Neutral Citation Number: [2016] EWHC 3316 (Ch)

Case No: HC-2015-002013

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2016

Before :

Mr David Railton QC
(sitting as a Deputy High Court Judge)

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Between :

DREAMVAR (UK) LIMITED **Claimant**

- and –

(1) MISCHON DE REYA (a firm)

(2) MARY MONSON SOLICITORS LIMITED **Defendants**

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David Halpern QC (instructed by **Healys LLP**) for the **Claimant**
Jeremy Cousins QC and Peter Dodge (instructed by **Triton Global Limited t/a Robin Simon**) for the **First Defendant**
Ben Patten QC (instructed by **BLM LLP**) for the **Second Defendant**

Hearing dates: **1, 2, 4, 7 and 8 November 2016**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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DEPUTY JUDGE DAVID RAILTON QC

David Railton QC (sitting as a Deputy High Court Judge):

Introduction

1. In September 2014 a Mr David Haeems was the registered owner of a freehold mews house at 8 Old Manor Yard, Earl's Court, London SW5 ("the Property"). The Property was unoccupied, and unencumbered. On 17 September 2014 a fraudster impersonating Mr Haeems purported to sell the Property to the Claimant, Dreamvar (UK) Limited ("Dreamvar"), for £1.1 million. In exchange for the purchase price, the fraudster gave Dreamvar a forged transfer document. The fraud was discovered in November 2014, before Dreamvar had been registered as the owner of the Property. By that time the fraudster, and the money he received from Dreamvar, could no longer be found.

2. By this action Dreamvar seeks to recover the loss it has suffered as a result of this fraud from the solicitors instructed by it on the purported purchase, Mischon de Reya ("MdR"), the First Defendant, and also from the solicitors instructed by the fraudster, Mary Monson Solicitors Limited ("MMS"), the Second Defendant. There is no suggestion that either firm was in anyway complicit in any part of the fraud, and it is common ground that they both acted honestly and innocently in carrying out their respective roles in the purported transaction.

3. Dreamvar's claims against MdR are for negligence (in contract and in tort) and for breach of trust. It will be necessary to consider the particular claims made in greater detail later, but in summary terms, Dreamvar's claim in negligence is put in two ways. The first is based on what is said to be the failure by MdR to identify a number of features relating to the transaction which individually or collectively should have alerted it to there being a real risk of fraud, and then failing to advise Dreamvar accordingly. MdR denies that there were any features of the transaction which should have alerted it to an increased risk of fraud, or that it was under any obligation to advise Dreamvar that there was such a risk. It also does not accept that even if a solicitor acting reasonably had advised Dreamvar that there was a risk of fraud, such advice (in the terms in which it could reasonably have been given) would have led to Dreamvar withdrawing from the transaction, or otherwise avoiding the consequences of it.

4. The second way in which the claim in negligence is put against MdR, which was introduced by way of amendment at the start of the trial, is an alleged failure by MdR to seek an undertaking from MMS that it had taken reasonable steps to establish its client's identity. In making this amendment, Dreamvar made clear that it did not assert that the seeking of such an undertaking represented standard conveyancing practice in 2014, or that there was anything in the public or professional domain that alerted solicitors acting for purchasers to the need to seek such an undertaking. It nonetheless asserts that conveyancing practice was unreasonable in failing to provide such protection. MdR contends that this allegation is unsustainable, in that in not seeking such an undertaking it was following established conveyancing procedure, to which the leading elements of the profession had directed their minds, and that accordingly it cannot be criticised for not doing so.

5. The claim against MdR for breach of trust starts with the common ground that the purchase monies, when paid by Dreamvar to MdR, were held on trust by MdR. Dreamvar contends that MdR was only authorised to release these purchase monies on

completion of the purchase of the Property, which in this context meant a genuine completion of a genuine purchase. In this case there was no genuine completion, or genuine purchase, and accordingly in releasing the purchase monies to the fraudster MdR was (it contends) in breach of trust. MdR's case is that it was authorised by Dreamvar to release the purchase monies in exchange for undertakings from the vendor's solicitors (MMS) given in accordance with standard conveyancing practice, and that accordingly it was not in breach of trust. In the alternative, should it be held to have been in breach of trust, MdR seeks relief under s.61, Trustee Act, 1925, on the grounds that it acted honestly and reasonably, and ought fairly to be excused.

6. Dreamvar's claims against MMS are for breach of warranty of authority, breach of trust and breach of undertaking. The claim for breach of warranty of authority is again put in two ways. The first is that in acting for the person who was purporting to sell the Property, MMS warranted that it had the authority of the registered owner of the Property, i.e. the real Mr Haeems. If such a warranty were given, it is common ground that it was broken, in that MMS did not in fact have the real Mr Haeems' authority to do anything, but had been instructed only by the fraudster, purporting to be Mr Haeems. MMS however disputes that any such warranty was given, and asserts that the only warranty was that MMS had a client or principal, for whom it was acting. That warranty was not broken, because it did indeed have a client, albeit not (as matters turned out) one who was the registered owner of the Property, or able to sell it to Dreamvar.

7. The second way in which the claim for breach of warranty of authority is put against MMS is that it warranted that it acted for the person claiming to be Mr Haeems, the registered owner of the Property, and that it had exercised reasonable care and skill in establishing his identity as such. This alternative case is based on the contention that in conveyancing practice the purchaser's solicitor expects and relies on the vendor's solicitor to carry out appropriate due diligence in relation to its client, including the necessary money laundering checks. If this warranty were given, it was broken, in that – as set out further below – MMS has admitted that it did not undertake such identity checks on the purported vendor as would have been taken by a competent solicitor. MMS however contends that no such warranty was given, and that in any event, even if reasonable care had been exercised, the chances were that the fraud would still have occurred.

8. The claim for breach of trust against MMS is based on the contention that in receiving the purchase monies from MdR (on behalf of Dreamvar), MMS held the monies on trust for Dreamvar, and was only authorised to part with them on a genuine completion of a genuine transaction, which never happened. MMS disputes that it received the monies on trust at all, and further contends that even if that were wrong, it was in any event authorised to release them on completion, whether or not the completion was a genuine completion of a genuine sale. In this connection MMS relies heavily on the terms of the Law Society Code for Completion by Post (2011 edition) (the "Code") which MdR and MMS agreed would apply. If, contrary to MMS's case, it was in breach of trust in parting with the purchase monies, MMS (by reason of its admitted lack of competence in checking its client's identity) does not contend that it should be relieved of liability under s.61.

9. The claim for breach of undertaking was originally raised by MdR against MMS as part of its cross-claim for contribution from MMS. On the last day of the trial, Dreamvar applied to amend to adopt the claim, and as the amendment raised no new issues of substance, MMS did not object to it. It is accordingly the third claim by Dreamvar against MMS. It is based on the terms of paragraph 7(i) of the Code, which it is said amount to an undertaking by MMS to have the authority of the real Mr Haeems, i.e. the registered owner of the Property, to receive the purchase monies on completion. MMS again disputes that the Code has that effect, and contends that the undertaking required and given by paragraph 7(i) refers simply to its client.

10. In addition to the claims by Dreamvar against MdR and MMS, there are also claims by MdR against MMS, whereby MdR seeks an indemnity or contribution from MMS in respect of any liability it might be held to have to Dreamvar. These claims are in part based on the provisions of the Civil Liability (Contribution) Act, 1978, whereby if MMS and MdR are liable to Dreamvar in respect of the same damage, the Court may order contribution between them in such amount as may be found to be just and equitable having regard to the extent of their respective responsibility for the damage in question. MdR also contends that MMS was in breach of the express or implied terms of the agency between them created by the adoption of the Code, and was in breach of a duty of care in tort owed by it as agent, and is accordingly liable in damages to MdR in the amount of any liability MdR may have to Dreamvar. For its part, MMS in turn seeks a contribution from MdR under the 1978 Act should both it and MdR be found liable to Dreamvar.

11. In support of its position on each of the claims made against it, MMS relies heavily on a recent decision of Mr Robin Dicker QC, sitting as a Deputy High Court Judge, in the case of *P&P Property Limited v Owen White & Catlin LLP, Crownvent Limited t/a Winkworth* [2016] EWHC 2276 (Ch). In broad summary the case concerned similar claims on similar facts against a vendor's solicitor (for breach of warranty of authority, breach of trust, and breach of undertaking), as those which arise here. Mr Dicker QC concluded that the vendor's solicitor had no liability to the defrauded purchaser in such circumstances.

12. Mr Ben Patten QC, who appeared for MMS before me (and for the successful vendor's solicitor in *P&P*) contends that I am bound by Mr Dicker QC's decision, and as a result that the claims against MMS must be dismissed. Mr Halpern QC, who appeared for Dreamvar, and Mr Cousins QC who appeared (with Mr Dodge) for MdR, contends that Mr Dicker QC's decision was wrong, and that I should not follow it. It will accordingly be necessary to consider the judgment in *P&P* in more detail later.

The facts

13. There is little dispute between the parties as to the underlying facts. Dreamvar was incorporated on 25 March 2013, and is, and was in 2014, a small residential property development company. Its sole shareholder and director is Mr Erman Vardar. Mr Vardar provided three witness statements in this matter, and gave oral evidence. He was born in Turkey on 22 September 1990, and was 23 at the time of the events the subject of these proceedings. He lived in Ankara until September 2012, when he moved to London. He had received a BA in Business Management from Bilkent University in Ankara, and had undertaken two business internships in Turkey, but

otherwise had no business experience before moving to England. Between January 2013 and July 2015 he was studying full-time for an MA in International Marketing at Regent's College in London. He believed property development would be profitable, and set up Dreamvar as a sideline business while studying for his masters degree.

