the purchaser which in this case was only given on terms that it would be used to fund an actual purchase of the property. There was therefore a clear breach of trust. But if the Code applies and governs all questions of authority (which is both parties' case) then Mr Patten contends that at the moment when the vendor's solicitor receives the purchase monies it will be in order to complete the sale and that his receipt of the money will therefore, in accordance with paragraph 10, normally constitute completion of the transaction so that there will be no *scintilla temporis* during which the vendor's solicitor will in fact hold the monies as agent for the purchaser's solicitors. He will be required on completion to use the monies for any purpose instructed by his vendor client and, once the monies have been paid to him, it is not open to the purchaser under the Code to demand their return. If the transfer turns out to be forged or the vendor is an imposter then the remedy of the purchaser is against the vendor. The solicitor is released from any liability under paragraph 3.

92. The essential element in this analysis is that the purchase monies when in the hands of the vendor's solicitor are at the free disposal of his client and are never held by the solicitor as agent for the purchaser's solicitors and therefore on trust for the purchaser. The agency created by paragraph 3 of the Code is therefore simply contractual and is limited to carrying out the tasks specified in paragraphs 11 and 12. Unless there is an agreed delay in completion then under paragraph 10 receipt of the monies in the vendor's solicitors' account triggers completion at that moment of the sale and purchase and the vendor client is entitled to the money. It is as if the money had been paid by the purchaser's solicitor directly to the vendor.

93. This is not likely to be an accurate analysis of the position in most cases because under paragraph 10 of the Code completion will only occur once the vendor's solicitor becomes aware that the purchase money has reached his account and he must then (under paragraph 9) immediately inform the purchaser's solicitors of their receipt. There will therefore almost inevitably be some period of time when it is held in the account as agent for the purchaser's solicitor. That was certainly so in *P&P* and it was also so in *Dreamvar* because MMS was required to hold the monies to MdR's order until a form of indemnity insurance to cover the possibility of adverse rights existing over part of the property had been agreed.

94. But even if receipt of the purchase money by the solicitor would in the case of a genuine transaction constitute completion that does not assist MMS and OWC in the present appeals because there was no completion of a sale of the property. The vendors had no title and the transfers were forgeries. Since completion did not take place, the vendor's solicitors had no authority to release the money to their clients or otherwise to dispose of it in accordance with their instructions. The purchase monies should have remained in their account to await either a genuine completion of the sale or further instructions from the purchaser's solicitors. The point about timing goes nowhere. Mr Patten seeks to meet this point by submitting that the references to completion in the Code should be read as meaning no more than the ceremony of completion regardless of whether in fact what occurred was the completion of a genuine transaction of sale. Not only is that inconsistent with the approach which this Court has taken to the use of the word "completion" in similar documents to the Code

but it is also irreconcilable with the obvious context in which the Code was intended to operate. The Code was adopted to set out the agreed basis for completion of a transaction which both firms of solicitors involved assumed was a genuine transaction. It was also drafted by the Law Society for use in relation to such transactions. The construction for which Mr Patten contends would deprive it of any purpose or utility.

95. In *P&P* the judge was minded to accept this but he took the view that the liability of OWC for breach of trust was excluded by paragraph 3 of the Code:

> "221. I agree with Mr Patten QC that the fact that paragraph 3 provides that the seller's solicitor is not required *"to investigate or take responsibility for any breach of the seller's contractual obligations"* is, in substance, inconsistent with the vendor's solicitor being liable, as the purchaser's agent, for breach of trust in releasing the money in the event that completion does not occur because the seller does not have title. One of the seller's obligations is to provide a genuine transfer of title. If the vendor's solicitor is liable for breach of trust merely because no genuine transfer is provided it would effectively be taking responsibility for what paragraph 3 says it is not. The extent of the vendor's solicitor's obligations on completion are governed by the express undertakings that it provides in accordance with the Code. In my view, in the light of the guidance in cases such as *Mothew*, in these circumstances it would be wrong to construe the Code so as to give rise to a breach of trust or, as a result, as an effective guarantee of title."

