Neutral Citation Number: [2013] EWHC 1380 (QB)

Case No: HQ12X01827

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2013

Before :

MR JUSTICE ANDREW SMITH

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Between :

Santander UK Plc	**Claimant**
- and -	
R.A. Legal Solicitors (a firm)	**Defendant**

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Mr. Neil Mendoza (instructed by **Matthew Arnold & Baldwin**) for the **Claimant**
Mr. Imran Benson (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing dates: 13 & 14 May 2013

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Judgment

Mr Justice Andrew Smith :

Introduction

1. This claim arises from a mortgage fraud. In 2009 the claimant, Santander UK Plc (who were formerly called Abbey National Plc and to whom I shall refer as "Abbey"), arranged to lend £150,000 (plus fees) to a Mr Srinivas Vadika against security by way of first legal charge on a property at 8 Opal Close, London E16 (the "property"), which they understood he was to buy. The defendants, RA Legal, a firm of solicitors, acted for Mr Vadika and Abbey on the proposed purchase and Abbey's proposed charge. They dealt with another firm solicitors called Sovereign Chambers LLP ("Sovereign"), who presented themselves as acting for a Ms Emma Slater, the registered owner of the property. Sovereign were fraudulent, and as a result RA Legal released to Sovereign £200,000, comprising money transferred to them by Abbey as the loan and funds paid to them by Mr Vadika, but Abbey never obtained a charge over the property.

2. Before going further, I should state that the dispute was presented at trial concisely and with exemplary efficiency. The papers were in proper order, and submissions and cross-examination were focused. As a result, a trial listed for three days was completed in less than half that time. This was, no doubt, partly because both parties recognised that they were litigating against another innocent and reputable party about who should bear a loss resulting from the dishonesty of others, but the conduct of the hearing is to the credit of both parties and their advisers.

3. Abbey bring claims (i) in breach of trust for an order for the restitution of the sum of £150,215 (see para 17 below), and (ii) alternatively for damages for breach of the terms of RA Legal's retainer by Abbey or tortious negligence. RA Legal's defences to the breach of trust claim are principally that:

   i) They deny that they acted in breach of trust;

   ii) They rely on section 61 of the Trustee Act 1925, and submit that, because they acted "honestly and reasonably, and ought fairly to be excused for the breach of trust", they ought to be relieved of any liability.

   Abbey did not really press the damages claim, recognising that they cannot realistically expect it to succeed if the breach of trust claim does not. The main questions that it raises are whether RA Legal failed to exercise reasonable skill and care when acting as Abbey's solicitors and whether they failed to take reasonable steps to protect Abbey's interests; and whether, if they did, it caused Abbey any loss.

4. Other matters that had been pleaded were not pursued. Abbey pleaded that under the terms of their retainer RA Legal were under absolute obligations to comply with the terms of their instructions and to obtain a fully enforceable first mortgage, but they recognised that this argument could not be maintained in light of authorities such as <u>Nationwide Building Society v Davisons</u>, [2012] EWCA Civ 1626 at paragraphs 52 and 53 and the earlier authorities there cited. RA Legal pleaded that Abbey's loss was caused partly or wholly by their own "imprudent lending", but Mr Imran Benson, who represented them, abandoned that contention. At one stage they proposed to argue that Abbey had not mitigated their loss and drafted an amended pleading accordingly, but that contention too was abandoned.

5. There is much common ground between the parties, including this:

   i) Sovereign were a firm of solicitors regulated by the Law Society and practising in London E15.

   ii) Sovereign were acting dishonestly.

   iii) It does not affect what I have to decide whether or not Mr Vadika was acting dishonestly. Abbey plead that he was, but this is not admitted by RA Legal. This question is not important to any part of my decision, and I express no view about it.

   iv) Ms Slater was not involved in the fraud and never agreed to sell the property to Mr Vadika nor, as far as the evidence before me goes, ever met him or had any dealings with him.

   v) RA Legal acted honestly at all times, and in particular Mr Abul Rahman, a solicitor and partner in RA Legal, and Ms Kavita Sharma, a solicitor who had day-to-day conduct of the transaction under his supervision, were honest.

   vi) Abbey instructed RA Legal by a letter dated 20 May 2009 to act as their solicitors and to perfect their legal charge over the property.

vii) Abbey's instructions and RA Legal's retainer incorporated parts 1 and 2 of the Council of Mortgage Lenders (CML) handbook current as at the date of the Certificate of Title, that is to say the edition of the handbook as at 1 June 2007 (the "handbook").

viii) Paragraph 5.6 of the handbook provided under the heading "First Legal Charge" as follows:

> "On completion we require a fully enforceable first charge by way of legal mortgage over the property executed by all owners of the legal estate. All existing charges must be redeemed on or before completion, unless we agree that an existing charge may be postponed to rank after our mortgage. Our standard deed or form of postponement must be used".

ix) Paragraph 10 of the handbook, which was headed "The Loan and Certificate of Title", included the following:

> "10.1. You should not submit your certificate of title unless it is unqualified or we have authorised you in writing to proceed notwithstanding any issues you have raised with us.
>
> 10.2. We shall treat the submission by you of the Certificate of Title as a request for us to release the mortgage advance to you.
> …
>
> 10.3.4. You must hold the loan on trust for us until completion. If completion is delayed, you must return it to us when and how we tell you (see part 2)".

x) On 17 July 2009, Abbey transferred £150,215 to RA Legal's account with Barclays Bank plc ("Barclays").

xi) On 21 July 2009 and 27 July 2009 Sovereign provided to RA Legal details of a bank account at The Access Bank UK Ltd ("Access") to which moneys for the purchase of the property should be transferred.

xii) On 28 July 2009 RA Legal instructed Barclays to transfer £200,000 to the Access account.

xiii) On 29 July 2009 Sovereign purported to effect on behalf of Ms Slater simultaneous exchange of contracts and completion of the property, but in fact completion within the meaning of paragraph 10.3.4 of the handbook never took place.

xiv) Abbey never obtained a first legal charge or any security over the property.

xv) Abbey have not recovered what they paid to RA Legal (or any part of it), and RA Legal have not recovered what they paid to Sovereign (or any part of it).

6. The issues between the parties are essentially these:

Compensatable loss for breach of trust

i) Did RA Legal act in breach of trust when they transferred the funds of Sovereign's account?

ii) If so, did the breach of trust cause Abbey loss?

Section 61 of the Trustee Act, 1925

iii) Did RA Legal act reasonably?

iv) Ought RA Legal fairly to be excused for the breach of trust, and should the court relieve them either wholly or partly from personal liability for their breach?

Claim for damages

v) Did RA Legal act in breach of their contract of retainer by failing to exercise reasonable care and skill, and were they in breach of their common duty of care and negligent?

vi) If so, did it cause Abbey damage and if so in what amount?

7. Unsurprisingly the history of the transaction is fully documented, but I heard evidence from three witnesses.

i) Abbey called Mrs Tracey Carr, who is employed in their Financial Crime and Risk Execution Department, and has worked for Abbey or their predecessors in connection with fraud investigations since 1998. She is now a Financial Crime Manager and has responsibility for reviewing Abbey's procedures relating to mortgage fraud.

ii) Abbey also called Mr Paul May, who is employed by them in their Specialist Mortgage Services Department as a Senior Lending Manager. He has been employed by Abbey since 2002 and before that he worked for Alliance and Leicester PLC.

iii) RA Legal called evidence from Mr Abul Rahman, to whom I have already referred.

They were all honest in their evidence and sought to assist the court. In one respect, however, I am unable to accept Mr May's evidence: as I shall explain, his evidence, at least in his witness statement, about what Abbey would have done if informed about completion being delayed described a more rigid and decisive response than is, to my mind, realistic or Mr May was able to explain or to support in cross-examination. I regard Mr Rahman as a particularly impressive witnesses, who was entirely straightforward and candid and did not prevaricate or seek to excuse such (minor) criticisms of him or his firm as could properly be made.