14. Between March 2013 and September 2014 Mr Vardar was interested in purchasing a number of residential properties in London on behalf of Dreamvar. There appear to have been 9 such properties where Mr Vardar's interest was such that he instructed MdR to act for Dreamvar in relation to them, although only two proceeded to completion. In addition, Mr Vardar also instructed MdR to act on behalf of members of his family in their purchase of a family home in March 2014. Mr Vardar chose MdR because of its undoubted reputation and expertise in real estate matters. The individual he primarily dealt with at MdR was Ms Helen Curtis-Goulding, a solicitor of some 7 years experience in residential conveyancing. Ms Curtis-Goulding also provided three witness statements in this matter, and gave oral evidence.

15. Mr Vardar first learned about the Property when he was contacted on about 1 September 2014 by Ms Melody Yousefi of the estate agents, Douglas & Gordon ("D&G"). Mr Vardar knew Ms Yousefi from a previous introduction she had made to him in connection with another property in April 2014. D&G are a well known and reputable firm of estate agents, who have been carrying on business in west London for nearly 60 years. Like MdR and MMS, there is no suggestion that D&G were in any way complicit in the fraud.

16. Ms Yousefi informed Mr Vardar that D&G had been instructed by the owner of the Property, who wanted a quick sale. She said that the seller was getting divorced and needed to complete the sale in three days. She further said that the Property had been rented out, but that the owner was now in a position to sell it with vacant possession. Because of the need for a quick sale, D&G were only offering the Property to property developers. The asking price was £1.1 million. Mr Vardar was immediately interested in the opportunity, and looked round the Property on 1 September 2014. The Property was unoccupied and unfurnished. He considered it to be a good opportunity, and later the same day made an offer of £1 million.

17. After reverting to her client, Ms Yousefi informed Mr Vardar that she had received an offer of £1.1 million from another developer, who had demonstrated that he had available funds, and that in order to secure the Property, Mr Vardar would have to at least match the competing offer. After considering the matter further, Mr Vardar called Ms Yousefi back. He increased his offer to £1.1 million, and confirmed that he had sufficient funds to complete the purchase. He was later informed by Ms Yousefi that his offer had been accepted. Shortly afterwards, he emailed Ms Curtis-Goulding instructing her firm to act for Dreamvar in the purchase. He told her that "*the seller wants it to be sold ASAP before he files or gets filed a divorce*", that he (Mr Vardar) wanted "*to exchange and complete on Wednesday*" (i.e. 3 September 2014), and that he knew that "*this will not be enough time to do some necessary researches but I am willing to take that risk*". He continued: "*Please advise if this is possible and clarify what risks I am taking (which searches you are not going to be able to make due to time constraint)*".

18. The next day (2 September 2014) Mr Vardar informed Ms Curtis-Goulding by e-mail that he had checked the Property himself and that it was "*vacant and physical defects is not present*". He added that "*the only vital things are speed and the possibility of the wife putting anything on the title*". On the same day, D&G sent Ms Curtis-Goulding a Memorandum of Sale, which gave the name of the vendor as "*Mr David Haeems*" and stated that his solicitors were MMS. The telephone and fax numbers given for MMS had a Manchester area code, and its DX exchange was in Swinton, Manchester. Ms Curtis-Goulding, in accordance with her normal practice, carried out a search on the Law Society's "*Find a Solicitor*" online function, and confirmed that MMS existed and was regulated by the Law Society. As well as its head office in Salford, MMS also had offices in Birmingham and London.

19. The following day (3 September 2014) Ms Curtis-Goulding confirmed to Ms Slater of MMS by e-mail that she was instructed on behalf of Dreamvar in the purchase of the Property. Ms Slater's response to Ms Curtis-Goulding said that she (Ms Slater) had not yet received *"my client's ID or formal instructions in writing nor the signed and completed Protocol forms from him*". She said that until those were returned she would not be able to send Ms Curtis-Goulding a contract pack. She continued, *"My understanding from my colleague's initial discussions with our client is that he is keen to complete quickly, but not as quickly as you suggest*".

20. On the same day Ms Curtis-Goulding sent Mr Vardar a retainer letter and terms of business. Although addressed to Mr Vardar, there is no dispute that MdR's client was in fact Dreamvar. The retainer letter set out the scope of the work which MdR would carry out for Dreamvar. These included *"(c) carrying out a full review of the supporting papers with the contract, including all title matters relating to the Property and search results, and raising additional enquiries with the Seller's solicitors and public authorities; (d) preparing a comprehensive report on title explaining to you all the title matters and relevant property information relating to your purchase of the Property"*. The retainer did not deal expressly with the terms on which MdR would hold or be authorised to release any purchase monies provided to it by Dreamvar.

21. Nothing further was heard from MMS until 11 September 2014, when Ms Curtis-Goulding received a letter dated 10 September 2014 from Ms Slater containing (amongst other things) a draft contract and freehold office copy entries, as well as a property information form, a fittings and contents form, and a disclosable overriding interest questionnaire (each of which forms had been signed on the face of it by Mr Haeems on 6 September 2014). The Proprietorship Register showed "*David Ralph Haeems*" to have been registered as the freehold proprietor on 19 January 2000 with his address being that of the Property. The Charges Register contained no reference to any mortgage loan. The draft contract defined the "*Seller*" as "*David Ralph Haeems of Flat C, 64 Broadfield Road, London, SE6 1NG*".

22. Prior to sending its letter dated 10 September 2014 to MdR, MMS had sent a client care letter to its client, which had (amongst other things) asked for documents to verify his identity and address. The documents sent to it by its client on 9 September 2014 in response to this request were copies of a driving licence and TV licence, which had been verified on their face on 5 September 2014 as true and accurate copies by a Mr Farooq Zoi, a Solicitor and Commissioner for Oaths.

23. It appears from later correspondence with Mr Zoi that he was asked to verify the documents when he was (by chance) in the waiting room of Dennings, a firm of solicitors in Barking, who were acting for the supposed Mr Haeems on another matter, and who feature later in the story. There are some oddities on the face of the driving licence, in that it appears to have been issued only shortly before (on 28 August 2014), and was valid only for just over 3 years, but it did give the address as the Broadfield Road address appearing in the draft contract. Further, a TV licence was not a source which the Law Society's Anti-Money Laundering Practice Note identified as being useful for the verification of UK based clients. No other steps appear to have been taken by MMS to verify its client's identity. No-one from MMS at any time met its client.

24. No witness from MMS was called to give evidence before me. As a result, the scrutiny or consideration that was given to these documents by anyone within the firm, or to MMS's anti-money laundering obligations generally, is unknown. As mentioned earlier, it is however accepted by MMS that it did not act competently in accepting these documents as adequate proof of its client's identity, and that MMS should have insisted that its client attended for a meeting at its London office with proof of identity and a proof of address.

25. Having reviewed the package received from MMS, on 12 September 2014 Ms Curtis-Goulding made some minor amendments to the draft contract, and by email of the same day raised some further enquires of MMS. As her email recorded, MdR's instructions at that time were to proceed to exchange of contracts at the earliest possible opportunity, and it was common ground that Mr Vardar (having identified what he considered to be a good opportunity), was pressing for early exchange and completion. The enquiries raised included seeking confirmation as to "*whether or not throughout your client's ownership he has ever been asked to make any payments towards the maintenance or repair of [the access roadway to the Property]*", and "*whether or not there is a management company in existence with respect to the houses adjoining the roadway and if so whether or not your client has a share in this*".

26. Ms Slater replied to these enquiries on 15 September 2014 saying that MMS's client "*contributes yearly but is unable to remember the annual charge*", and "*states that there is a management company which takes care of Old Manor Yard – servicing and maintenance of the electric gates and lighting. He has not provided any further detail*". MMS further observed that its client would need to post signed conveyancing documents back to her "*as the conveyancing department is in our head office in Salford*". It was apparent from this, and from a further email sent by Ms Slater the following day, that it was not envisaged that MMS's client would sign the relevant documents in a face to face meeting with Ms Slater.

27. On the same day (15 September 2014), Ms Slater sent Ms Curtis-Goulding the Completion Information and Undertakings, signed by MMS as the seller's solicitor. This document confirmed that the Law Society's Code for Completion by Post would be adopted. The only documents listed to be provided at completion were "*TR1 Executed by Seller*", and "*Originals of any relevant copy documents relating to the Property supplied during the transaction*".

28. On the following day (16 September 2014) Ms Curtis-Goulding sent Ms Slater a draft transfer deed, together with requisitions on title. A particular concern Ms Curtis-Goulding had was that the title stated that the Property was subject to rights of way arising from leases of 2 to 12 Old Manor Yard, and so she asked to see at least one lease to see what the position was. Ms Slater replied to her later that day, saying that she had spoken to the Land Registry who had checked their files, and had no copies of the leases, adding that all the properties were now freehold titles, so it seemed likely that the leases were not appropriately dealt with at HMLR when the leasehold titles were closed. She nonetheless offered to ask her client to provide indemnity insurance for missing documents if Ms Curtis-Goulding remained concerned about the point. In a separate email, Ms Slater also approved the transfer, reporting to Ms Curtis-Goulding that she was sending it "*and the contract to my client by email for his signature and return*", and adding that she hoped that "*the documents will be back with me tomorrow, in which case I will be ready to exchange and complete then*".

29. Also on 16 September 2014, Ms Curtis-Goulding sent Mr Vardar MdR's Report on Title. This was based on MdR's standard form report, but adapted by Ms Curtis-Goulding to deal with the particular circumstances relating to the Property. In compiling it she reviewed the transaction as a whole. The Report confirmed that David Ralph Haeems was the current owner on the Proprietorship Register. It dealt with the replies to enquiries that had been received from MMS, pointing out the risk that Dreamvar may need to contribute to the costs of the managing agents in maintaining the electric gates and lighting. As Ms Curtis-Goulding explained, she did not consider the question about contributing to the costs of maintenance or repair of the roadway to be a problem, in that she had satisfied herself that the part of the roadway in front of each property in the mews was part of the title of the relevant property.