96. This was followed by Mr Railton QC in *Dreamvar* who said:

> "112. The argument that "*completion*" in this context is intended to have the same meaning as considered earlier in this judgment (i.e. that of a genuine completion), is in my view formidable. Clearly, that is what the purchaser, and his solicitor, is aiming to achieve in paying the monies to the vendor's solicitor as agent, under the Code. As the Code recites, however, it is "*intended to provide a fair balance of obligation between seller's and buyer's solicitors and to facilitate professional co-operation for the benefit of clients"*. The provisions of paragraph 3 need to be seen in this light. It is expressly provided that the obligation to act as agent for the purchaser's solicitor "*does not require the seller's solicitor to investigate or take responsibility for any breach of the seller's contractual obligations and is expressly limited to completion pursuant to paragraphs 10 and 12"*.
>
> 113. I agree with Mr Dicker QC that this provision is inconsistent with the vendor's solicitor being liable, as the purchaser's agent, for breach of trust in releasing the monies in the event that completion does not occur because the vendor is not the registered owner or does not have title. It must follow

> that the vendor's solicitor is entitled to release the monies (to itself on behalf of its client, or otherwise to its client's order), even if the transfer document received in return is not a genuine one, and there is not, as a result, a genuine completion. I further agree with Mr Dicker QC that such obligations as there may be on the vendor's solicitor in relation to the genuineness or otherwise of the transfer document provided by his client are to be found in the undertakings given by it in accordance with the other provisions of the Code (which I consider later in this judgment)."

97. In my view paragraph 3 cannot be construed as releasing or excluding any liability on the part of the vendor's solicitor for breach of trust still less as giving him authority to release the purchase monies in the absence of a genuine completion of the sale. It does no more in terms than to absolve him from any responsibility as the buyer's agent to investigate possible breaches by the seller of his contract. The agency is a limited one. But we are not concerned with whether the vendor's solicitor should be responsible by reason of his agency for any breaches of the vendor's own obligations. The issue is simply one of authority to complete and there is nothing in paragraph 3 which either qualifies or alters the instructions to the vendor's solicitors contained elsewhere in the Code or limits their personal liability for not complying with those instructions.

98. The result in my view is that both OWC and MMS acted in breach of trust when they released the purchase monies to or at the direction of their clients. But a point is taken in *P&P* about the tranche of £430,000 which it was agreed that OWC should hold as agents for the vendor and which was sent to the vendor on the afternoon of 12 December shortly before the balance of the purchase price and therefore just before completion. It is said that because of this agreement the £430,000 was no longer held on trust for the purchaser when it was released.

99. P&P's response to this is that the monies were not at the free disposal of the vendor because the agreement to vary the contract and allow the £430,000 to be held by OWC as the vendor's agent was made in response to and in reliance on a request by the vendor that the monies would be used to fund the purchase of a property in Dubai. The monies therefore became impressed with a *Quistclose* trust so that in the event that the specified purpose was not carried out, they continued to belong in equity to the purchaser under a resulting trust: see *Twinsectra Ltd v Yardley* at [100]. This would undoubtedly give P&P an ability to trace the monies into the hands of the vendor or anyone else who was not a *bona fide* purchaser for value. But it would not expose OWC to a liability for breach of trust unless they had undertaken not to release the £430,000 except for the purposes of the Dubai property purchase so that they had no authority to part with the monies other than in those circumstances.

100. The attendance notes in OWC's conveyancing file show that the variation of the contract to provide for the £430,000 to be held by OWC as agents for the vendor was discussed in a series of telephone conversations between Ms Lim and Mr Robinson on 12 December and agreed to by Mr Robinson in a letter which was emailed to Ms Lim at 12:19 on that day. Although the variation was undoubtedly made in reliance on the vendor's representations that the £430,000 was needed to fund the Dubai purchase, OWC did not give any further undertaking not to release the money except for that

purpose. Ms Lim made it clear to Mr Robinson in their various conversations on 12 December that the variation was necessary in order to allow her to release the £430,000 to her client prior to completion and that the money would be released that day. In fact the £430,000 was transferred to the vendor from OWC's client account during the afternoon of 12 December shortly before the balance of the purchase monies was released.