The transaction

8. I set out the history of what happened in some detail: much of it is uncontroversial. RA Legal carried on practice in London E3 and about half their work was commercial and residential conveyancing. They ceased to practise on 1 October 2009 because they could not obtain professional indemnity insurance at a reasonable price. There were two partners, Mr Rahman and Mr Babul Ahmed. Mr Rahman, who qualified as a solicitor in 1999, was an experienced conveyancer. Ms Sharma was a solicitor who in 2009 had been qualified for about 5 years and she conducted many conveyancing transactions. Although, as I have said, she conducted this transaction under Mr Rahman's supervision, she did not need day-to-day guidance.

9. On 20 May 2009 Abbey sent to Mr Vadika a letter (the "mortgage offer") offering a loan of £150,000, plus £995 for fees that had been added to the loan amount, and stating that the loan was available until 30 September 2009. It said that Abbey might withdraw the offer if completion of the loan did not take place by 30 September 2009 or in other specified circumstances, namely (i) if information provided by Mr Vadika or obtained by Abbey changed and the changes affected their decision to lend; (ii) if Abbey became aware that information that Mr Vadika had provided was inaccurate or incomplete; or (iii) if Abbey became aware of a significant change in Mr Vadika's financial circumstances or in the value of the property. Mr May accepted, and I find, that otherwise Abbey, being regulated by the Financial Services Authority and committed to treating their customers fairly, would not have withdrawn the offer.

10. On 20 May 2009 Abbey also wrote to RA Legal advising them that they were prepared to provide a loan of £150,000 to Mr Vadika on the security of a first mortgage over the property and in accordance with the terms of the mortgage offer, a copy of which they enclosed. Abbey wrote that they understood that RA Legal acted for Mr Vadika and asked them to act on their behalf also "in order to affect our security over the property" on the basis that Mr Vadika was to be responsible for RA Legal's fees and costs. As I have indicated, the instructions incorporated parts 1 and 2 of the handbook and the letter also stated, "In acting for Abbey, please ensure that: … You investigate the title to the property, complete the Certificate of Title and ensure that Abbey receives a fully enforceable first mortgage over the property". I should set out some further provisions of the handbook (in addition to those at para 5 above):

> "You are only authorised to release the loan when you hold sufficient funds to complete the purchase of the property and pay all stamp duty land tax and registration fees to perfect the security as a first legal mortgage …" (para 10.3.1).
>
> "If, after you have requested the mortgage advance, completion is delayed you must telephone or fax us immediately after you are aware of the delay and you must inform us of the new date for completion (see part 2)" (para 10.5).
>
> "See part 2 for details of how long you can hold the mortgage advance before returning it to us. If completion is delayed for longer than that period, you must return the mortgage advance to us. If you do not, we reserve the right to require you to pay

> interest on the amount of the mortgage advance (see part 2)" (para 10.6).

The relevant part 2 of the handbook for Abbey's dealings was not put in evidence.

11. Apparently RA Legal had not then met Mr Vadika to take instructions, but, as Mr Rahman explained and I accept, it is common for solicitors to wait for lenders' instructions before taking instructions from their purchaser client and sending out a client care letter. He understood that Mr Vadika had arranged the purchase privately, and no estate agent was involved. I accept his evidence that this was not unusual in the area where RA Legal practised: in itself it did not raise any concerns or suspicions about the purchase, and I consider that there was no reason that it should have done so. Mr Neil Mendoza, who represented Abbey, did not suggest otherwise.

12. On 27 May 2009 Ms Sharma sent Mr Vadika a "client care letter", confirming his instructions and enclosing a purchase instruction form setting out details of the proposed transaction, including the purchase price and mortgage amount required. On 9 June 2009 Mr Rahman met Mr Vadika to make checks on his identity and to give advice about conveyancing procedures. Mr Vadika completed and signed the purchase instruction form and also "a source of funds form", which recorded that he was to provide approximately £50,000 from his earnings. He provided Mr Rahman with a bank statement in his name, a credit card statement, his passport and a driving licence, producing the originals and allowing Mr Rahman to take photocopies. Mr Rahman observed a slight difference in the spelling of his name on the bank statement (Srinvas) and on other documents (Srinivas), but this was explained as a mistake on the part of the bank and Mr Rahman accepted that explanation. Although at one time Abbey appeared to rely upon this discrepancy to suggest that Mr Rahman should have suspected fraud, this was quite unrealistic and the point has rightly been abandoned. On 10 June 2009 Ms Sharma wrote to Mr Vadika, confirming that RA Legal had received mortgage instructions from Abbey and drawing his attention to some points about the proposed mortgage.

13. On 19 June 2009 RA Legal received a letter from Sovereign, which stated that they acted for the seller of the property, Ms Slater, and that they understood that RA Legal were instructed by Mr Vadika, who had agreed, subject to contract, to purchase the property for £200,000. They enclosed a draft contract, office copy entries of the register of title and an "official HIPS pack". The copy entries referred to a transfer of the land dated 7 February 1986 (the "1986 transfer"), and said that it contained a provision about boundary structures and some restrictive covenants. Ms Sharma replied on 26 June 2009 proposing amendments to the draft contract, raising certain enquiries about the property and asking for a copy of the 1986 transfer.

14. On 7 July 2009 Sovereign sent to RA Legal an amended contract, which purported to have been signed by Ms Slater, and what purported to be a letter signed by her about a parking space at the property, together with a plan showing the space. They also enclosed a completed enquiries form, and promised that the 1986 transfer would be sent when received. On 13 July 2009 Mr Rahman and Ms Sharma met Mr Vadika. They went through documentation with him and provided him with a completion statement. He confirmed that he would be paying the balance. At the meeting he signed the contract and the mortgage deed, which was to be dated when completion

took place. Mr Vadika had requested simultaneous exchange of contracts and completion, although it is not clear from the evidence when he gave these instructions. In Mr Rahman's experience this is not an unusual request, it did not appear curious or arouse suspicions and Abbey do not contend that it should have done.

15. Also on 13 July 2009 Ms Sharma wrote again to Sovereign. She reiterated the request for the 1986 transfer, and enclosed a draft transfer (TR1) form for Sovereign's approval and requisitions on title. The requisitions included these requests:

> "(A) Please specify the mortgages or charges witch [sic] will be discharged on or before completion.
>
> (B) In respect of each subsisting mortgage of [sic] charge:
>
> (i) Will a vacating receipt, discharge of registered charge or consent to dealing, entitling, the Buyer to take the property freed from it, be handed over on completion?
>
> (ii) If not, will the seller's solicitors give a written undertaking on completion to hand the [sic] one over later?
>
> (iii) If an undertaking is proposed, what other suggested terms on [sic] it?"

16. On 13 July 2009 Ms Sharma also wrote to Abbey enclosing a Certificate of Title and requesting that Abbey send funds for 17 July 2009, which it was anticipated would be the date of completion, as the Certificate of Title stated. The Certificate of Title was on Abbey's standard form, and it included this statement:

> "We, the conveyancers named above, give the Certificate of Title set out in the annex to rule 3 of the Solicitors' Code of Conduct 2007 as if the same were set out in full, subject to the limitations contained in it".

(In fact no "conveyancers" were named above, but the term was clearly intended to refer to RA Legal and the form was signed by Ms Sharma.) Rule 3 of the code provided that:

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

The Certificate of Title form also stated this under the heading, "Important – administrative arrangements":

> "… You are required to notify us by phone or fax no later than 12.00 noon on the day of the anticipated completion date if completion is not taking place.
>
> If completion does not take place on the anticipated completion date as notified to us, and a new date is not agreed by us (but the transaction is still going to proceed) OR, completion will not be taking place because the transaction is not proceeding at all, then you must immediately return to us by CHAPS the exact amount of money that you received from us…
>
> If completion is delayed and we agree to you holding the funds, you must account to Abbey for interest on all advance funds in your possession at a rate equal to 50% of Abbey's standard mortgage rate (as advised by Abbey) per annum or at the rate you actually receive on the funds (whichever if the greater).
>
> However if you fail to return funds in accordance with any of our instructions, we reserve the right to charge you interest for the whole period you are in possession of the advance funds at the rate equal to Abbey's standard variable rate (as advised by Abbey National) plus 4% per annum."