30. In paragraph 4 of the Report, Ms Curtis-Goulding specifically flagged to Dreamvar that MdR had not yet received back the Local Authority Search, and that "*the risk involved with this is that should the search reveal any adverse matter such as a breach of planning law, you would be stuck with this and remedying this in the future*". It is common ground that Mr Vardar was untroubled by that risk, and was willing to take it. The Report dealt with various matters relating to completion, and concluded on p.14 by saying: *"Subject to any matters specifically referred to in this report, we are of the opinion that upon completion of the purchase of the Property and registration at the Land Registry you will obtain a good and marketable title to the Property"*. It is common ground that MdR did not identify to Mr Vardar, either in the Report, or elsewhere, the risk of identity fraud, i.e. the risk that the purported seller might not in fact be the Mr Haeems who was the registered owner of the Property, or the consequences for Dreamvar if that were to happen.

31. Prior to receiving the Report on Title, Mr Vardar had emailed Ms Curtis-Goulding on 16 September 2014 making it clear that he wanted to exchange that day, even if completion could not take place then. As he said, he was in a position to send the funds then. Dreamvar had borrowed £700,000 from Mr Vardar's father on 2 September 2014 for the purpose of acquiring and developing a residential dwelling, at an interest rate of 10% annually for the duration of the loan. Although it was not suggested that MdR was aware of it at the time, this loan was the source of the bulk of the purchase monies. The full amount of the purchase monies was subsequently transferred by Mr Vardar to MdR, and was held by MdR in its client account.

32. Later on 16 September 2014 Mr Vardar attended at MdR's offices to sign the contract and transfer deed. He met Ms Curtis-Goulding, and it is common ground that there was an exchange between them concerning the risk to Dreamvar in relation to the title to the Property. In his witness statement, and in parts during his oral evidence, Mr Vardar suggested that the question he raised with Ms Curtis-Goulding was a general one as to whether there was any risk to Dreamvar obtaining good title to the Property. As he put it in his witness statement, in words which I am satisfied he would not have used at the time, he said he "*expressly asked her whether there was any risk to the Claimant obtaining clear and unencumbered title to the Property*". Ms Curtis-Goulding's recollection of the meeting is that she was asked about the risk arising out of Mr Haeems' apparently impending divorce only, and she denies that she was asked any wider question.

33. Having heard both Mr Vardar and Ms Curtis-Goulding give evidence, I am satisfied that they are both truthful witnesses, doing the best they can to recall the relevant details. In my view the most likely subject of the discussion between them on 16 September 2014 was the position of the wife, and the potential consequences to Dreamvar arising in connection with that. This was the point which Mr Vardar had been originally concerned about in his email of 2 September 2014. It was not regarded by Ms Curtis-Goulding as being a problem, in that the supposed wife was not in occupation, and had not registered any interest against the Property. I am satisfied that she understood the question raised by Mr Vardar as relating to the wife, which is indeed confirmed by Mr Vardar's first witness statement, where he says that the answer given by Ms Curtis-Goulding was that "*there was no risk whatsoever that the estranged "wife" had any rights over the Property"*. It may of course be that Mr Vardar, being unaware (and not having been advised) of any other risk to Dreamvar's title, interpreted the exchange as giving a wider assurance, but it is in my view unlikely that such a wider assurance was expressly sought or given at that meeting.

34. Also on 16 September 2014, and on the other side of the transaction, MMS's client asked MMS to transfer the proceeds from the sale of the Property to another firm of solicitors instructed by him, namely Dennings. It appears that this request came shortly after MMS had asked its client for details of his bank account to which the proceeds should be transferred. MMS regarded the request as unusual, but agreed to act on these instructions after receiving on 17 September 2014 an email from Mr Zeeshan Mian of Dennings, and subsequent confirmation from that firm on headed paper, that it was instructed to act for Mr Haeems in another matter, and that the client account details he had given were correct. Mr Mian informed MMS that Dennings was instructed by Mr Haeems to act for him in connection with the purchase of "*different machineries and equipments from chine (sic) to be sent and installed on Joint Venture Contract basis*".

35. The Report on Title did not deal with the question of indemnity insurance in respect of the missing leases, but this was something which Ms Curtis-Goulding advised Mr Vardar about separately in a further email exchange on 17 September 2014. It appears that Ms Curtis-Goulding decided on her own initiative to take up the offer of indemnity insurance, which the seller was to pay for. She explained the point to Mr Vardar by email at 2.01pm that day, saying that MdR had insisted on it for his protection, and that of any future buyer, and that she was comfortable that it would be acceptable to a future

buyer. She asked for confirmation that Mr Vardar was happy to proceed to exchange and completion on that basis, which he confirmed he was in his response at 2.28pm.

36. Prior to that email exchange between Ms Curtis-Goulding and Mr Vardar, MdR had sent the purchase monies (£1.1 million) to MMS. In her email to Ms Slater at 11.59am on 17 September 2014, Ms Curtis-Goulding informed MMS that she was insisting on the provision of indemnity insurance, and asked for a quote to be obtained. She continued by saying that she was going to "*put funds in the system to you to be held to my order until such time as we agree the form of policy*". The purchase monies were subsequently transferred to MMS on that basis, and a manuscript note by MMS shows that MMS was aware that they had been received in MMS's client account at 12.47pm that day.

37. Shortly after receiving Mr Vardar's instructions to proceed, and on confirmation of the indemnity insurance, at 2.45pm on 17 September 2014 Ms Curtis-Goulding and Ms Slater spoke by telephone, and agreed that exchange (pursuant to Law Society Formula B) and completion should take place simultaneously. This was confirmed by MdR's letter to MMS dated 17 September 2014, which enclosed the contract, signed on behalf of Dreamvar, and by MMS's letter to MdR of the same date, which enclosed the TR1 executed by the seller, and the contract signed by him. Following completion, MMS paid £19,800 to D&G by way of their commission, and the balance of the purchase monies (less fees and disbursements) of £1,078,570 to Dennings. Dennings subsequently paid away that sum to a bank account in China.

38. Following completion, Mr Vardar took possession of the Property, and started preparatory work for its refurbishment, it being his intention to carry out improvements, and then sell it (hopefully at a profit) within a few months. For these purposes he engaged a project manager and architect, Ms Sally Yeoh (of GIA London Ltd), with whom he had worked on two previous projects (one at a property acquired by Dreamvar, and the other a project on Mr Vardar's family home). He had also sought her advice in relation to other projects which Dreamvar had considered, but not pursued. It is clear that she was a trusted adviser, and indeed a friend of Mr Vardar. In her evidence she explained that she carried out detailed work in connection with the Property, including drawing up detailed plans, and liaising with a structural engineer, building inspector, and specialist trades, including a plumber and electrician. As a result of that work, she was able to draw up and present on 20 November 2014 a quote (in the total sum of £122,350, plus VAT) for the high quality refurbishment works proposed.

39. Unfortunately, this coincided with the discovery of the fraud. On 10 November 2014 the Land Registry contacted MMS saying that it was making periodic checks in an attempt to provide greater security for the register, and asked MMS to confirm the steps it took to establish the identity of Mr Haeems, and to provide copies of any evidence of identity retained by it. On 17 November 2014, having received the information requested, the Land Registry informed both MMS and MdR that it was unable to link Mr Haeems to the address given on his driving licence, and given the high value of the Property, it wished to make contact with him as a precautionary measure. It is unclear how that contact was made, but on 20 November 2014 solicitors acting for the real Mr Haeems contacted MdR, and the nature of the fraud became apparent. When informed of the position, Mr Vardar was understandably shocked and in disbelief. He stopped

work on the Property, and instructed other solicitors to advise him. On 15 December 2014 Ms Yeoh put in a bill to Dreamvar for the aborted work on the Property in the sum of £11,400, and this is part of the damages now sought from both defendants in these proceedings.

Claims in negligence against MdR

40. It is common ground that MdR owed Dreamvar a duty to exercise reasonable care and skill in both contract and tort. It was also common ground (applying the principles summarised by Lloyd J in *Matrix Securities Ltd v Theodore Goddard* [1998] PNLR 290 at 322), that the standard of competence by which MdR is to be judged is that of a specialist residential conveyancing firm of solicitors. MdR held itself out as such, and indeed its reputation for high quality advice and expertise was one of the reasons for Mr Vardar instructing the firm.

41. It is apparent that in September 2014 identity fraud was a recognised risk in property transactions. In the Law Society's Practice Note on Property and Registration Fraud dated 11 October 2010, the Law Society stated as follows:

> ***1.2 What is the issue?***
> *Fraud is on the increase and there is a rising incidence or awareness of fraudsters targeting the properties of both individuals and companies. These attacks often include identity and other types of fraud, and the presentation of forged documents to Land Registry for registration. Land Registry wishes to bring these matters to the attention of the public and have issued public guides to this effect.*
> *...*
> ***2. Fraud threats for property transactions***
> ***2.1 Impersonation of conveyancers and conveyancing practices***
> *...*
> *Where a party is unrepresented, and you are unable to confirm that sufficient steps have been taken to verify that party's identity, Land Registry requires you to provide certified identification information obtained by you or another conveyancer in respect of that party...*
> *...*
> ***2.2 Seller and buyer frauds***
> ***...***
> ***2.2.2 Vulnerable registered owners***
> *Land Registry has identified that certain categories of owners may be more susceptible to registration frauds. These vulnerable registered owners include, for example, elderly owners who are in hospital or have moved into a care home. These types of owners often own properties without a legal charge. Attempts could be made to sell or charge their property by use of identity fraud.*
> *Owners who live abroad are also particularly vulnerable to this type of fraud.*
> *Some clients may be particularly at risk from fraudulent activity because, for example:*
> - *they no longer live in the property and there was an acrimonious break up with a partner*
> - *they let the property or it is empty...*
> - *they have already been the victim of identity fraud*

- *they are a personal representative responsible for a property where the owner has died and the property is to be sold.*

2.3 Vulnerable properties

Land Registry has identified that certain types of properties may be particularly vulnerable to registration frauds, such as:

- *unoccupied properties, whether residential or commercial*
- *tenanted properties*
- *high value properties without a legal charge*
- *high value properties with a legal charge in favour of an individual living overseas*
- *properties undergoing redevelopment*

...