101. Although Mr Robinson's evidence was that he agreed to the variation in the contract and the release of the money to the vendor only on the basis that it would be used to fund the Dubai transaction, that is not, as I have explained, sufficient to render OWC liable for breach of trust if they were entitled to rely on the amendment to the contract to give them the authority to release the monies to their client. Mr Patten contends that once the amendment to the contract took effect, the £430,000 was no longer to be held by OWC under the terms of the Code pending completion like the rest of the purchase monies. The purchaser had authorised OWC to hold it as agents for the vendor. The fact that the amendment was procured by fraud is nothing to the point for the purpose of determining whether they acted in breach of any trust in favour of the purchasers. The contract put the £430,000 at the disposal of the vendor subject to his using the money for the Dubai purchase. But that was a fiduciary obligation imposed on him, not on his solicitors, and they were entitled to release the monies to their client in accordance with the amended contract.

102. The judge in *P&P* held that the various exchanges which took place between Ms Lim and Mr Robinson were not sufficient in their terms to have created a *Quistclose* trust in respect of the £430,000. But even if he was wrong about that, it does not (as I have explained) assist P&P if OWC are entitled to rely on the amended contract. The judge concluded that the amendment to the contract authorised OWC to pay the £430,000 to their client and that, in doing so, they did not therefore act in breach of trust. But in my view he was wrong about this. The real answer to the point taken about the £430,000 is the one which Mr Blaker provided in reply. Since the contract was a nullity, so was the amendment made to it on 12 December. OWC were not therefore entitled to rely upon it as giving them authority to release the £430,000 to their client and remained bound by the Code in respect of the entirety of the purchase price. Since there never was any genuine completion of the sale, they are liable in my view to account for the entirety of the monies paid to them by the claimant.

Section 61

103. Section 61 of the Trustee Act 1925 provides as follows:

> "If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same."

104. In *P&P* the judge indicated that he would not have granted relief to the vendor's solicitors had he found them to be in breach of trust. In *Dreamvar* the judge refused relief to MdR but indicated that he would have granted relief had he found MMS to be in breach in trust. On this appeal OWC seek relief under s.61 in the event that this Court finds that they acted in breach of trust. In *Dreamvar* MMS did not seek relief under s.61 and do not do so on this appeal. The claimant contends that even if MMS is held liable for breach of trust MdR should not be excused. Its remedy in that event is to seek contribution (as it does) from MMS.

105. It is convenient to begin by saying something about the limits of the jurisdiction under s.61 and the way it should be exercised. In neither case is it suggested that the defendant solicitors acted other than honestly. The issues are whether they acted reasonably and, more generally, whether they ought fairly to be excused. The satisfaction of the requirements that the solicitor should have acted honestly and reasonably are obviously highly material to the question whether they should be granted relief but are not conclusive of that question.

106. In *Re Windsor Steam Coal Co (1901) Ltd* [1929] 1 Ch 151 a liquidator was held to have been guilty of misfeasance by settling a claim against the company for breach of some agreements in return for a substantial payment. The court subsequently held that there had been no breach of the agreements and that the liquidator should not have proceeded to settle the claim without taking further advice. One issue which arose was whether (on the assumption he was a trustee) the liquidator should be granted relief under s.61 in respect of the payment he had made. This was refused. Lawrence LJ (at page 164) said:

> "Under s. 61 of the Trustee Act, 1925, three conditions must be complied with before the Court will excuse a trustee who has committed a breach of trust by making a payment to the wrong person. First, the payment must have been made honestly; secondly, the payment must have been made reasonably; and thirdly, the trustee must show that he ought fairly to be excused for having made the payment. In the present case the payment was one made by a trustee on the assumption that he was trustee to a person who was not his cestui que trust, although made in the belief that the payee was a cestui que trust. In these circumstances even if the appellant had taken the best possible advice and had made the payment acting on such advice, I am of opinion that that would not have been sufficient to excuse him, regard being had to the fact that he was a trustee employed because of his professional skill and paid for his services in performing his duties. The authority referred to by Mr. Gavin Simonds of *National Trustees Co. of Australasia v. General Finance Co. of Australasia* [1905] AC 373, seems to me to be directly in point. In that case a trustee had paid two-thirds of a fund to persons other than the person entitled, and in making that payment he had acted on the advice of his solicitors and had acted honestly believing such advice to be good. In the judgment of the Board the following passage from Lord Redesdale's judgment in *Doyle v. Blake* (1804) 2 Sch & Lef