17. On 15 July 2009 RA Legal obtained from the Land Registry an official search certificate, the priority period of which expired on 25 August 2009. On the same day Abbey transferred to RA Legal £150,215, representing the loan amount of £150,000 together with a refund, or "loyal mover cashback", of £250 less £35 for a telegraphic transfer fee. The position about the additional £215 was not explored at the hearing, and in particular I heard no submissions about whether it was part of "the loan" within the meaning of paragraph 10.3.4 of the handbook. Had I upheld Abbey's claim in principle, I would have invited submissions about this. In this judgment I shall consider only the claim about the £150,000.

18. Exchange and completion did not take place on 17 July 2009 as had been envisaged. Although she left messages, Ms Sharma was unable to speak with Sovereign, and exchange and completion were delayed. RA Legal did not advise Abbey that completion had not taken place on 17 July 2009, the date for completion stated in the Certificate of Title, notwithstanding what the "administrative arrangements" said about funds being returned if completion did not then take place. Mr Rahman accepted that Abbey should have been so advised, so that Abbey might give instructions about what RA Legal should do with the funds held by RA Legal. Mr Rahman told me that in his experience, if completion of a transaction of this kind is delayed, lenders such as Abbey generally ask the solicitors whether they would prefer to return the funds or to retain them and account for any interest accruing on them. If it seems that completion is imminent (even if another definite date for completion has not been agreed), the solicitor will generally retain the funds with the lenders' authority because if money is returned and has to be transferred back for the

transaction to proceed this could delay matters for perhaps as long as ten days. In this case it appeared to Mr Rahman that completion was indeed imminent, and I infer that, if on 17 July 2009 RA Legal had informed Abbey that completion had not taken place that day, that it was not clear what had delayed matters on the seller's side but that RA Legal thought that completion was imminent, they would have instructed RA Legal to retain the funds, or at least would have authorised them to do so and RA Legal would have retained the funds.

19. In reaching this conclusion I have considered the evidence of Mr May, including his evidence in his witness statement that if, after Abbey had released funds, he had been advised "of a 12 day delay to completion", he would have "not allowed an application to proceed or [the] advance to be released, at the very least pending further investigation". The reference to 12 days is, of course, to the time between 17 July 2009 and 29 July 2009 when Sovereign purported to complete the sale, but there is no reason to think that anyone on 17 July 2009 could or should have foreseen a delay until 29 July 2009. Mr May accepted in cross-examination that in any case this delay would not have justified Abbey in withdrawing the offer letter's promise of an advance subject to completion by 30 September 2009. He also accepted that Abbey's response would not have been, at least initially, from an employee of his position. He explained that RA Legal should have reported the delay in completion to Abbey's "Geoban" unit based on Teesside, and the staff there would have responded as they thought appropriate. Although Abbey had written policies to guide Geoban operatives, they were not disclosed in the proceedings. Mr May said that he believed that, if Geoban had been advised that completion had not taken place, they would have required that the funds be returned, but then in cross-examination he acknowledged that it would have been otherwise if completion had been rearranged, say, for the next day and he was unable to say what delay would have been accepted by Abbey's Geoban operatives. He also acknowledged that, if the funds had been returned but a new Certificate of Title with a revised completion date then submitted, Abbey would, in compliance with the offer letter, have returned the funds to the solicitors. This evidence was, to my mind, vague and rather muddled, but I cannot accept that Abbey would have required the return of the funds if advised that completion was apparently imminent, even if a new date for completion had not been set. I also conclude that RA Legal would have told Abbey that they considered this to be the position, and Abbey would have accepted this. I therefore conclude that, had RA Legal contacted Abbey on 17 July 2009 or shortly afterwards to report to them that completion had not taken place and explained the position about the transaction, Abbey would have instructed them to hold the funds with a view to completing the sale. Mr May's evidence was not of a quality to persuade me that in these circumstances Abbey would have required the funds to be returned: such a response would have inconsistent with Mr Rahman's experience and, to my mind, would have made no real business sense. If this conclusion is in conflict with the evidence that Mr May's ultimately gave, then I reject his evidence on this point.

20. On 21 July 2009 Sovereign wrote that their client would like to complete on 22 July 2009. They sent RA Legal a copy of the 1986 transfer: it is not suggested that it contained anything that significantly affected the title to the property or that would have required qualification to a Certificate of Title such as RA Legal had given to Abbey or anything of which RA Legal should have advised them. Sovereign also enclosed (i) a TR1 Land Registry transfer form for the property which purported to be

signed by Ms Slater with her signature apparently witnessed by a Mr Mark Thomas; and (ii) replies to the Requisitions on Title (described in Sovereign's letter as replies to enquiries). They replied to the requisitions set out above in paragraph 15 by writing against (A) "Mortgage Express" and against (B) "Confirmed". Mr Rahman was not sure whether he or Ms Sharma reviewed the replies but his evidence was that, had he seen them, he would have thought the answers provided his firm with an enforceable undertaking that, on completion, Sovereign would provide confirmation that the registered charge had been discharged. His evidence about this was not challenged on the basis either that he had misunderstood the replies or that his understanding of them was unreasonable.

21. I should also refer to the replies under the heading "Completion Arrangements". The request was "Please answer any of the following requisitions against which X has been placed in the box", and there were four requisitions as follows:

> "Where will the completion take place?
>
> We should like to remit the completion monies direct to your bank account. If you agree, please give the name and the branch of your account, and its sort code, and the title and number of the account to be credited.
>
> In whose favour and for what amounts will the banker's drafts be required on completion?
>
> Please confirm that you will comply with the Law Society's Code for the completion by Post (1998 edition)."

None of the boxes was checked with an "X" (or at all). When Sovereign returned the form they had written against the first "formula B". This, I take it, referred not to a procedure for completion but to formula B for exchanging contracts by telephone or telex where each solicitor holds his or her client's signed part of the contract, set out in the Law Society's Conveyancing Handbook. They also gave against the second requisition details of an account with the Access Bank UK Ltd ("Access"). They did not agree to comply with the code for completion by post: that code applies, as it specifically states, only where solicitors expressly agree to use it to complete a specific transaction.

22. When Mr Rahman tried to contact Sovereign on 22 July 2009, he was unable to do so. He left a message that, if he did not hear from them, he would return the funds to Abbey. On 22 July 2009 RA Legal received from Mr Vadika the balance of the purchase price by way of a bankers' draft for £53,893 and also a letter from Sovereign giving details of their client account with Access. On 27 July 2009 Sovereign wrote to RA Legal stating that their client would like to complete that day "or at your earliest". On 28 July 2009 Mr Rahman telephoned the Law Society to check on Sovereign's standing, although he knew other local solicitors who had dealt with them and understood from what he had heard that they were (as he put it) bona fide solicitors. The Law Society informed him that Sovereign were a regulated firm. Abbey no longer suggest (as they had) that RA Legal should have done more to check

whether Sovereign were solicitors of good standing. On 28 July 2009 RA Legal paid £200,000 to Sovereign's bank account by a same day electronic transfer between banks.

23. On 29 July 2009 Sovereign purported to exchange contracts for sale and to complete the transaction, using formula B to exchange contracts. RA Legal believed that the transaction was genuine. Ms Sharma wrote to Sovereign to confirm that exchange and simultaneous completion had taken place at 14.20, enclosing the contract signed by Mr Vadika. RA Legal dated 29 July 2009 the mortgage deed, which had been signed on 13 July 2009. They received from Sovereign a contract dated 29 July 2009 that purported to be signed by Ms Slater. Mr Vadika told RA Legal that he would collect the keys to the property that day from Ms Slater. On 2 August 2009 Ms Sharma sent a land transaction form to HMRC with a cheque for £2,000. On 4 August 2009 RA Legal received a letter from HMRC explaining that information on the SDLT (Stamp Duty Land Tax) return was incomplete or incorrect, and on 12 August 2009 Mr Sharma spoke with them and HMRC later issued a Land Transaction return certificate for the property. Mr Rahman and, I infer, Ms Sharma, had no concerns or suspicions that anything was untoward about the transaction.