3. Mitigating fraud threats

3.1 Client identity

You should be aware that exercising reasonable care in viewing documents intended to establish identity may not conclusively prove that the person or company is the person or company they are purporting to be. In addition it may not be possible for you to conclusively establish that such person or company is either the registered proprietor of the relevant property or entitled to become so registered.

Even where you have followed usual professional practice the court may hold that the steps taken exposed someone to a foreseeable and avoidable risk and amounted to a breach of duty of care. See Edward Wong Finance Co Ltd v Johnson Stokes & Master [1984] 1 AC 296.

3.1.1 Conveyancing anti-money laundering

Conveyancing transactions are regulated activity under the Money Laundering Regulations 2007. You must therefore take steps to:

- *identify and verify your client by independent means*
- *identify and, on a risk-sensitive approach, verify any beneficial owners, and*
- *obtain information on the purpose and intended nature of the business relationship.*

This last requirement means more than just finding out that they want to sell a property. It also encompasses looking at all of the information in the retainer and assessing whether it is consistent with a lawful transaction. This may include considering whether the client is actually the owner of the property they want to sell.

You should also comply with Money Laundering Regulations and Law Society general practice information.

...

3.4 Identity document provisions

You should be aware of the provisions relating to identity documents in the following documents:

- *AML requirements*
- *CML Lenders' Handbook*
- *BSA instructions*

3.5 Enhanced due diligence

Where you do not see a client face-to-face, the Money Laundering Regulations 2007 provide that you must undertake enhanced due diligence. Not undertaking face-to-face checks may increase the risk of the transaction being exposed to investigation by the law enforcement agencies and/or the SRA.
For further information see paragraph 4.9.1 of the Law Society's anti-money laundering practice note.
Non face-to-face transactions increase the risk of fraud and these risks may be mitigated in the following ways.

- *If you are accepting instructions from one client on behalf of others or by a third party, rule 2.01(c) of the Code of Conduct requires you to check that all clients agree with the instructions given. For example, an unwary conveyancer might deal solely with the son or daughter of a registered proprietor and have no contact with the person who is the owner.*
- *Where you know or have reasonable grounds for believing that your instructions are affected by duress or undue influence, you should bear in mind also the provisions of rule 2.01(d).*
- *In the case of a third party charge created to secure debts of another, you should consider contacting the purported lender independently. If there is a purported representative for the lender, then consider contacting that representative for confirmation of the transaction. In these circumstances there is a regulatory requirement for separate representation.*

Risks of fraud are increased if documents are provided to clients for execution other than in the presence of you or your staff.
...

42. In its Anti-money Laundering Practice Note dated 22 October 2013, the Law Society further stated as follows:

4.9 Enhanced due diligence
Regulation 14 provides that you will need to apply enhanced due diligence on a risk-sensitive basis where:

- *the client is not dealt with face-to-face*

...
In applying the risk-based approach to the situation you should consider whether it is appropriate to:

- *seek further verification of the client or beneficial owner's identity*
- *obtain more detail on the ownership and control structure of the client*
- *request further information on the purpose of the retainer or the source of the funds, and/or*
- *conduct enhanced ongoing monitoring.*

4.9.1 Non face-to-face clients
A client who is not a natural person can never be physically present for identification purposes and will only ever be represented by an agent. The mere fact that you do not have face-to-face meetings with the agents of an entity or arrangement does not automatically require that enhanced due diligence is undertaken. You should consider the risks associated with the retainer and the client, assess how well standard CDD measures are meeting those risks and decide whether further CDD measures are required.

> *Where a client is a natural person and they are not physically present for identification purposes, you must undertake enhanced due diligence.*
>
> *Regulation 14 (2) outlines possible steps which can be taken above standard verification procedures to compensate for the higher risk of non face-to-face transactions. The regulations suggest the following options, although this list is not exhaustive:*
>
> - *using additional documents, data or information to establish identity. This may involve using electronic verification to confirm documents provided, or using two or three documents from different sources to confirm the information set out in each...*

43. As will be apparent from the above, there was a known risk of identity fraud in property transactions which competent conveyancing professionals were aware of in September 2014. As is also apparent from the above, however, the necessary first line of defence in respect of such risk where a client had instructed a solicitor, was the solicitor instructed by that client. It is that solicitor who is primarily responsible under the Money Laundering Regulations, and the Law Society guidance, for being satisfied as to its client's identity. Indeed that solicitor is necessarily best placed to determine the appropriate level of due diligence, to carry out such checks as may be warranted, and to form an overview of the person instructing it, and the transaction in which it is instructed. In the ordinary course, that is not something that the solicitor acting for the party on the other side of the transaction can do, and indeed it is usually inappropriate for that solicitor to have direct contact with the other client.

44. Neither party called expert evidence before me, but these factors confirm the evidence given by Ms Curtis-Goulding that the ordinary expectation of solicitors acting for a purchaser in a conveyancing transaction, where the vendor is represented by a solicitor, is that the vendor's solicitor will carry out the necessary identity checks in respect of the vendor. This expectation is based on the fact that it is the responsibility of the vendor's solicitor to do so, and that competent solicitors will in the ordinary course discharge that responsibility competently. This of course does not mean that the solicitor acting for the purchaser can proceed (without more) on the basis that the true identity of the vendor is guaranteed. There will inevitably be frauds which succeed despite the most careful checks carried out by the solicitor acting for the supposed vendor. But in the absence of indications to the contrary, it is a reasonable starting point for the purchaser's solicitor to assume, as Ms Curtis-Goulding did in the present case, that the vendor's solicitor had carried out the necessary identity checks in relation to its client, and had been satisfied with the result.

45. In the present case, this position was confirmed to Ms Curtis-Goulding by the first email exchange she had with MMS. In that exchange, on 3 September 2014, Ms Slater informed Ms Curtis-Goulding that she (Ms Slater) had not yet received *"my client's ID or formal instructions in writing nor the signed and completed Protocol forms from him*", and said that until those were returned she would not be able to send Ms Curtis-Goulding a contract pack. This confirmed, as Ms Curtis-Goulding had expected, that MMS was indeed carrying out necessary identity checks, and the fact that it later proceeded by providing the necessary documentation, indicated that it had been satisfied with them.

The first claim in negligence against MdR

46. It is not contended in the present case that a competent solicitor, acting for a purchaser in a residential property transaction, would need to point out to its client in each case that there is a theoretical risk of identity fraud, however small or remote that risk might reasonably be perceived to be. It is certainly possible that some competent solicitors would inform their clients of this as a matter of course, but on the evidence before me I can form no view as to how widespread any such practice might be. It was not MdR's practice.

47. The essence of Dreamvar's case, and the basis of the first way in which it puts its case in negligence against MdR, is that a purchaser's solicitor becomes under a duty to give information and advice to its client about the vendor's identity, and the risks of identity fraud, if there is (as referred to by Mr Halpern in his written opening submissions) "*some unusual feature of the case which would ring alarm bells in the mind of a reasonably prudent conveyancer*". In Mr Halpern's submission there were sufficient factors here to put a reasonable conveyancing solicitor on enquiry, and MdR should have informed and advised Dreamvar accordingly. Mr Cousins did not dispute the principle proposed by Mr Halpern, but resisted strongly the suggestion that there were any features in this case which would have required a reasonably prudent conveyancer to inform and advise its client of a risk of identity fraud.

48. Dreamvar contends that there were 10 features of the transaction which, individually or in combination, should have suggested to a competent solicitor that it was a fraud, and which accordingly should have rung the necessary alarm bells. The underlying facts relating to these features are not in dispute, but what it is said should be discerned from them is. The first three are that the Property was (1) high value, (2) unencumbered, and (3) unoccupied. These are factors referred to in the Law Society's practice note dated 11 October 2010. None of these was regarded as unusual or noteworthy by Ms Curtis-Goulding in the circumstances of this transaction, and she was not asked about the first two in evidence. As to the third, she did not regard it as suspicious that the Property was unoccupied in circumstances where (as she had been told) the vendor was separating from his wife. A related allegation, that the Property was being sold at an undervalue, was not pursued.

49. The next three features alleged by Dreamvar relate to the address in Broadfield Road, Catford, used by the vendor for the purposes of the transaction. It is said that (4) that address did not correspond to the address on the title register (which was the Property), (5) the vendor was not registered as having any leasehold or freehold interest in the Broadfield Road address, and (6) it was surprising that someone living at the Broadfield Road address should be the owner of the Property. Ms Curtis-Goulding did not consider it to be for her to "*second guess*" where the vendor was living. She did not consider it suspicious that the vendor was using a different address to that entered in the Proprietorship Register 14 years earlier, and did not see anything unusual in a person who was in the process of a marriage break-down to be living elsewhere in a potentially more modest property, and on a short tenancy or licence which was not registrable.

50. The next alleged feature relied on by Dreamvar is (7) that the vendor had instructed solicitors in Manchester, who may not have acted for him beforehand. It is difficult to see that this is inherently suspicious, in circumstances where MMS in fact also had an

office in London (albeit its conveyancing was dealt with in Salford), and there can be many reasons for someone wanting to instruct solicitors outside London, including personal connections, and (not least) cost. Ms Curtis-Goulding certainly did not consider this to be an issue, or unusual. She checked that MMS existed and was regulated by the Law Society through the Law Society's "*Find a Solicitor*" online function.

51. Dreamvar also rely on the fact (8) that the sale was being rushed through, with the reason being given that there was an impending divorce. It was suggested to Ms Curtis-Goulding that what she had been told about the reasons for the sale indicated that the vendor had it in mind to somehow defraud his wife, or to put the proceeds of the sale beyond her reach, and hence that the transaction had an unpleasant or unscrupulous air about it. The related allegation, that this gave rise to a risk that the sale could be set aside was not pursued, such allegation depending on the (also withdrawn) argument that the Property was being sold at an undervalue. Ms Curtis-Goulding did not consider any impending divorce to be suspicious, or of any concern to Dreamvar, in circumstances where the wife was not in occupation, and had no interest registered against the title.