> 231, 243 is quoted: "'I have no doubt that they' (the executors) 'meant to act fairly and honestly, but they were misadvised; and the Court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts he has done. If, under the best advice he could procure, he acts wrongly, it is his misfortune; but public policy requires that he should be the person to suffer.'" Lord Redesdale was there considering the primary liability of the trustee. When it came to the question whether he ought to be excused under a provision similar to that contained in s. 61 of the Trustee Act, 1925, the Board held that in the case of a trustee who acted in that capacity as part of his business and was paid for his services the Court ought not to excuse him. The judgment of the Board states that: "It is a very material circumstance that the appellants" - the trustees - "are a limited joint stock company formed for the purpose of earning profits for their shareholders; part of their business is to act as trustees and executors; and they are paid for their services in so acting by a commission which the law of the colony authorizes them to retain out of trust funds administered by them, in addition to their costs. What they now ask the Court to do is to allow them to retain a sum of money to which the respondents' title is clear, in order thereby to relieve the trust company from a loss they have incurred in the course of their business by reason of their having paid a like sum to wrong parties. The position of a joint stock company which undertakes to perform for reward services it can only perform through its agents, and which has been misled by those agents to misapply a fund under its charge, is widely different from that of a private person acting as gratuitous trustee."

107. This strict approach to the position of professional trustees finds an obvious counterpart in the need to have regard to the effect of the breach on the beneficiaries. In the present context of a solicitor acting for a purchaser in relation to a fraudulent sale, this was a factor which weighed heavily with Briggs LJ in the *Santander UK* case where he said:

> "[33] The second main stage of the s 61 analysis, usually described as discretionary, consists of deciding whether the trustee ought fairly to be excused for the breach of trust. This requires that regard be had to the effect of the grant of relief not only upon the trustee, but also upon the beneficiaries: see *Marsden v Regan* [1954] 1 All ER 475, [1954] 1 WLR 423, per Evershed MR at 434; and *Bartlett v Barclays Trust Co (No 1)* [1980] Ch 515, [1980] 1 All ER 139, [1980] 2 WLR 430, per Brightman J at 538A. Furthermore, s 61 makes it clear that even if the trustee ought fairly to be excused, the court still retains the discretionary power to grant relief from liability, in whole or in part, or to refuse it. In the context of relief sought by solicitor trustees from liability for breach of trust in

> connection with mortgage fraud, much may depend at this discretionary stage upon the consequences for the beneficiary. An institutional lender may well be insured (or effectively self-insured) for the consequences of third party fraud. But an innocent purchaser may have contributed his life's savings to the purchase and have no recourse at all other than against his insured solicitor, where for example the fraudster is a pure interloper, rather than a dishonest solicitor in respect of whose fraud the losers may have recourse against the Solicitors' Compensation Fund.
>
> [34] Relief under s 61 is often described as an exercise of mercy by the court. In my judgment the requirement to balance fairness to the trustee with a proper appreciation of the consequences of the exercise of the discretion for the beneficiaries means that this old-fashioned description of the nature of the s 61 jurisdiction should be abandoned. In this context mercy lies not in the free gift of the court. It comes at a price."