24. On 4 August 2009 Mr Vadika telephoned RA Legal, stating that he had not received the keys from the vendor and that "his solicitor" said that he had not received the sale money: I quote from a note of a telephone message. Mr Rahman telephoned Sovereign and was told that they had "bank problems that they hoped would be resolved soon". Mr Rahman asked that Sovereign explain the position in writing, and on 5 August 2009 RA Legal received a letter from Sovereign by fax in which they wrote that they were "presently resolving internal issues with Access Bank and a completion in the above matter has been delayed". They said that they were unable to say how long it would take before the problem was resolved and "we await your instructions in this matter". Mr Rahman responded the same day that Sovereign's problems with their bank were not a reason to delay completion, and that as far as they were concerned the transaction had been completed and Sovereign's client was in breach of contract for failing to release the keys. They also stated that Sovereign had given an undertaking to discharge the financial charge over the property and they were not released from it. They stated that they required a substantive response by mid-day on 6 August 2009, failing which they would serve notice to complete.

25. Having heard nothing further from Sovereign, on 10 August 2009 Ms Sharma wrote giving notice to complete. Sovereign replied on 11 August 2009, apologising for their "late reply", which they attributed to a faulty line that had interrupted their telephones, their internet and their fax. They gave an account of Access acknowledging a mistake and said that the bank had promised to give a final report that morning. In reply RA Legal reiterated that they were not concerned with any problems that Sovereign had with their bank. They requested that Sovereign contact the bank and its solicitors giving notice that the £200,000 received in relation to the purchase was unrelated to any claim that the bank might have against Sovereign and that they instruct the bank to return the funds to RA Legal by close of business that day. Mr Rahman was asked in cross-examination whether by this stage he entertained concerns that the transaction might not be bona fide (or, as it was put, whether there were "alarm bells"). He replied that he did not have such concerns

because he understood that he was dealing with a regulated firm of solicitors, who had remained in communication with them and given an explanation for the delay.

26. On 12 August 2009 Mr Ahmed spoke with a Mr Folaramni Dawodu at Sovereign and was told that the problems with the bank had been resolved. Ms Sharma wrote to Sovereign asking that that be confirmed in writing and that they also confirm that the mortgage over the property had been discharged in accordance with Sovereign's undertaking. They asked that fees of £150.00 plus VAT and interest from the date of notice be retained before surplus funds were released to Sovereign's client. They also asked for confirmation that the transaction was finally completed and that the keys would be released to Mr Vadika.

27. A statement of Sovereign's client bank account shows that on 28 July 2009 they received from RA Legal into their client account the £200,000, representing (essentially) the funds from Abbey and the payment by Mr Vadika. It was paid out of the account by 13 August 2009, when three substantial transfers were made from the account, leaving a balance of under £6,000. The remaining credit in the account was withdrawn on 17 August 2013, and the account was closed on 22 September 2009. There is no evidence about what became of the money, except that neither Abbey nor RA Legal have recovered any of it. But on 13 August 2009 Sovereign confirmed (untruthfully) that "all monies as being disbursed as per client's instructions and the matter is now completed". They also confirmed that they would send a cheque for £150 plus VAT within 28 days. That day RA Legal wrote to Mr Vadika confirming "that the matter has formally completed" and promising to revert once "the registration process has been completed".

28. On 1 September 2009 RA Legal applied to the Land Registry to register the transfer of the property and to renew the priority search in favour of Abbey. It was due to expire on 12 October 2009. On 2 September 2009 the Land Registry informed RA Legal that they could not process the application because they had not been provided with evidence of the discharge of a charge in favour of Mortgage Express dated 15 April 2004. Again Mr Rahman explained in cross-examination that this communication did not alarm him or lead him to have suspicions about the transaction: in his experience, it is not uncommon for lenders whose charge has been redeemed to be dilatory in completing and returning to vendors' solicitors the form (DS1) required by the Land Registry to clear the register of their charge. Accordingly on 4 September 2009 Ms Sharma wrote to Sovereign to request that they send evidence of the discharge as soon as possible, and receiving no reply she wrote again on 14 September 2009. On 17 September 2009 the Solicitors Regulatory Authority intervened into Sovereign's practice, instructing Messrs Kennedys as the Interventions Agents.

29. On 17 September 2009 RA Legal notified the Land Registry that the application would be cancelled on 1 October 2009 unless they received a reply to their requisition dated 2 September 2009. Ms Sharma obtained the Land Registry's agreement to extend the application until 29 October 2009. On 29 September 2009, having received no reply from Sovereign, Ms Sharma again wrote for evidence that Mortgage Express charge had been discharged. She said that if RA Legal did not hear from them within 14 days they would report Sovereign to the Law Society for breach of their undertakings.

30. As I have said, on 1 October 2009 RA Legal ceased to practise. On 9 October 2009 they sent Mr Vadika a receipt for their fees of £1,139.25, with a cheque for £920.79 which they held from the transaction. On 15 October 2009 Abbey National sent what is clearly a pro-forma letter to RA Legal stating that they had not received confirmation that their charge had been registered. In reply on 23 October 2009 RA Legal informed them that they had "a pending application at the Land Registry which is being delayed due to the seller's solicitors failing to provide us with proof of discharge". They also stated that they had become aware that the seller's solicitors had "since been intervened by Law Society and [they were] now contacting the intervening solicitors to provide us with appropriate discharge". They informed Abbey that the firm had ceased to practise as from 1 October 2009 "due to failing to obtain competitive Professional indemnity for the current year" and that they would write to Abbey's panel department that they should be removed from the panel.

31. On 28 October 2009 Mr Rahman attempted to make contact with Kennedys. On 29 October 2009 they were informed by the Land Registry that the application had been cancelled because no evidence had been supplied that the charge in favour of Mortgage Express had been discharged.

32. On 5 November 2009 RA Legal were requested by a Mr Jeremy Lewis of Alexander JLO solicitors to remove the priority search in favour of the Abbey so that they could complete a sale of the property that the priority search prevented. When Mr Rahman spoke to Mr Lewis on 6 November 2009, Mr Lewis explained that his firm was acting for Ms Slater in respect of the sale of the property to another buyer. He said that they were aware that there had been a fraudulent attempt to sell the property, and that Sovereign had acted for the purported seller, but that Ms Slater knew nothing of the purported sale to Mr Vadika. It was only then that Mr Rahman realised that the transaction might have been fraudulent. On 6 November 2009 Mr Rahman wrote to Kennedys explaining that RA Legal had been unable to register Abbey's interests because Sovereign had not provided confirmation of discharge, conveying what he had been told by Mr Lewis. On 27 November 2009 RA Legal received a letter from Kennedys, explaining that they had search Sovereign's database files and there appeared to be no papers relating to the property or to Ms Slater.

33. On 10 November 2009 the Land Registry enquired of RA Legal whether they wished to withdraw the priority search.

34. On 19 November 2009 RA Legal wrote to Abbey explaining that they had been unable to register their charge because Sovereign had failed to provide DS1 form certifying that the Express Mortgage charge had been discharged. They said they had been in touch with Kennedys and referred to what they had been told by Mr Lewis. They informed Abbey that they still believed that the transaction between Mr Vadika and Ms Slater was "a genuine transaction", and that they had on their file an executed transfer by "the seller" and "the standard undertaking given by seller's solicitors to discharge the seller's charge in favour of Mortgage Express secured on the property". Mr Rahman explained in his evidence why RA Legal did not communicate with Abbey immediately when they realised that there might have been a fraud: he first consulted the firm's insurers, because he wanted guidance about how he should deal with the situation and because the terms of the insurance cover required this. The

involvement of the underwriters resulted in delay between 5 November 2009 and 19 November 2009.

35. On 24 November 2009, 2 December 2009 7 December 2009 and 8 December 2009 Mr Rahman repeatedly telephoned Abbey about his letter of 19 November 2009, but he was told only that Abbey were looking into the matter. This was confirmed in a letter dated 8 December 2009 from Abbey's Mortgage Centre. On 18 December 2009 Messrs DLA Piper UK LLP wrote to RA Legal, advising them that they had been instructed by Abbey and asking for RA Legal's files by 23 December 2009. RA Legal replied on 23 December 2009, sending the file and explaining, in reply to DLA Piper UK's enquiries, that they had been unable to register Abbey's legal charge because Sovereign had not provided the necessary DS1 form.

36. Mrs Carr explained that the matter was not referred within Abbey to her department for investigation of the fraud until February 2010, but this apparent delay was not explained. She told me that Abbey have not reported it to the police because in her experience (surprisingly and, it seems, even in apparently clear cases such as this) the police are unwilling to investigate mortgage frauds unless several fraudulent transactions are involved.