52. As for the supposed urgency of the sale, it is clear that Mr Vardar was very keen to exchange and complete quickly, and indeed that had been a feature of a number of the transactions he had previously instructed MdR in respect of. Mr Vardar's reason for urgency was rational and commercial. As he explained, it was a competitive market, and once he had identified a transaction which gave him the sort of opportunity he was looking for, he wanted the vendor committed to the sale to him as soon as possible. There is nothing inherently unusual or suspicious in parties moving quickly in a transaction of this nature. In this case it appears that when Mr Vardar was first introduced to the Property, the agents, D&G, were indicating that there was considerable urgency. This was not however borne out by MMS's email to MdR on 3 September 2014, in which Ms Slater said that she understood that her client was keen to complete, but "*not as quickly as you suggest*". Subsequent steps over the following two weeks did not indicate a great rush by the vendor.

53. The next feature relied on by Dreamvar relates to (9) the management charges, and the vendor's failure to identify the amount of the annual charge, or indeed the name of the management company, and whether there was a share in it which should be transferred to Dreamvar. The absence of the vendor having details in relation to these management matters was not regarded as unusual by Ms Curtis-Goulding, in circumstances where the management related only to the electric gates and lighting in the mews, and that any annual charge in relation to it was likely to be modest in the scheme of things. She explained that this could easily be dealt with post-completion, if necessary, and she (rightly) took the view that it was not a matter which Mr Vardar would want to hold up the transaction.

54. The final feature relied on by Dreamvar is (10) the fact that Ms Curtis-Goulding was aware (from her email exchanges with MMS) that the vendor was to receive form TR1 from MMS by post, and was also to return the signed and witnessed form to MMS by post. The point which appeared to be made in relation to this, is that it would indicate that MMS had not in fact met the vendor. While, as is now known, that was in fact the position, it is not in my view apparent from the fact that the transfer document is being

dealt with by post. As Ms Curtis-Goulding said, it would be a "*big jump to make*" to infer from these postal arrangements that MMS had not met its client.

55. The features relied on by Dreamvar need also to be seen in the context of other countervailing features which are relied on by MdR in support of its case that based on the totality of the facts known to Ms Curtis-Goulding at the time, there was no real risk of fraud which required her to raise it with her client. Chief amongst these is the fact that a reputable firm of solicitors, MMS, was acting for the vendor, was patently aware of its due diligence obligations, and could be assumed to have made such enquiries as it considered were necessary to satisfy itself as to its client's identity. There was nothing in the conduct of the transaction which suggested to MdR that MMS was not competent. Further, the vendor had also instructed a reputable firm of estate agents, D&G, which was also subject to Money Laundering Regulations, and which could also be assumed to have discharged its obligations.

56. In my view it is necessary to look at all the relevant facts known to MdR at the time of the transaction, and to consider whether a competent solicitor in MdR's position, with that knowledge, would have considered there to be a real risk of identity fraud, which it should raise with its client. Ms Curtis-Goulding did not consider that there was such a risk at the time, either when reviewing the purchase as a whole at the time of completing the Report on Title, or at any other time. She further told me that even in hindsight, she would not have done things differently. In my judgment the view she formed at the time was a view which a competent solicitor, acting with reasonable care and skill, could have formed. It follows that MdR was not in my view negligent in failing to inform Dreamvar of the risk of fraud, or in failing to advise him either to withdraw from the transaction, or to investigate further the vendors, or the circumstances of the sale.

Consequences if Dreamvar informed of the risk

57. In these circumstances, the question of how Dreamvar would have reacted had Mr Vardar been informed of any risk of identity fraud does not arise. As I have been addressed on this is some detail, I will however express my conclusions on it. Mr Vardar was clearly an intelligent and thoughtful individual. It was apparent not just from his evidence, but also from the way in which he handled previous actual and potential purchases of property, that he analysed the risks he was taking carefully, and adopted a pragmatic and commercial approach to them. As Mr Cousins for MdR submitted, these previous transactions show that the risks which Mr Vardar was prepared to assume included (a) uncertainty over the possible extension of relatively short leases; (b) uncertainty over the possibility of obtaining the landlord's consent to proposed alterations; (c) not having full management information; (d) a refusal by a vendor to answer pre-contact enquires; (e) a vendor offering to provide only a limited title guarantee; and (f) the possibility that time might permit only limited due diligence.

58. In each case however, when Mr Vardar was taking on a risk with which he was not previously familiar, he was careful to understand what it was, and then to form a view as to whether it was one which he (or more accurately Dreamvar) should take. He did this on the basis of advice from MdR, and also input from others close to him, including Ms Yeoh. It was on this basis that he was able to discount or accept certain risks, including in particular the trade off between doing full searches and acquiring full

information, and the desirability of exchanging and completing rapidly, so that the opportunity was not lost. His approach in relation to this consideration of risk was careful and logical.

59. Mr Vardar's evidence was that he was not aware that there was any risk of fraud by the vendor in the sale of the Property, and that (had he known that there was such a risk) he would not have been prepared to take it. His reason for this was that it would be a risk to the whole of his capital, in other words, if it materialised, he would lose everything. That he said, was a risk he was not prepared to take, and it was different in kind to the other sorts of risks which had come up in his other transactions, and which he had in principle been willing to accept. I accept Mr Vardar's evidence that he was not aware of the risk of this sort of identity fraud occurring, but I do not accept that he would necessarily have never entered into the contract for the purchase of the Property had he been aware of such risk. The position in my view is likely to have been much more nuanced.

60. What Mr Vardar's approach on previous opportunities shows is that when an unfamiliar risk is identified, he asks about it, with a view to assessing the risk to him, and whether it is a risk he should take. While he clearly sounded out Ms Yeoh's views on some occasions, on legal matters he looked to MdR for advice. If he had been advised of the existence of a risk of identity fraud, he would in my view in all probability have asked Ms Curtis-Goulding for her advice as to it. How he would then have reacted would have depended on the advice he was given. I am not satisfied, if he were advised that the risk was remote and the reasons for that view explained, that he would have aborted the purchase. It is likely that he would only reach that decision if advised that he should withdraw from the transaction, or if advised to make further investigations or take further steps, the result of which did not, in MdR's view, adequately address the perceived risk.

61. The point is illustrated by Mr Vardar's third witness statement, in which he addresses Dreamvar's alternative case in negligence, and the advice which it is alleged that MdR should have given about seeking an undertaking from MMS that it had taken reasonable steps to establish the identity of its client. Mr Vardar's evidence is that he would have accepted such advice, but would have withdrawn from the transaction if such an undertaking was not forthcoming. Mr Vardar did however appreciate that such an undertaking would not remove the risk, and did not provide a guarantee that the vendor was in fact the real Mr Haeems. It only addressed the question of reasonable care being taken by MMS. It was quite possible that MMS exercised reasonable care, but the fraudster nonetheless satisfied it of his identity.

62. As to the further steps which it is alleged that MdR should have advised Dreamvar to undertake (had the features of the transaction identified a real risk of identity fraud), these are (i) to ask for an undertaking from MMS that it had taken reasonable steps to establish its client's identity, and (ii) to investigate further what MMS had done to satisfy itself in respect of its client's identity, including reviewing the identity documents relied on by it. Ms Curtis-Goulding was dismissive of both possibilities. As to the first, she did not envisage any circumstance in which a vendor's solicitor would have been willing to give such an undertaking, and as such she would not have asked for one, and (if she had) would have read nothing into any refusal or reluctance to do so. While (as considered later in this judgment) Ms Curtis-Goulding may be wrong

in relation to the willingness of solicitors generally to provide undertakings of this (or a more onerous nature), it was not in my view unreasonable to hold the view that they would not.

63. As to the second, Ms Curtis-Goulding was clearly unwilling to put her firm in the position of having to review in isolation identity documents provided in respect of the vendor, who was not her client. In her view her firm (and indeed any firm) would not want to assume any responsibility in respect of such documents relating to individuals who are not the firm's clients. Again, I do not consider that such an approach would have been unreasonable.

64. Accordingly, even if MdR should have advised Dreamvar of the risk of fraud, it is unlikely that MdR would have advised it to take either of the further steps alleged by it, and it would have been reasonable for MdR not to do so. While I have little doubt that if advised by MdR to take either step, Dreamvar would have accepted such advice, it would not in practice have arisen. The key question therefore, if the risk of identity fraud had been raised by MdR with Mr Vardar, would be the terms in which it was raised. If (contrary to the above) the risk had appeared to MdR as being one in respect of which further steps needed to be taken before it could safely be accepted by Dreamvar, it would follow from Ms Curtis-Goulding's evidence that she would not consider the steps suggested as viable, and that accordingly, in the absence of any alternatives, her advice would have been not to proceed. In those circumstances, I am satisfied that Mr Vardar would have accepted the advice, and would have aborted the transaction.

Alternative claim in negligence against MdR

65. As outlined earlier, the second way in which the claim in negligence is put against MdR, is an alleged failure by MdR to seek an undertaking from MMS that it had taken reasonable steps to establish its client's identity. In this context, this is raised as a free-standing complaint, in that it is said that MdR should have done this, even if it is right that there was no enhanced risk of fraud in the present case. The contention, as I understand it, is that in each case of this nature (i.e. of residential conveyancing) the purchaser's solicitor should seek to have a directly enforceable right against the vendor's solicitor, which reflects the reality of its (and its client's) reliance on the vendor's solicitor for doing due diligence on the vendor's identity.

66. This submission of course assumes that the vendor's solicitor does not in the usual course assume responsibility for such matters by other routes, such as a warranty of authority, or a direct undertaking as to the transfer documents provided, or a direct duty of care in tort. The former two possibilities are alleged in this case, and are considered later in this judgment.