108. In *P&P* the vendor's solicitors cannot be said to have acted reasonably. Although, as Sir Andrew Morritt C said in *Davisons v Nationwide Building Society* [2012] EWCA Civ 1626 reasonableness does not mean perfection, there was on any view a series of failures by OWC to carry out a number of relatively basic checks on the identity of their client. The judge at [253]-[276] carried out a detailed review of what Ms Lim had done in order to comply with the MLR. He concluded that she had not acted reasonably and, as a matter of discretion, should not be granted relief:

> "277. I should add, in this context, that I obtained the impression during her cross-examination that, whilst Ms Lim was undoubtedly aware of her obligations in respect of client due diligence and was careful to ensure that she was provided with the necessary documents, she was less prepared to insist on her client answering any further questions that she had. Although I am conscious that Mr Harper was not Ms Lim's only client and that the demands of a conveyancing solicitor's practice are likely to be such as to make complying with a solicitor's obligations in this respect more difficult, such obligations are important and, in my view, on this occasion Ms Lim would have fallen short of the high standard equity expects of a trustee.
>
> 278. It is difficult to know what would have happened had Ms Lim asked Mr Harper for more information about his residence and work in Dubai. The fraud was plainly a sophisticated one which appears to have [been] carried out with some expertise. However, in my view, it is plainly possible that, despite the obvious sophistication of the fraud, further questions would have revealed the true position or discouraged Mr Harper from proceeding further and, even if they did not, they would have increased the prospect of that occurring.

> 279. So far as the question of discretion is concerned, such factors as exist reinforce the conclusion that, if Owen White had been liable for breach of trust, they should not have been granted relief. P&P Property is not, as I understand it, insured against the fraud, and incurred a liability to City & Western in respect of the loan for the purchase price. It also incurred a potential liability to the true Mr Harper as a result of the work that it carried out on the property. No submissions have been made as to whether P&P Property might have or have had a potential claim against Peter Brown & Co. and nothing in this judgment should be taken as expressing any views on that issue one way or another. In any event, I do not consider that, even if such a claim were to exist, it would provide a reason for exercising the court's discretion to grant relief to Owen White."

109. For this Court to interfere with the exercise of discretion carried out by the judge, it is necessary for OWC to identify an error of principle. Mr Patten does not suggest that the judge misdirected himself as to the relevant legal test or failed to take into account anything that was material to his decision. The findings which he made about the reasonableness of Ms Lim's conduct were also clearly open to him on the evidence and are not really contested. In these circumstances, there is no basis in my view for this Court to interfere with the judge's decision to refuse relief to OWC under s.61.

110. That leaves the question of whether MdR should be granted relief in the event that the other members of the Court share my view that MMS acted in breach of trust. In refusing relief, the judge had regard to the consequences of MdR's breach of trust on *Dreamvar* which he described as disastrous. The company is small. It has lost the purchase price, has no insurance against fraud, and was left with creditors of more than £1.2m. In relation to MdR, the judge said:

> "187. As for MdR's position, it is common ground that it is insured for events such as this, and that its insurance cover is sufficient to cover in full the loss suffered, should it not be excused from liability. In terms of balancing the relative effects or consequences of the breach of trust, it is apparent that MdR (with or without insurance) is far better able to meet or absorb it than Dreamvar. While, as I have held, it was not unreasonable for MdR not to have advised Dreamvar about the risk of fraud, or to have sought greater protection for Dreamvar against that risk (such as further undertakings), it is also not irrelevant that MdR was necessarily far better placed to consider, and as far as possible achieve (a matter not in the event tested), greater protection for Dreamvar against the risk which in fact occurred. As I have already found, Dreamvar has no recourse against MMS, and (it appears) no practical likelihood of either tracing or making any recovery from the fraudster. As a result, the only practical remedy it has is against MdR.
>
> 188. For these reasons, I conclude that MdR ought not fairly to be excused for the breach of trust, and that I should in any

> event, in my discretion, decline the relief sought. I would however add that if, contrary to my conclusions above, MMS were liable to Dreamvar, I would have exercised my discretion to relieve MdR of its liability for breach of trust to the extent of the liability found against MMS."