The criticisms of RA Legal

37. Abbey complain about how RA Legal handled the transaction. Some of these matters were not distinctly pleaded, but were relied upon by Mr Mendoza in the course of his opening. I required a written formulation, and before evidence was called Mr Mendoza set out the matters that Abbey allege. (They are set out as allegations in support of Abbey's contention that RA Legal did not act reasonably for the purposes of the Trustee Act, 1925, but Mr Mendoza confirmed that they are also their allegations for the damages claims.) They are these:

    i) RA Legal provided the Certificate of Title when they had not completed their investigation into the title of the property.

    ii) Although the Abbey form for the Certificate of Title stated that RA Legal should return the money advanced immediately if completion was delayed and no new date was agreed with Abbey, RA Legal did not comply with those instructions when completion did not take place on 17 July 2009.

    iii) RA Legal did not contact Abbey about completion being delayed, as required by Abbey in the Certificate of Title form, in order to seek instructions.

    iv) RA Legal paid the funds to Sovereign relying only on the replies in the Requisition of Title dated 13 July 2009, and the replies did not cover the position if there were no exchange of contracts or completion after funds had been released.

    v) RA Legal released Abbey's funds to Sovereign before contracts had been exchanged, and without a letter to Sovereign stating that the money had been released or requiring that they be held to the order of RA Legal.

vi) RA Legal did not notify Abbey until 23 October 2009 that the transaction had been delayed because Sovereign had failed to provide proof of discharge of the prior charge, and they did not tell Abbey that they could not register the charge before 19 November 2009.

vii) RA Legal released to funds to Sovereign on 28 July 2009, although no legal charge had been executed in that, although Mr Vadika signed the charge before funds were released, it was not dated until 29 July 2009.

38. The first complaint of failing properly to investigate the title before providing Certificate of Title is that RA Legal had not seen the 1986 transfer when they issued the Certificate. By it RA Legal stated that they had investigated the title and that Abbey and Mr Vadika would on completion have "good and marketable title to the Property and to appurtenant rights free from prior mortgages or charges and from onerous encumbrances …". Thus, the terms of the Certificate of Title cover the "two quite separate questions" that Millett LJ distinguished in Barclays Bank plc v Weeks Legg & Dean, [1999] QB 309, 324, when regretting "a growing unfamiliarity with the language which was once the common currency of conveyancers of unregistered land": namely the question whether the seller has shown a sufficiently good title to the property (a "good and marketable title") and what is the subject matter of the sale ("the Property and … appurtenant rights free from prior mortgages or charges and from onerous encumbrances"). Mr Rahman accepted that a Certificate of Title should not have been given in unqualified terms until his firm had been satisfied that nothing in the 1986 transaction materially affected the title or the property. Of course he was right to accept that, but the error was to my mind understandable. Ms Sharma clearly had well in mind that she should inspect the 1986 transfer, and I accept Mr Rahman's evidence that the transaction would not have gone ahead and money would not have been released before it had been inspected. It must surely have seemed to Ms Sharma highly improbable that the 1986 transfer might include anything about boundary structures or restrictive covenants or other rights reserved against the property that might materially affect either what was being sold or the quality of the title. In the event it contained nothing significant to either, and RA Legal had checked this before they released the money. Mr Mendoza accepted that this criticism was inconsequential, and Abbey's loss is not connected with it.

39. It is convenient to consider the second and third complaints together. As I have said, because of paragraph 10.3.4 of the handbook RA Legal's retainer was that, if completion was delayed, they were to return to Abbey the loan moneys "when and how we tell you". By the Certificate of Title, Abbey told RA Legal about returning the money. I am prepared to regard these "administrative arrangements" as being by way of instructions to RA Legal, and neither Mr Rahman in his evidence nor Mr Benson in his submissions suggested otherwise. The provision about returning the loan "when and how" Abbey told RA Legal was qualified by the words "see part 2", which is relied upon by neither party and is not in evidence. (Had the case turned on this, I would have afforded the parties the opportunity to deal with this, but it does not and the sums involved are not sufficient to warrant pursuing the point.)

40. However that may be, the arrangements were not that RA Legal should return the funds without first taking Abbey's instructions. Their retainer required them, if completion was delayed, to contact Abbey by telephone or fax: see paragraph 10.5 of

the handbook. The administrative arrangements contemplated that RA Legal might in fact retain the funds with Abbey's agreement. Indeed, if a solicitor in the circumstances of RA Legal on or immediately after 17 July 2009 simply returned funds to Abbey without seeking instructions from them (and so derailed any prospect of completion in the immediate future) he might well, I think, have been in breach of his duties to the purchaser or Abbey or both. I cannot therefore accept the second complaint, that RA Legal did not immediately simply return the funds when completion did not take place on 17 July 2009. Abbey's real complaint here, as it seems to me, is the third, that RA Legal did not contact them at all when completion was delayed. As I have explained, in my judgment, had they done so Abbey would have instructed them to keep the money with a view to arranging a new completion date and completing the transaction. Again, Mr Rahman rightly acknowledged that RA Legal were at fault in this regard, but the fault was inconsequential as far as concerns how the transaction proceeded.

41. I also take the fourth and fifth complaints together. Sovereign's answers to the Requisitions did not provide for how Sovereign were to deal with moneys that were paid to Sovereign and completion did not take place, and RA Legal did not seek and Sovereign did not provide an undertaking about this. I cannot accept the fourth complaint: as Mr Rahman pointed out, the answers to the Requisition of Title are not the vehicle in which Sovereign would be expected to deal with the position if completion did not take place. But it was to my mind clear that, when RA Legal sent Sovereign funds to effect under formula B exchange of contracts and completion, Sovereign held them to RA Legal's order unless and until the transaction was completed. Mr Rahman told me that in his experience of cases in which there was no completion of a sale the seller's solicitor (unsurprisingly, indeed all but inevitably) has always recognised that he has to return the funds. In any case, since the fraud was effected by Sovereign pretending to complete, these complaints too are inconsequential.

42. As for the sixth criticism, for the greater part of the period between 29 July 2009 and RA Legal's letter of 19 November 2009, RA Legal had no suspicion that the transaction might not be genuine or that Abbey might not obtain a first legal charge securing their loan. According to Mr. Rahman, he appreciated the possibility of fraud only when he was contacted by Mr Lewis. I have explained why I do not criticise him, or RA Legal, for not appreciating this in August 2009 or when they received the Land Registry's letter of 2 September 2009. Mr Rahman could not recall quite when he learned that the Solicitors Regulatory Authority had intervened in the practice of Sovereign, but he believed that he heard about this in October 2009 before Mr Lewis telephoned him. With hindsight it is perhaps surprising that this did not cause him concern about the integrity of this transaction, but this point was not put to Mr Rahman when he was cross-examined or pressed by Abbey, and in any case it would not significantly affect my assessment of the sixth criticism. Once Mr Rahman realised the possibility of fraud, he cannot be criticised for referring the matter to RA Legal's insurers and this inevitably caused some delay: it explains the delay of some two weeks. I am not persuaded that this criticism of RA Legal is made out. It is to my mind unrealistic to suppose (and Abbey did not suggest) that any delay on the part of RA Legal after the funds were transferred from Sovereign's client account on 13 August 2009 in passing information to Abbey prejudiced their

prospect of recovery. After all, they did not respond to the letter of 19 November 2009 for almost a month, despite Mr Rahman pressing them to do so.

43. This seventh complaint is that, although the legal charge was signed by Mr Vadika on 22 July 2009, it was not then dated but held by RA Legal for them to complete with the date when completion took place. Mr Rahman was cross-examined on the basis that, because it was undated, the charge was therefore not "binding" or "effective". There is nothing in this complaint, and it was all but abandoned by Mr Mendoza in his closing submissions. The procedure followed by RA Legal was that contemplated by the Law Society's conveyancing handbook at paragraph 3.9.1:

> "Since it is not possible for the buyer to mortgage a property which he does not own, it follows that formal completion of the mortgage cannot take place until after completion of the purchase, irrespective of the fact that the mortgage funds will have been released to the use of the borrower on completion of the earlier purchase. As soon as completion of the purchase of the property has taken place, the mortgage deed can be completed by insertion of the date of completion and any other formalities which have to be entered in it, e,g, date of first repayment…"

In any case, it made no difference to the history of the transaction when the charge was dated and Abbey's loss was unaffected by this.