67. It will be remembered that in adding this allegation by way of amendment at the start of the trial, Dreamvar made clear that it did not assert that the seeking of such an undertaking represented standard conveyancing practice in 2014, or that there was anything in the public or professional domain that alerted solicitors acting for purchasers to the need to seek such an undertaking. This is an unpromising basis for the contention that it was negligent of MdR not to seek such an undertaking from MMS. The contention is however firmly based on the submission that if there is no

other protection for the purchaser, and no other steps which a competent solicitor should take to guard against the risk of his client suffering loss of this type in a purchase such as the present, then the profession as a whole has adopted an approach which is not reasonable.

68. In this connection Mr Halpern relies on two reported cases as authority for the proposition that it is appropriate in such circumstances for the court to depart from established professional opinion. The first is the decision of the Privy Council in *Edward Wong Finance Co Ltd v. Johnson Stokes & Master* [1984] AC 296. In that case the plaintiff lenders agreed to advance a sum to enable purchasers to buy, free of encumbrances, the ground floor of a factory building in Hong Kong. The lenders instructed the defendant solicitors to act for them in the mortgage transaction. At the time in Hong Kong it was the customary conveyancing practice of solicitors in completing a contract for the sale of land for the purchaser's or lender's solicitors to forward the purchase price to the vendor's solicitors on an undertaking by the vendor solicitors to forward to the purchaser's or lender's solicitors the executed documents of title. Pursuant to this procedure, the mortgage monies were paid to the vendor's solicitor, in return for an undertaking by him to forward the duly executed documents of title to the defendant solicitors within 10 days. Regrettably, having received the mortgage monies, the vendor's solicitor absconded, and did not honour his undertaking. The lenders accordingly never received the agreed security for their advance, and sued the defendant solicitors for negligence.

69. The Privy Council held that the solicitors had been negligent. Lord Brightman, giving the opinion of the Board, said (at p.306F), that "*in assessing whether the respondents fell short of the standard of care which they owed towards the appellants, three questions must be considered; first, does the practice, as operated by the respondents in the instant case, involve a foreseeable risk? If so, could that risk have been avoided? If so, were the respondents negligent in failing to take avoiding action*?" Lord Brightman considered that there was a foreseeable risk, proved by the fact that some years earlier a sub-committee of the Law Society of Hong Kong had flagged the risk of a Hong Kong style completion miscarrying. He further considered that such risk was readily avoidable by the purchaser's or lender's solicitors taking reasonable steps to satisfy themselves that the vendor's or borrower's solicitor had authority from his client to receive the purchase monies or loan. In circumstances where the risk was foreseeable, and readily avoidable, Lord Brightman considered that there could only be one answer to his third question, namely that the solicitors were negligent in not foreseeing and avoiding the risk.

70. The second reported case relied on by Mr Halpern is the House of Lords decision in *Bolitho v. City & Hackney Health Authority* [1998] AC 232. That was a claim for clinical negligence. A child died in hospital as a result of not being intubated, and the issue was whether it was negligent of the doctor concerned not to have intubated him. There was expert evidence going both ways as to what would be a competent course to follow in the particular circumstances which arose. The House of Lords concluded that the doctor concerned had not failed to exercise reasonable care and skill. In the course of his judgment Lord Browne-Wilkinson considered the position where there were different expert views as to competent medical practice. At p.241G-242A, he said the following:

> *My Lords, I agree with these submissions to the extent that, in my view, the court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that the defendant's treatment or diagnosis accorded with sound medical practice. In the Bolam case itself, McNair J. [1957] 1 WLR 583, 587 stated that the defendant had to have acted in accordance with the practice accepted as proper by a 'responsible body of medical men.' Later, at p. 588, he referred to 'a standard of practice recognised as proper by a competent reasonable body of opinion.' Again, in the passage which I have cited from Maynard's case [1984] 1 W.L.R. 634, 639, Lord Scarman refers to a 'respectable' body of professional opinion. The use of these adjectives - responsible, reasonable and respectable - all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.*

71. Later in his judgment, after referring to the decision in *Edward Wong* (amongst others), Lord Browne-Wilkinson said as follows, at p.243A-D:

> *These decisions demonstrate that in cases of diagnosis and treatment there are cases where, despite a body of professional opinion sanctioning the defendant's conduct, the defendant can properly be held liable for negligence (I am not here considering questions of disclosure of risk). In my judgment that is because, in some cases, it cannot be demonstrated to the judge's satisfaction that the body of opinion relied upon is reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular, where there are questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that the relative risks and benefits have been weighed by the experts in forming their opinions. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.*
>
> *I emphasise that in my view it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgment which a judge would not normally be able to make without expert evidence. As the quotation from Lord Scarman [in Maynard v. West Midlands Regional Health Authority [1984] 1 W.L.R. 634, at 639] makes clear, it would be wrong to allow such assessment to deteriorate into seeking to persuade the judge to prefer one of two views both of which are capable of being logically supported. It is only where a judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the benchmark by reference to which the defendant's conduct falls to be assessed.*

72. In the present case, the arrangements for the completion of the purchase of the Property were dealt with pursuant to the Code. I consider the detailed provisions of that later in this judgment, but (as recorded in the Code) its intention was "*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*". Its provisions include undertakings which are to be provided by the seller's solicitors on completion. In addition, the Law Society has published a Handbook on Conveyancing for the guidance of the profession. It cannot therefore be said that the leading elements of the profession have not directed their minds to what a solicitor needs to do to provide a proper level of protection for its client. As recorded in the concessions made by Dreamvar when making the amendment to introduce this allegation, there has been no suggestion from such elements that seeking an undertaking from a vendor's solicitor as to taking reasonable steps to ascertain its client's identity has been regarded as necessary or appropriate.

73. In these circumstances, this is not one of those exceptional cases where it would be right to say that the practice of the profession in not seeking such an undertaking is unreasonable or illogical. The position is similar to that considered by the Court of Appeal in *Patel v Daybells* [2001] EWCA Civ 1229 in connection with a challenge to the reasonableness of a purchaser's solicitor paying purchase monies to a vendor's solicitor against an undertaking to discharge an existing mortgage. As Robert Walker LJ, delivering the judgment of the Court, said at [65]:

> *In order to succeed in the appeal Daybells does not have to prove that the alternative system would be unworkable or that it would expose clients to greater risks. In the absence of an alternative system actually adopted by a significant number of conveyancing solicitors, it is sufficient to show that the practice now routinely followed by English solicitors (with the approbation of the Law Society and the Council of Mortgage Lenders) is (in Lord Browne-Wilkinson's words in Bolitho) one on which "the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter". In our judgment Daybells has shown that.*

74. Such protection as there is to the purchaser in circumstances such as the present comes from its solicitor taking reasonable care to identify any real risks of fraud to it (and to advise accordingly), from the protection given to the purchase monies as trust monies, from the undertakings given under the Code, and from any other warranties given, or duties assumed, by the vendor's solicitor. In so far as they are alleged to be engaged on the facts of the present case, I consider the latter of these later in this judgment. If they do not provide protection in fact to Dreamvar, it is unfortunate, but it does not mean that a practice whereby the purchaser's solicitor does not as a matter of course seek an undertaking from the vendor's solicitor that it has taken reasonable steps to establish its client's identity is unreasonable or illogical.

75. For the above reasons, I dismiss the claims in negligence against MdR.

Modern conveyancing practice

76. Before considering the further claims against MdR and MMS, it is convenient to consider the material before me as to modern conveyancing practice concerning the completion of a sale of a residential property. In so far as this practice gives further

protection to the purchaser in relation to the risk of identity fraud, it would also be relevant to the issues of negligence which I have just considered, and would provide further objective justification for the course taken by MdR. Its main relevance for present purposes is however in providing the necessary context and background to the claims for breach of trust (against both MdR and MMS) and for breach of undertaking (against MMS).

77. Until comparatively recently, the standard practice in residential conveyancing was for there to be a physical completion meeting, at which the purchase monies were exchanged for the necessary documents of title. The procedure was summarised by Lord Brightman in November 1983 in the Privy Council's decision in *Edward Wong*, at p.303F-304A:

> *The normal method of completing a contract for the sale of land in England is for the purchaser's solicitor to deliver to the vendor's solicitor a draft for the balance of the purchase money in exchange for an executed grant of the land or interest in land contracted to be sold; if the property is subject to a mortgage, the mortgagee will either be a party to the grant and receive the whole or part of the purchase money by way of redemption; or he will execute a separate release of his charge in return for the redemption money; if the property purchased is to be financed by a new mortgage, the loan will be made against delivery of the executed grant and instrument of charge. In other words, the payment of money and perfection of title are simultaneous transactions. This procedure is merely a reflection, in the context of a contract for the sale of land, of the common-sense principle that, in the absence of an agreement for credit, the purchase money is not handed over to the vendor or anyone else except in exchange for the delivery of the subject matter of the sale, whether it be a loaf of bread or a parcel of land; and, if a loan is made on security, the money advanced is not handed over save in exchange for a charge executed by a person who can show a good title to the intended security. In the instant case this simple and fraud-proof procedure was not followed.*

78. It is common ground that by the time of the *Edward Wong* decision, conveyancing practice in England was already departing from what has been referred to as the traditional "*old-style*" completion. Further, as Robert Walker LJ noted in *Patel v. Daybells* at [58]:

> *Lord Brightman was not wholly correct in the description which he gave in 1983 of standard conveyancing practice in England at that time. Postal completions had been common since the late 1970's, and even when the solicitors for the vendor and the purchaser met face to face at completion, an undertaking to discharge an outstanding mortgage was commonly offered and accepted.*

79. By the time of the Court of Appeal decision in *Santander UK v RA Legal Solicitors* [2014] EWCA Civ 183 in February 2014, Briggs LJ was able to say (at [69]), "*We were told, and I have no reason to doubt, that old style face-to-face completion is now most unusual, at least in ordinary residential conveyancing*". While the basis on which postal completions were carried out before 1984 is unclear, I am told that from 1984 the generally (if not universally) accepted terms on which such completions have been conducted in England are those published by the Law Society.