111. The judge was entitled to take all these factors into account in exercising his discretion and in my view his conclusion is unimpeachable. But his indication in [188] that he would have excused MdR in the event that MMS is also liable to the purchaser for breach of trust is, with respect to the judge, difficult to follow. Although such a finding of liability gives Dreamvar another means of recovering its money, it does not provide MdR with any grounds for being relieved of its own liability. The assessment of the reasonableness of its conduct and the inequality of position between it and its former client remain the same. Mr Halpern QC is right in my view to submit that any distribution of liability should be achieved through contribution proceedings and not by the exculpation of MdR under s.61.

Breach of undertaking

112. In addition to the claims for breach of trust, P&P and Dreamvar seek orders to enforce the undertaking contained in paragraph 7 of the Code. MdR seeks a similar order by way of indemnity against MMS. For convenience, I will set out paragraph 7 again. It states:

> "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, charge or other financial incumbrance which was specified under paragraph 6 but has not then been redeemed or discharged, to receive the sum intended to repay it;
>
> **BUT** if the seller's solicitor does not have all the necessary authorities then:
>
> (iii) to advise the buyer's solicitor no later than 4pm on the working day before the completion date of the absence of those authorities or immediately if any is withdrawn later; and
>
> (iv) not to complete without the buyer's solicitor's instructions."

113. The key part of the undertaking for this purpose is paragraph 7(i). In both *P&P* and *Dreamvar* the purchasers contended that the reference to the "seller's authority" must be construed as meaning the real vendor/owner when named in the contract and not the imposter who had actually instructed OWC and MMS. The issue is therefore the same as the one which arises in relation to the claim for breach of warranty of authority save that in this case it turns on the proper construction of the express undertaking that was actually given.

114. Mr Cousins for MdR, in an argument which was adopted by P&P and Dreamvar, submitted that the only interpretation of "seller" that was consistent with the authorities on the meaning of completion was that it meant the person named as the vendor in the contract. Paragraph 7 is part of the machinery of completion under which the vendor's solicitor confirms that he is authorised by the vendor to proceed to completion. The only person who could give that authority for the purposes of the completion of a genuine sale would be the true owner of the property.

115. That approach to construction has the support of the judgment of Briggs LJ in *Santander UK* which I quoted from earlier. He held that the failure by the purchaser's solicitors in that case to obtain from the fraudulent solicitors who purported to act for the named vendor an agreement to adopt the Code and what is now the paragraph 7 undertaking meant that the vendor was deprived of the summary remedy of enforcement that would otherwise have been available to its solicitors. Briggs LJ was dealing with the 1998 Edition of the Code in which paragraph 4 contained the equivalent of what is now paragraph 7. But he clearly regarded the references to the seller as meaning the vendor named in the contract: see [94-[95].

116. In both actions the judge took a different view. In *P&P* Mr Dicker said:

> "243. Mr Patten QC submitted that there was no breach of undertaking. So far as paragraph 7(i) is concerned, he submitted the reference to the "seller" is to the person agreeing to sell the property, not to the true owner. He submitted that the provision was introduced to address the risk that if monies were forwarded to the seller's solicitor that person might run off with them leaving the buyer with no remedy against the seller. He referred to *Edward Wong Finance Company v Johnson Stokes & Master* [1984] AC 296 where the vendor's solicitor absconded with the completion monies and in which the Privy Council commented at p.307H that to address this risk *"all that is needed in such a case is that the purchaser's or lender's solicitor should take reasonable steps to satisfy himself that the vendor's or borrower's solicitor has authority from his client to receive the purchase money"*. I accept Mr Patten QC's submissions in this respect. In my view, the reference to "seller" in the Code is to the person agreeing to sell the property, not a reference to the registered title holder if different. The passage cited from the Edward Wong case is consistent with his submission as to the purpose of the provision."