44. Accordingly, I conclude that the loss suffered by Abbey had no connection with any of their criticisms of how RA Legal conducted the transaction.

<u>Breach of trust</u>

45. It is common ground that the money that RA Legal received from Abbey was impressed with a trust and that the terms of the trust were that it was to be held for Abbey "until completion". Abbey's case is that RA Legal acted in breach of trust "in paying away the sums advanced by [Abbey]". They paid it away in two stages: they transferred it to Sovereign on 28 July 2009 pending completion on the basis (as I have concluded) that Sovereign held it to RA Legal's order pending completion, and on 29 July 2009 they then released it, believing that they were completing the sale. Abbey say that RA Legal were in breach of trust on 28 July 2009 when they transferred the trust fund to Sovereign and on 29 July 2009 because the purported completion was not genuine but a nullity for which Sovereign used forged documents.

46. In <u>Lloyds TSB Bank Plc v Markandan & Uddin</u>, [2012] EWCA Civ 65 the Court of Appeal considered another mortgage fraud case, in which (unlike this case) those purporting to act as solicitors for the vendor were not in fact solicitors at all but fraudsters pretending to be a branch office of a genuine firm of solicitors called Deen, and (like this case) they provided forged documents in order apparently to complete the sale. There were other similarities with this case: the solicitors acting for the buyer and lenders, Markandan & Uddin ("Markandan") were retained by the lenders on the terms in the handbook, including those in paragraph 10.3.4; there was to have been simultaneous exchange and completion; and in advance of the intended completion Markandan transmitted to the "seller's solicitors" the completion money,

including funds advanced by the lenders. The Court of Appeal held (loc cit at para 50) that Markandan were in breach of trust for two reasons: first, there never was completion of the transaction because after remitting the money Markandan had "received in return documents that purported to be what they expected to receive but which were forgeries", and therefore the purported contract and the purported completion were nullities. Rimer LJ, with whose judgment Mummery LJ and Sir Mark Potter agreed, continued:

> "Nothing, said Lear, will come of nothing, and so it is 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."

47. The other reason that Markandan were held to have been in breach of trust was that they remitted the funds to the "seller's solicitors" before the purported completion. They had agreed that completion should take place by post, and under paragraph 6 of the then applicable Law Society's code for completion by post required the buyer's solicitor to remit to the seller's solicitor the sum required to complete and the seller's solicitor to hold the funds to the order of the buyer's solicitor. However, Rimer LJ said (at para 53) that it was in itself a breach of trust for Markandan to remit funds to what they thought was the branch office of Deen:

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

The undertakings to which Rimer LJ referred were undertakings to provide the documents necessary to register title in the property: that is clear from the passage of the judgment at first instance, to which Rimer LJ referred at paragraph 35 of his judgment.

48. Nationwide Building Society v Davidson, [2002] EWCA Civ 1626, was another case of mortgage fraud in which those purporting to act for the seller were not solicitors

but fraudsters posing as a firm of solicitors and in which forged documents were used when the fraudsters purported to complete. In a response to an argument that a provision in the handbook at paragraph A3.1.2 about what safeguards solicitors should carry out if those acting for the seller were not known to them conferred implicit authority to remit funds if the stipulated safeguards had been taken, Sir Andrew Morritt C, with whom Sullivan and Munby LJJ agreed, said this (at para 40): "The trust imposed on the loan moneys in the hands of [the solicitors] by para 10.3.4 of the CML Handbook could only be discharged by completion of the purchase of return on the money to [the lender]".

49. These authorities apply the basic principle that "A trustee who wrongly pays away trust money, like a trustee who makes an unauthorised investment, commits a breach of trust and comes under an immediate duty to remedy such breach", per Lord Browne-Wilkinson in Target Holdings Ltd v Redferns, [1996] AC 421, 437C. Mr Benson did not dispute this principle but argued that nevertheless RA Legal were not in breach of trust because, he said, although they held the money for Abbey, they did so "with [Abbey's] authority (and instruction) to apply it in the completion of the transaction of purchase and mortgage of the property. Those instructions were revocable but, unless previously revoked, the defendant was entitled and bound to act in accordance with them": see Millett LJ in Bristol and West Building Society v Mothew, [1998] Ch 1 at p.22D.

50. It is convenient first to consider the position disregarding the fact that the money was advanced to Sovereign on 28 July 2009, in advance of the intended completion on 29 July 2009. Although he did not use this citation from Snell's Equity (32nd Ed, 2010) paragraph 29-004 to put his proposition in precisely these terms, Mr Benson's starting point was, as I understand it, effectively this:

> "If the trustee takes the same care of the trust property as a man of ordinary prudence would take of his own, he will not be liable for accidental loss, such as a theft of the property while in his possession or in the possession of others to whom it has been entrusted in the ordinary course of business, or a depreciation in the value of the securities upon which the trust funds have been rightfully invested."

This principle goes back, as Jessel MR stated in Job v Job, (1877) 6 Ch D 562, to what Lord Hardwicke said in Jones v Lewis, (1751) 2 Ves Sen 240 about the liability of a trustee who is robbed of the trust property. In so far as it concerns when a trustee entrusts the property to others, the leading authority is the decision of the Court of Appeal and the House of Lords in Speight v Gaunt, (1883) 22 Ch D 727 and (1883) 9 App Cas 1. Although the authority was apparently not cited in any of the more recent cases to which I have referred (or in the case of AIB Group (UK) plc v Redler, [2013] EWCA Civ 45, to which I refer below), the judges in them were certainly fully familiar with it and had it in mind. The claim was against a trustee who employed a broker to invest trust funds in corporation stocks and who paid the price from trust funds to a broker when he produced what was called a "bought-note", which amounted simply to an assertion by the broker that he had made contracts to buy the stocks. The broker had not acquired the securities and never did, he appropriated the money to his own

purposes and shortly afterwards he became bankrupt. I cite these passages from the judgment of Jessel MR in the Court of Appeal:

> "It seems to me that on general principles a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. In other words, a trustee is not bound because he is a trustee to conduct business in other than the ordinary and usual way in which similar business is conducted by mankind in transactions of their own." (loc cit at pp.739,740)
>
> My view has always been this, that where you have an honest trustee fairly anxious to perform his duty and to do as he thinks best for the estate, you are not to strain the law against him to make him liable for doing that which he has done and which he believes is right in the execution of his duty, without you have a plain case made against him. In other words, you are not to exercise your ingenuity … for the purpose of finding reasons for fixing a trustee with liability; but you are rather to avoid all such hypercriticism of documents and acts and to give the trustee the benefit of any doubt or ambiguity which may appear in any document, so as to relieve him from the liability with which it is sought to fix him.
>
> I think it is the duty of the Court in these cases where there is a question of nicety as to construction or otherwise to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons for fixing him with any liability upon the contract." (loc cit at p.746)

51. This statement of principle and the courts' approach was, I think, in accordance with the judgments of the other members of the Court of Appeal, Lindsey and Bowen LJJ and endorsed in the House of Lords. For example Lord Blackburn (loc cit at p.19) referred to the "general rule that a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary man of business would take in managing similar affairs of his own"; and he identified this exception to it:

> "… a trustee must not choose investments other than those which the terms of his trust permit, though they may be such as an ordinary prudent man of business would select for his own money; and it may be that however usual it may be for a person who wishes to invest his own money, and instructs an agent, such as an attorney, or a stock broker, to seek an investment, to deposit the money at interest with the agent till the investment is found, that is in effect lending it on the agent's own personal security, and is a breach of trust."