80. The first version of the Law Society's Code for Completion by Post was published in 1984, apparently in response to the *Edward Wong* decision. It was subsequently revised in 1998 and 2011. The version of the Code which applies in the present case is the 2011 edition, and (save where otherwise indicated) when I refer in this judgment to the Code I am referring to that version. On its cover-sheet, the Code has an express warning that *"Use of this code embodies professional undertakings"*. Under the heading *"Introduction and scope"*, it states that "*The code provides a voluntary procedure for postal completion for residential transactions. It may also be used by licensed conveyancers. Solicitors adopting the code must be satisfied that its adoption will not be contrary to the interests of their client. When adopted, the code applies without variation unless otherwise agreed. 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.*"

81. It will be necessary to consider certain parts of the Code in greater detail later in this judgment, but for present purposes it is sufficient to set out the main provisions of it which are relevant to the submissions that have been made to me:

> ***General***
>
> *...*
>
> *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***
>
> *4. The buyer's solicitor will use reasonable endeavours to ensure that sufficient funds are collected from the buyer and any mortgage lender in good time to transmit to the seller's solicitor on or before the completion date.*
>
> *5. The seller's solicitor should provide to the buyer's solicitor replies to completion information and undertakings in the Law Society's standard form at least five working days before the completion date unless replies have been provided to such other form requesting completion information as may have been submitted by the buyer's solicitor.*
>
> *6. The seller's solicitor will specify in writing to the buyer's solicitor the mortgages, charges or other financial incumbrances secured on the property which on or before completion are to be redeemed or discharged to the extent that they relate to the property, and by what method.*
>
> *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; ...

(iii) undertakings to be given; ...

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;

(iii) 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.*

Claim for breach of trust against MdR

82. There is no doubt that the purchase monies, when received by MdR from Dreamvar, and paid into MdR's client account, were held on trust by MdR for Dreamvar. In *Target Holdings v Redferns* [1996] A.C. 421, the plaintiff lender paid monies to the purchaser's solicitors on terms that they were to be transferred to the purchaser/mortgagor once the property had been purchased and charged to the lender. The monies were, in breach of trust, paid away before any charge was granted, although a charge was received a month later. The primary issue was the remedy available to the lenders for the breach of trust, but in the course of his judgment, Lord Browne-Wilkinson said the following, at p.436A-C:

> *This case is concerned with a trust which has at all times been a bare trust. Bare trusts arise in a number of different contexts: e.g. by the ultimate vesting of the property under a traditional trust, nominee shareholdings and, as in the present case, as but one incident of a wider commercial transaction involving agency. In the case of moneys paid to a solicitor by a client as part of a conveyancing transaction, the purpose of that transaction is to achieve the commercial objective of the client, be it the acquisition of property or the lending of money on security. The depositing of money with the solicitor is but one aspect of the arrangements between the parties, such arrangements being for the most part contractual. Thus, the circumstances under which the solicitor can part with money from client account are regulated by the instructions given by the client: they are not part of the trusts on which the property is held.*

83. Similarly, in *Bristol & West Building Society v. Mothew* [1998] Ch 1, the plaintiff lender paid monies to the defendant solicitors which were to be used to finance the purchase of a property. As Millett LJ stated, at p.22D-E:

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

84. MdR's entitlement and obligation to pay away the purchase monies when received from Dreamvar accordingly depend on the terms of the authority and instructions given to it by Dreamvar. This was not something expressly addressed in the terms of MdR's retainer whereby it was instructed to act for Dreamvar in its purchase of the Property. Mr Halpern contends that it is to be implied into the retainer (on the basis that it is so obvious that it goes without saying) that MdR was only authorised to release the monies in order to complete the purchase of the Property. In this context Mr Halpern contends that this requires a genuine completion, in which (in exchange for the purchase monies) a genuine transfer document from the genuine owner of the Property was received. The paying away of the purchase monies in return for a forged transfer from someone who was not the registered owner of the Property was not (Dreamvar contends) an authorised disposition of the monies, and amounts to a breach of trust.

85. Mr Cousins accepts that the terms on which MdR was authorised to pay away the purchase monies depends on what is properly to be implied into its retainer. Ignoring the situation where the monies are returned to Dreamvar, he suggests that there are two possibilities: (i) payment away on actual completion (which, as I understand it, he accepts in this context would be a genuine, as opposed to a pretended, completion), or (ii) payment away against an undertaking, from the vendor's solicitor, to forward the title documents to it. In this case, such an undertaking was received from MMS pursuant to the Code, and the payment of the purchase monies to MMS was accordingly (it is submitted) an authorised disposition of the monies. The basis for this submission is that Dreamvar implicitly agreed to MdR dealing with the monies in accordance with ordinary conveyancing practice.

86. The basis on which terms can be implied has recently been authoritatively reviewed by the Supreme Court in *Marks & Spencer plc v. BNP Paribas* [2015] UKSC 72, esp at [14] to [31], per Lord Neuberger. The primary basis for the implication of a term is if it is necessary to give the contract business efficacy or is so obvious that it went without saying. The context, purpose and other terms of the contract are of course relevant factors in making such assessment. The implication of a term does not depend on proof of an actual intention of the parties when negotiating the contract but is concerned with what notional reasonable people, in the position of the parties at the time at which they had been contracting, would have agreed. It is a necessary but not sufficient condition for implying a term that it appeared fair or that the court considered that the parties would have agreed it if it had been suggested to them.

87. In *Lloyds TSB Bank plc v. Markandan & Uddin* [2012] EWCA Civ 65, fraudsters, purporting to be solicitors operating at a branch office of a genuine firm, purported to act for sellers of a house (who had not in fact agreed to sell their house at all). The

defendant solicitors ("M&U") were instructed by lenders ("C&G") who were advancing the majority of the purchase price. The instructions to the solicitors were on the terms contained in the Council of Mortgage Lenders ("CML") Handbook, which included a provision that the solicitors "*must hold the loan on trust for us until completion*". The solicitors agreed to adopt the then version of the Code (the 1998 version), and sent the mortgage monies to the supposed sellers' solicitors in exchange for an undertaking by them to forward on completion the requisite documents of title. The documents were never received, and the defendant solicitors were sued by the lenders for (amongst other things) breach of trust.

88. In giving the leading judgment in the Court of Appeal, Rimer LJ (with whom Mummery LJ and Sir Mark Potter agreed), said the following, at [37]:

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

89. After referring to the submission by the lenders that "*completion*" only occurred once the relevant transfer and charge were registered, Rimer LJ said as follows, at [39] and [50]:

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

> ...
> *50. In my judgment, ... the judge ... 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. The key points in Rimer LJ's judgment for present purposes are that (i) the monies would have been held on trust until completion even if the express CML terms had not applied; (ii) completion on agreed terms by post is intended to be equivalent to the old-style ceremony, whereby the monies were exchanged for the requisite title documents; and (iii) completion in this context means a genuine completion, i.e. an exchange of real money for real documents. The decision in *Markandan* was followed by the Court of Appeal in *Nationwide Building Society v. Davisons* [2012] EWCA Civ 1626 and *Santander v. RA Legal Solicitors* [2014] EWCA Civ 183, in which the transactions in question were also governed by CML terms, but neither of which casts doubt on the more general propositions stated by Rimer LJ.

91. In these circumstances it was, in my view, an implied term of MdR's retainer that it would only release the purchase monies received by it from Dreamvar on completion of the purchase of the Property, and completion in this context meant a genuine completion. I am satisfied that such a term was necessary for business efficacy, and was so obvious that it would go without saying. The fact that completion by post was subsequently agreed by MdR with MMS, in accordance with ordinary conveyancing practice, does not detract from that conclusion. While it may be relevant context for the proper construction of the obligations assumed under the Code, if the purchase monies are paid away for a purported completion under the Code which is not genuine, then there will in my view be a breach of trust by MdR.

92. As to whether the contract for the sale of the Property was a nullity, it was common ground between the parties that I was bound by the decision in *Markandan* to hold that it was. Such nullity, it was said, in any event followed from the decision of the House of Lords in *Shogun Finance v. Hudson* [2003] UKHL 62. Importantly, it was not suggested by any party that if the contract were a nullity, such conclusion had any effect on any of the other claims made in these proceedings, including the claims for

breach of undertaking, or breach of warranty of authority. In view of the terms of the *Markandan* decision I accordingly do not need to consider this further, save to record that Mr Patten for MMS expressly reserved its right to challenge this conclusion in a higher court. But whether or not the contract was a nullity, it is clear that it was not, nor could it be, completed in the sense referred to in *Markandan*.

93. Despite the weight of this authority, and while not in any way detracting from his reliance on it in the context of MdR's claims against MMS, Mr Cousins nonetheless contended that an undertaking received from a genuine solicitor in accordance with the requirements of the Code would be a sufficient basis on which it could release the purchase monies, even if the solicitor was not in fact acting for the owner of the property being sold, and there was no genuine sale which could be completed. This submission was based on the comments by the Judge at first instance in *Markandan* (Mr Roger Wyand QC, sitting as a Deputy High Court Judge), in which he said (at [30]), that "*The authority entitled [the solicitors] to pay away on receipt of the documents necessary to register title or, if paying away before that stage, on receipt of a solicitor's undertaking to provide such documents"*. It was further submitted by Mr Cousins that on the facts, the reason why that was not made out in the *Markandan* case was that the person who gave the undertaking was not a solicitor at all, and that accordingly the defendants there could not show that they had received the necessary solicitor's undertaking.