117. In *Dreamvar* Mr Railton was much more sympathetic to the construction of paragraph 7(i) advanced on behalf of MdR and the purchasers. But he was ultimately persuaded in the light of Mr Dicker's decision and the evidence of Ms Curtis-Goulding that she did not regard MMS as having warranted that they were acting for the true owner to hold that paragraph 7(i) was not sufficiently clear in its terms so as to have the effect which the purchasers contend for:

> "133. It was common ground before me that the undertaking in paragraph 7(ii) was an absolute undertaking to have the

> authority of the (genuine) proprietor of each relevant mortgage, charge or other financial encumbrance. Indeed, such an undertaking would be necessary to mitigate the mischief in *Edward Wong*. Further, as *Patel v. Daybells* shows (at [60]-[63], per Robert Walker LJ), even in cases where the Code does not apply, unconditional and unqualified undertakings by the vendor's solicitor whereby responsibility is accepted for the discharge of mortgages over the property being sold, are commonplace. While the Notes to the Code do not say that a similar rationale to that described in relation to the undertaking in paragraph 7(ii) applies to the undertaking in paragraph 7(i), it can be questioned why it does not. The authority of the vendor's solicitor to receive the purchase monies on behalf of the true owner or registered proprietor could equally be regarded as an indispensable requirement of residential conveyancing, the purpose of which is intended to be a genuine completion.
>
> …..
>
> 151. As set out above, I have concerns as to the views expressed in some of the cases which indicate that the general understanding within the profession is that solicitors acting for vendors in transactions for the sale of residential property would not give, and would not be expected to give, an undertaking to the effect that their client is the registered owner of the property being sold. I also have concerns as to whether construing paragraph 7(i) as applying only to the vendor's solicitor's client (and not the registered owner, if different) meets the mischief to which the paragraph was directed, and whether the proposed distinction between the nature of the obligation accepted to be assumed by paragraph 7(ii) is consistent with the suggested (more limited) construction of paragraph 7(i).
>
> 152. It is however the position that the views expressed in cases such as *Excel*, *Grandison* and *Stevenson* were effectively repeated in the factual evidence I heard from Ms Curtis-Goulding, and in the evidence before Mr Dicker QC in *P&P* (at [123]). It is also noteworthy that I was not referred to any guidance or commentary which expressed a view that the effect of paragraph 7(i) was (or was intended) to transfer the risk of identity fraud by the supposed vendor to the vendor's solicitor. These factors point to the objective expectations of the parties not being to the effect that MMS was assuming such a responsibility."

118. "Seller" is not a defined term in the Code and has to take its meaning from the context in which it is used. The Code was obviously designed to deal with the risks inherent in the arrangements for postal completion formerly in use in Hong Kong which were that the vendor's solicitor might abscond with the purchase monies without having

used the money to discharge any existing mortgages over the title. But it was drafted on the assumption that the sale was otherwise genuine and that the vendor giving instructions to the solicitor was the person named in the contract. Mr Railton was therefore correct to say in [133] of his judgment that paragraph 7(i) was (consistently with paragraph 7(ii)) likely to have been intended to denote the vendor identified in the contract rather than the person actually giving the solicitor his instructions.

119. Mr Patten's response to this was that the references to "seller" in the Code should be given a consistent meaning. If the seller in paragraph 7(i) means the person named in the contract then OWC were not the "seller's solicitors" for the purposes of paragraph 7 and were not therefore bound by the undertaking. I do not accept this. Both OWC and MMS agreed with their opposite numbers to adopt the Code for the purposes of completion. They therefore agreed to give the undertakings set out in paragraph 7 and to be bound by the other terms of the Code which stipulate the obligations of the seller's solicitor. But the content of those undertakings and other obligations falls to be determined by the true construction of the Code, not by whether OWC and MMS were in fact instructed by the named vendor. Mr Dicker was wrong in his construction of paragraph 7(i) largely for the reasons which Mr Railton identified in his own judgment. In my view both OWC and MMS gave undertakings that they had the authority of the real Clifford Harper and David Haeems to receive the purchase monies on completion. In the circumstances Dreamvar's alternative argument that MdR were negligent by failing to obtain such an undertaking from MMS falls away.

Costs

120. The remaining issue is Winkworth's appeal against the judge's costs order in *P&P*. Although dismissing the claim against Winkworth, the judge reduced their recoverable costs by 10 per cent to take account of what he described as their wholly inadequate identity checks. The judge said that this was not conceded until after closing and that it could have been conceded much earlier with presumably a saving of costs. Mr Collett for Winkworth says that the judge was simply wrong about this. Both in their defence and more particularly in the further information supplied on 18 November 2014 it was made clear that Mr Hunt had relied on what Ms Lim told him about the vendor and had made no further AML checks of his own.