52. The importance attaching to the ordinary way in which transactions are done was made clear in both the Court of Appeal and the House of Lords. The transaction had

involved the trustee believing the representation on the face of the bought-note and paying the broker before receiving the securities, and in the House of Lords, Lord Selborne LC said (loc cit at p.12) that "the payment to the broker, if made comfortably within [the rules and usage of the London Stock Exchange] was no breach of trust and not at the [trustee's] peril". The yardstick of the ordinary course of business to test whether the trustee was in breach of trust echoes the judgments in the Court of Appeal: Lindley LJ said (loc cit at p.760):

> "If the ordinary course of business had been that the securities should be exchanged for the cheques, of course it would be different; but that is not the ordinary course of business. You pay the broker and he gets you the securities. He sees to all that. That is the ordinary course of business."

Bowen LJ said at (p.765):

> "Assuming that [the trustee] was right, in employing a broker, was he right in paying over so large a sum as £15,000 to him? Now a payment of that sort would be wise or unwise, I should say, according to whether there existed or did not exist a reasonable necessity for it, having regard to the ordinary course of business."

53. These principles cannot be doubted (and are unaffected by the trustee's statutory power in section 23 of the Trustee Act, 1925 to employ and pay agents without responsibility for their defaults if they were employed in good faith). I have cited <u>Speight v Gaunt</u> at some length out of respect for Mr Benson's argument. He submitted that its proper application in this case is that, if RA Legal were following usual and proper procedures in advancing the funds to Sovereign as they did, they were not in breach of trust. They did not retain possession of the trust property, but they paid it away for the purpose of completion of the transaction and this was not in itself a breach of trust, any more than a trustee who loses possession of the trust property because it is stolen or destroyed is necessarily in breach. The contention that RA Legal were in breach of trust reflects, he argued, a failure to recognise the distinction, the importance of which was emphasised by Lord Browne-Wilkinson in the <u>Target Holdings</u> case, "between the basic principles of trust law and those specialist rules developed in relation to traditional trusts", which might not apply to trusts that are recognised in other transactions in which property is held on trust "as but one incident of a wider commercial transaction involving agency", where "the purpose of [the] transaction is to achieve the commercial objective of the clients, be it the acquisition of property of the lending of money on security" (loc cit, at p.435H to p.436B). Thus, consistently with the approach of Millett LJ in the <u>Bristol and West Building Society</u>, (loc cit at pp.15H,16A), even if RA Legal acted in breach of their instructions, the court should "not willingly treat such conduct as involving a breach of trust or misapplication of trust money unless compelled by authority to do so …".

54. I see a good deal of force in Mr Benson's argument and it was presented attractively, but is it consistent with authority? With regard to the first argument in the <u>Markandan</u>

case (I revert to the second argument below), Mr Benson recognised that the decision could not be distinguished on the basis that Markandan were dealing with fraudsters posing as solicitors, whereas RA Legal were dealing with genuine (albeit fraudulent) solicitors. However, he argued that in the Markandan case the solicitors' submission in the Court of Appeal (see loc cit at para 37) was that the release of money for the purpose of completing the purchase brought the trust to an end because there had been completion. They did not argue that, although there was no "completion" within the meaning of the handbook, in releasing the funds they acted within their authority under the trust, and were exercising powers given to them, to bring the transaction to completion, and that, provided they acted in accordance with proper conveyancing standards, they were not in breach of trust. The Court of Appeal was wrong to think that, having decided there had not been completion, the only question was whether the trustees should be relieved of liability under section 61, but this was because nothing else was argued. If "Nothing will come of nothing", I should, as Lear invited Cordelia, allow RA Legal to "speak again", and entertain the new argument, even if (for this is the implication) it means that the defendant solicitors in other cases have been singularly supine in not overlooking it.

55. Mr Benson's submission about the <u>Davisons</u> case is similar. The decision of the Court of Appeal was about whether what the solicitors had done (paying the money over in the circumstances that they did) discharged the trust: Morritt C said at paragraph 40 of his judgment (cited at para 48 above) was that it had not. Mr Benson does not contend otherwise, but it does not follow, he argued, that when they so acted they were not acting in accordance with the authority that they were given as trustees, so that, if they acted in accordance with generally accepted conveyancing practice, they would not have been in breach of their duties as trustees.

56. I cannot accept this submission or this analysis of the cases. Mr Benson's argument depends on him showing that what the solicitors did was by way of exercising authority conferred on them by the terms of the trust. The Court of Appeal in each case decided that they were not, as a later Court of Appeal decision puts beyond doubt: the two cases were examined in detail by Patten LJ in <u>AIB Group (UK) plc v Mark Redler & Co</u> (cit sup), which concerned a transaction to re-mortgage a property rather than to acquire it, and his analysis of them (with which Arden and Sullivan LJJ agreed and which is binding on me) is that the solicitors did not have authority to pay away the trust funds. Thus, he said this of the <u>Markandan</u> case at paragraph 29:

> "When the defendant's solicitors paid the mortgage advance to the account nominated by the vendor's purported solicitors they received none of the documents referred to above in return and the lender had of course no charge or other security over the property. It therefore sued the solicitors for breach of trust in paying away the mortgage advance *without authority*. Its case was that under the terms of the solicitor's instructions the money was held by them on trust until completion and that completion had never taken place." (emphasis added).

The submission was upheld.

57. At paragraph 40, Patten LJ said this of the decision of the Court of Appeal in Davisons and in particular of paragraph 36 of Morritt C's judgment:

> "…counsel for Davisons raised a new argument in relation to the judge's finding that there had been a breach of trust. They contended that on a fair reading the CML Handbook as a whole (and in particular s.3 which deals with the need for the solicitor to follow the Law Society's guidance and regulations on mortgage fraud and money-laundering) the solicitors were authorised to pay the purchase price to Rothschild Small Heath prior to completion, notwithstanding the trust imposed by s.10.3.4 of the CML Handbook. The Court of Appeal rejected this submission on the basis that there is nothing in s.3 which by implication confers any authority on the solicitor to release the funds before completion and the same argument has not been advanced on this appeal."

58. Accordingly, here too the ratio of the decision (as stated at para 40 of the judgment) was that the solicitors had no authority to release the trust funds in circumstances in which they did.

59. This is not a case in which the trustees dealt with the trust asset under a power in the trust. As in the Markandan case and the Davisons case, the trust property was paid away without receiving genuine documents to complete transaction, and this is outside the authority conferred by paragraph 10.3.4 of the handbook. The solicitors were in the position of trustees who made an unauthorised investment and the consequences, described by Lord Browne-Wilkinson in the Target Holdings case (see para 49 above), follow. The conclusion is consistent with Speight v Gaunt. There the trustee was not obliged to retain the trust moneys: he was entitled to invest them. Here the trust required RA Legal to retain the fund until the trust was brought to an end by completion. If before completion they had lost the trust asset, the fund, through no fault of theirs and having taken all proper precautions, they would not be liable. However, this is not what happened because here, as in the Markandan and Davisons cases the solicitors deliberately transferred the funds out of their control. They released them to persons who purported to be acting for the vendor. They did so because they thought that there was to be completion and the trust would be ended, but they were wrong about that. The consequence of that is that they deliberately released the trust asset before the trust ended and so were in breach of trust.

60. I return to the fact that the trust funds (together with the money from Mr Vadika) were transferred to Sovereign on 28 July 2009. It was a comparable transfer before the date of intended completion that gave rise to the second argument in Markandan. In that case, as Rimer LJ explained at paragraph 53 of his judgment (set out at para 47 above), Markandan acted breach of trust in parting with the funds in exchange for what they believed to be but was not a solicitor's undertaking because the fraudsters who purported to give it were not solicitors at all. The question whether otherwise they would have acted without authority in releasing the funds did not arise on the facts of that case.

61. In his judgment in the AIB Group (UK) plc case (loc cit), Patten LJ refers to the second argument in the Court of Appeal in the Markandan case as follows (at para 32):

> "But [Rimer JL] also affirmed the decision of the judge, who had held that release of the mortgage advance was unauthorised simply because the money had been paid out without the solicitors receiving either the documents of title they had been promised or a solicitor's undertaking to provide them. There would therefore have been a breach of trust in that case even if the transaction had been a genuine one."