121. The judge was of course entitled to adopt an issue-based approach to costs and to reflect conduct in his order. But his reasons in this case do seem to have been based on a misapprehension and, given the position on the pleadings, there never was an issue as to whether and, if so, what checks Winkworth had carried out. It was always conceded that they had relied solely on the checks carried out by OWC. The basis on which the judge made the 10 per cent reduction was therefore wrong and Winkworth should have their costs of the action in full.

Conclusions

122. In summary therefore:

(1) <u>In *P&P*</u>

(i) I would allow P&P's appeal against the judge's finding that there was no breach of trust by OWC and refuse to grant OWC relief under s.61;

(ii) I would allow P&P's appeal against the dismissal of their claim against OWC based on the paragraph 7(i) undertaking;

(iii) I would dismiss P&P's appeal against the dismissal of the claims against OWC and Winkworth in negligence and for breach of warranty of authority;

(iv) I would allow Winkworth's cross appeal against the judge's costs order.

(2) *Dreamvar*:

(i) I would allow the appeals of MdR and Dreamvar against the judge's decision that there was no breach of trust by MMS;

(ii) I would refuse to grant relief to MdR under s.61;

(iii) I would allow the appeals of MdR and Dreamvar against the judge's dismissal of their claims based on a breach of the paragraph 7(i) undertaking;

(iv) I would dismiss Dreamvar's application for permission to amend to plead a claim in negligence against MMS.

Lord Justice Floyd :

123. I agree.

Lady Justice Gloster, Vice-President of the Court of Appeal (Civil Division) :

124. Subject to one point I agree with the judgment and conclusions of Patten LJ. The issue on which I disagree arises in the Dreamvar appeal and concerns the relief sought by MdR under s.61 of the Trustee Act 1925. In circumstances where, as this Court has now held, MMS was in breach of trust, I consider that MdR should be relieved from liability under s.61.

125. My reasons for differing from the views expressed by Patten LJ are as follows:-

i) MdR did not act dishonestly and, as we have held, it did indeed obtain the requisite undertaking from the vendor's solicitor under para 7(i) of the Code. The judge himself held that MdR had discharged the onus of showing that it had acted reasonably; see paragraph 183.

ii) On the facts, primary responsibility for not adequately checking the true identity of the fraudster lay with the latter's solicitors, namely MMS.

iii) The judge himself, having heard the evidence, clearly considered that MMS, and not MdR, should bear primary responsibility for Dreamvar's loss in circumstances where MMS were liable to Dreamvar; see paragraph 188. I see no reason to go behind the judge's contingent conclusion as to how he would have exercised his discretion, had the correct analysis been as we have indeed

found it to be; namely that MMS were in breach of trust and were liable for breach of their undertaking.

iv) I do not consider that the fact that MdR is insured should in the circumstances of this case lead to the conclusion that MdR should bear financial responsibility for Dreamvar's loss. Dreamvar was entering into what was for it a relatively substantial property development as a business transaction. I do not consider that the Court's sympathy should be with one commercial party (in reality with its loan creditors, given its insolvency) rather than another, simply because one, and not the other, has insurance. It is irrelevant, in my view, that Dreamvar was a newly formed company or that its beneficial owner was a young man.

v) There was no suggestion that MMS' insurance would not be adequate to cover the loss.

vi) I see no reason why these proceedings should be prolonged by yet further contribution proceedings as between MMS and MdR.

vii) Accordingly, I consider that MdR ought fairly to be excused for breach of trust and that the Court should exercise its discretion in its favour.

126. For the above reasons, I would have allowed MdR's appeal against the refusal of the judge to have granted relief under s.61 and I would have exercised the relevant discretion in its favour. But since Patten LJ and Floyd LJ disagree with me, Patten LJ's proposed order will stand.