62. Here the position is different. The fraudulent document, the transfer form with the forged signature of Ms. Slater, had already been sent to RA Legal on 21 July 2009. The undertaking to provide discharge of the Mortgage Express charge was given by genuine solicitors. The position is not, to my mind, covered by the decision in the Markandan case, and it is not clear to me that RA Legal were in breach of trust on 28 July 2009. After all (as I suggested in argument) it was not said and could not have been said that RA Legal had to keep the funds in cash: they were paid into a bank account and the trust property was by way of a chose in action against RA Legal's bank. Abbey transferred the funds into RA Legal's account with Barclays but I cannot accept that they would have been in breach of trust if they had transferred the funds to another client account at another bank. I see no principled reason to distinguish that position from them transferring the funds to Sovereign, who appeared to be a reliable creditor who were to hold the funds to their use. I do not need to decide whether the transfer on 28 July 2009 in itself amounted to a breach of trust. It suffices that on 29 July 2009 RA Legal released Sovereign from their obligation to hold the money to their order, against documents that were forgeries. This, in my judgment, was tantamount to transferring the moneys away without authorisation, and I put my decision that RA Legal acted in breach of trust on the basis of their conduct on 29 July 2009, rather than their conduct on 28 July 2009.

63. In his final submissions Mr Mendoza came close to arguing, I think, that RA Legal were in breach of trust earlier when they did not return funds to Abbey on 17 July 2009 when completion did not take place or immediately thereafter, having taken no instructions from Abbey to keep them although completion was delayed. That suggestion was new and no such case had been pleaded. I can deal with it briefly. I am not persuaded that this amounted to a breach of trust, rather than a breach of the terms of the retainer. Clear words would have been required to establish that the administrative arrangements' affected the terms of the trust: see the AIB Group case (loc cit) at paragraph 19. I could not conclude that this amounted to a breach of trust (even if the allegation had been pleaded) without having in evidence part 2 of the handbook to which paragraph 10.6 referred.

64. In any case I have concluded that Abbey would not have withdrawn the mortgage offer because completion was delayed, and in the end RA Legal would have remitted the funds to Sovereign. This complaint had no relevant causative effect, and there resulted from it no compensatable loss; see the Target Holdings case. Mr Benson

did not argue that loss did not result from the breach of which, as I have concluded, RA Legal were guilty.

Section 61 of the Trustee Act, 1925

65. Section 61 of the Trustee Act 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 …, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust …, then the Court may relieve him either wholly or partly from personal liability for the same".

66. Thus three conditions must be satisfied before the Court may exercise its discretion to grant relief, although the third, if satisfied, in reality means that there would be no room for relief to be refused. The first, that the trustee acted honestly, is not in dispute in this case. The issues are (i) whether RA Legal acted reasonably within the meaning of section 61, and (ii) whether they ought fairly to be excused for the breach of trust.

67. In Nationwide Building Society v Davisons at first instance (unreported, 24 April 2012) Ms Catherine Newman QC, sitting as a High Court judge of the Queen's Bench Division, considered what Rimer LJ had said in the Markandan case (at paras 60 and 61) about the condition that the trustee has acted reasonably, referring to solicitors performing their role "with exemplary professional care and efficiency", and to "the careful, conscientious and thorough solicitor, who conducts the transaction by the book and acts honestly and reasonably in relation to it in all respects but still does not discover the fraud". It had been submitted to her that Rimer LJ meant that for the section 61 discretion to be engaged a high standard of honest and reasonable conduct is required, but she was confident, she said, he intended "no gloss on the statutory provision". However Ms Newman refused relief under section 61 to Davisons. Her decision was reversed by the Court of Appeal but her observations about Rimer LJ's judgment were not criticised, and I endorse them. In the Court of Appeal in Davisons Morritt C said this (at para 48): "The section only requires [the solicitor] to have acted reasonably. That does not … predicate that he has necessarily complied with best practice in all respects. The relevant action must at least be connected with the loss for which relief is sought and the requisite standard is that of reasonableness not of perfection." Mr Benson relies upon this both in relation to the standard of conduct required of solicitors in the position of RA Legal and because Morritt C made clear that shortcomings that are unconnected with the loss are irrelevant when deciding whether a solicitor, or other trustee, has acted reasonably.

68. This approach is similar to that adopted in cases concerning section 727(1) of the Companies Act 1985, which provides that

> "If in any proceedings for negligence, default, breach of duty or breach of trust against an officer of a company or a person employed by a company as auditor (whether he is or is not an officer of the company) it appears to the court hearing the case that that officer or person is or may be liable in respect of the

> negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as it thinks fit."

69. In Barings Plc v Coopers & Lybrand, [2003] EWHC 1319 (Ch) Evans–Lombe J observed that this relieving provision is in similar terms to that applicable to trustees. He directed himself that auditors may have acted reasonably for the purpose of the section even though they were held to have acted negligently if their negligence was "technical and minor in character" and not "pervasive and compelling" (loc cit at para 1133). Of the proposition that a company officer or auditor may have behaved reasonably despite being negligent, Hoffman LJ observed in Re D'Jan of London Ltd, [1993] BCC 646, 649A that "It may seem odd that a person found to have been guilty of negligence, which involves failing to take reasonable care, can ever satisfy a court that he acted reasonably. Nevertheless, the section clearly contemplates that he may do so and it follows that conduct may be reasonable for the purpose of sec. 727 despite amounting to lack of reasonable care at common law". Of course section 61 of the Trustee Act, 1925 does not specifically refer to the trustees being liable for negligence, but I agree with Evans-Lombe J that this is not a reasoning for giving a different interpretation or application to "reasonably" in the two statutes. The expression "pervasive and compelling" derives from the judgment of Ollsen J in Maelor-Jones v Heywood-Smith, (1989) 54 SASR 285, 294, which was about a corresponding Australian statutory provision and in which he said this: "Whilst it may well be that, in a particular situation, the very circumstances which gave rise to a finding of negligence may be so pervasive and compelling as also to demand a conclusion that a person had acted unreasonably for the purposes of the exculpatory section nevertheless that section is to be taken to directing its attention to a much wider area of concern – both in point of scope and time frame".

70. I conclude that RA Legal acted reasonably for the purposes of section 61 of the Trustee Act 1925. It is sufficient for this conclusion that, as I have found, none of the criticisms made of the RA Legal were connected with Abbey's loss, but I also conclude that they do not amount to fault on the part of RA Legal that was sufficiently serious or involved such a departure from ordinary and proper standards as to cut them off from the court's discretion to relieve them of liability.

71. I must therefore consider whether RA Legal ought fairly to be excused for their breach of trust and the court should exercise its discretion to relieve them of liability. Mr Mendoza submitted, and I accept, that the criticisms of RA Legal can be taken into account even though they did not cause Abbey's loss and was not connected with it. But this consideration is still relevant. This is, to my mind, clear from Morritt C's judgment in Davidson, in which he said this (at para 61):

> "Little argument was directed to the exercise of the discretion if we found that Davisons had acted honestly and reasonably. This is not surprising. The loss sustained by Nationwide was caused by the fraud of an unconnected third party. Even if

> Davisons had insisted on answers to requisitions on form TA13 and on separate written undertakings it is probable that the imposter would have complied, the matter would have proceeded to apparent completion by post and the imposter would have disappeared with the balance of the purchase money. The lapse from best practice, if any, did not cause the loss to Nationwide. Given that Mr Wilkes acted both honestly and reasonably I can see no ground on which Davisons should be denied relief from all liability. I would so order."

72. For essentially the same reasons it seems to me that it is fair to excuse RA Legal's breach of trust. The law generally (although not invariably) leans towards confining the responsibility of professional people to a duty to take reasonable care their liability for breach of that duty, and in particular does not readily impose on them responsibility for loss resulting from the fraud of others: see Platform Funding Ltd v Bank of Scotland Plc, [2008] EWCA Civ 930 para 48 per Rix LJ. This, to my mind, confirms that it would fair to excuse RA Legal's breach of trust or to grant them relief from all liability for it.

Damages claims

73. For the reasons that I have stated, I conclude that such criticisms as were properly made of RA Legal in relation to this transaction were not an effective cause of Abbey's loss. Abbey really accepted that, if the claim for breach of trust does not succeed, they cannot expect to succeed in their damages claim. They were right to do so. I dismiss the damages claims.

Conclusion

74. I therefore conclude that RA Legal acted in breach of trust in releasing to Sovereign the funds advanced by Abbey, but I relieve them of all liability in respect of their breach. I dismiss the damages claims.