94. In my view, the terms of Rimer LJ's judgment do not support such a distinction. What is required is a genuine completion, not anything less. The submission is also in my view inconsistent with the decision in *RA Legal*. In that case the vendor's solicitors (Sovereign) were genuine solicitors, but acting fraudulently, without any instructions from the supposed vendor. Briggs LJ, having accepted that the purchaser's solicitors had authority to transfer (in that case) loan monies to the account of the solicitors acting for the vendor prior to completion, to hold to the purchaser's order pending completion, continued (at [16]) as follows:

> *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.*

95. I therefore conclude that MdR was in breach of trust in paying away the purchase monies to the vendor's solicitor, MMS, in circumstances where there was not, nor could there be, a genuine completion of the contract of sale, which was in any event a nullity. Before considering MdR's application for relief under s.61, Trustee Act, 1925, it is convenient to consider the claims against MMS.

The claims against MMS – the decision in P&P

96. Given the substantial reliance placed upon it by Mr Patten, a useful starting point in considering the claims against MMS is the decision of Mr Robin Dicker QC, sitting as a Deputy High Court Judge, in *P&P*. The broad facts in that case were similar to the present. A fraudster, impersonating the true owner, purported to sell a residential property at 56 Brackenbury Road, London W6 to the claimant property investment company ("P&P"). When the fraud was discovered, P&P brought proceedings against the purported vendor's solicitors ("Owen White") and the estate agents who had marketed the property ("Winkworth"). The claims against Owen White were for breach of warranty of authority, negligence, breach of trust and breach of undertaking. The claims against Winkworth were for breach of warranty of authority and negligence. In a detailed and careful judgment, the Judge rejected each of the claims made.

97. In *P&P*, by the Law Society's Completion Information and Undertakings form (TA13), the respective solicitors (Owen White for the vendor, and Peter Brown & Co ("Peter Brown") for the purchaser), agreed that the 2011 version of the Code was to apply. It is not apparent which particular documents, if any, were agreed by that form to be supplied at completion, or in what terms they were described. Exchange of contracts took place 6 days before completion. The contract was signed by Owen White on behalf of the seller, who was identified in the contract as "*Clifford Michael Phillip Harper of 52 Brackenbury Road, London W6"*. The purchase price was provided to Owen White in three tranches. The first was in the sum of £103,000, which was transferred to Owen White from Peter Brown on the day before completion, which Peter Brown had been holding to Owen White's order by way of deposit.

98. The second tranche of the purchase price was in the sum of £327,000, and was transferred directly to Owen White on the day of completion by a firm of solicitors called Carlsons, who were acting for the mortgagees from whom P&P had raised finance to acquire the property. Once that tranche had been received, and in view of a delay in transferring the balance of the purchase monies, Peter Brown and Owen White agreed that the contract should be amended so that the total of the first and second tranches, £430,000, should henceforth be held by Owen White by way of deposit as agent for the seller. Once that amendment had been agreed, Owen White paid away the £430,000 to the seller's bank account in Dubai. The final tranche of the purchase monies, £600,000, was also transferred to Owen White directly by Carlsons, at about 12.49pm on the same day. Following receipt of it, at about 3.40pm that day, Owen Smith called Peter Brown to confirm receipt of the monies, and the purported sale and purchase was formally completed. The final tranche was then paid away to the fraudster. The transfer signed by the purported vendor was sent to Peter Brown shortly afterwards.

99. Although, as will be apparent from the above (and as indeed would be expected), there are a number of differences in the detailed fact pattern between *P&P* and the present case, it was not suggested by any of the parties before me that any of these differences was material for present purposes in my consideration of the allegations of breach of warranty of authority, breach of trust and breach of undertaking made against MMS. It was accordingly submitted by Mr Patten that I should follow the decision in *P&P*. In this connection I was referred to the decision of the Supreme Court in *Willers v. Joyce* [2106] UKSC 44, in which the doctrine of precedent, in particular in the context of

decisions of the Judicial Committee of the Privy Council, was reviewed. In the course of giving judgment, Lord Neuberger (with whom the other members of the Supreme Court agreed), said as follows, at [9]:

> *So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary: see Patel v Secretary of State for the Home Department [2013] 1 WLR 63 , para 59...*

100. Mr Patten submitted that there was no reason, powerful or otherwise, for me to depart from the decision in *P&P* in relation to any of the claims against MMS in the present case. Mr Halpern and Mr Cousins, on the other hand, contended that I should depart from the decision in relation to each of the claims against MMS, on the basis that the decision was either wrong, or (in relation to breach of warranty of authority) contrary to earlier binding authority. In this connection I was also referred to the decision in *Great Peace Shipping Ltd v.Tsavliris Salvage Ltd* [2002] EWCA Civ 1407, in which the Court of Appeal upheld Toulson J's "*bold conclusion"* that the Court of Appeal's decision in *Solle v. Butcher* [1950] 1 KB 671 was wrong, and inconsistent with the earlier binding authority of *Bell v. Lever Bros Ltd* [1932] AC 161.

Breach of trust by MMS

101. There has been no challenge in the present case to the correctness of the Judge's decision in *P&P* in relation to the first two tranches of the purchase price paid to Owen White, and which were then agreed to be held by it for the seller as part of the deposit. The real issue as regards breach of trust in *P&P* concerned the third tranche of £600,000, which was paid directly to Owen White by the prospective mortgagee's solicitors. The primary reasons for the Judge concluding that Owen White were not in breach of trust in respect of this third tranche are set out at [216] to [226], and [237] to [240] of his judgment.

102. The first reason relates to the terms of paragraph 10 of the Code. This provides that "*The seller's solicitor will complete upon becoming aware of the receipt of the sum specified in paragraph 9 … 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*". It had been submitted on behalf of Owen White that the effect of this was that (absent either qualification identified in (i) or (ii)), completion would occur simultaneously with receipt of the money such that there was no period during which a trust could exist.

103. The Judge (at [218]), in my view rightly, considered that if either of the situations in sub-paragraphs (i) or (ii) of paragraph 10 arose, the monies transferred to the vendor's solicitor would be held to the purchaser's solicitor's order. Subject to that, he agreed with Owen White's submission that from the moment of becoming aware of receipt, the vendor's solicitor was not required to hold the monies on trust for the purchaser's solicitor, but was permitted to use them for the purposes of completion in accordance

with the rights and obligations set out in the Code. This conclusion was challenged before me by Mr Cousins on the basis that it was incomplete, in that even if the situations in sub-paragraphs (i) or (ii) did not apply, there would nonetheless (it was submitted) be a period of time between the transfer of the monies to the vendor's solicitor, and the vendor's solicitor becoming aware of their receipt, and in that period the monies must be held on trust to the order of the purchaser's solicitor.

104. I would agree with Mr Cousins that it is possible that there could be a gap between receipt of monies by the vendor's solicitor, and the vendor's solicitor (which in this context I interpret as being the relevant individual dealing with the matter in the vendor's solicitor) becoming aware of such receipt. Indeed in the usual course, it would be expected that notification by the vendor's solicitor's bank to it of the receipt of the monies would not be instantaneous. In such circumstances, I would agree with Mr Cousins that at that time the monies would be held to the order of the purchaser's solicitor. The same conclusion would in my view also apply if the purchase monies were sent through to the vendor's solicitor in stages. Under paragraph 10 of the Code it is only when the vendor's solicitor becomes aware of the receipt of the sum specified in paragraph 9 (i.e. the full sum required to complete), that completion (subject to paragraph 10(i) and (ii)) takes place.

105. Such conclusion is supported by the Court of Appeal decision in *RA Legal*. In that case, the Code (then the 1998 version) had not been agreed. One of the issues which arose was whether it was a breach of trust by RA Legal to transfer the purchase monies to Sovereign without first taking effective steps to ensure that, once transferred, the monies would be held by Sovereign to its order. Briggs LJ dealt with this submission in the context of RA Legal's application for relief under s.61, Trustee Act, 1925. He accepted the Judge's conclusion that, regardless of the absence of a written direction or undertaking, Sovereign did in law hold the completion monies to RA Legal's order from the moment of its receipt until formally released by RA Legal at the moment of pretended completion the following day. Briggs LJ commented at [78] that "… *I consider that to be an inevitable consequence of the fact of the payment, against the background that it was made by a purchaser's solicitor to Sovereign holding itself out as the vendor's solicitor in anticipation of completion, which Sovereign had requested by letter on the previous day* ".

106. Support for such conclusion is also to be found in the decision of HH Judge Pelling QC, sitting as a Judge of the Chancery Division, in *Purrunsing v A'Court* [2016] EWHC 789 (Ch). That case was another fraudulent sale of a property by a fraudster. It seems that the transaction was subject to the 1998 version of the Code. The purchaser sued his solicitor, as well as the purported vendor's solicitors. Judgement was entered against both for breach of trust, and the issue of primary relevance for present purposes for HHJ Pelling QC to decide was the application by each for relief under s.61, Trustee Act, 1925, and (so far as relevant) the apportionment of liability between them. It was not necessary for the Judge to decide on that application whether there had in fact been a breach of trust (it being common ground that there had been), but he nonetheless summarised the underlying principle at [41], independently of any application of the Code, or any particular version of it, as follows: "*The vendor's solicitor is as much a trustee of the purchase money while it is in his possession pending completion as is the purchaser's solicitor*."

107. The Code does not in my view alter this position. While the 2011 version of it does not contain the same express provision which was previously in paragraph 6 of the 1998 Code, namely that "*pending completion, the seller's solicitor will hold the funds to the buyer's solicitor's order"*, the statements of principle in *RA Legal* and *Purrunsing* did not depend on that express obligation.

108. The point is in any event of limited relevance on the facts of the present case, in that it is clear that the purchase monies were in fact sent to MMS on terms that they were to be held to MdR's order, until such time as MdR and MMS had agreed the form of the indemnity insurance to be taken out (see paragraph 36 above). The monies when received by MMS (at 12.47pm on 17 September 2014), were accordingly held by it to MdR's order. At that time, contracts had not even been exchanged, but exchange and completion subsequently took place simultaneously (see paragraph 37 above). I accordingly proceed on the basis that MMS did hold the monies on trust when received from MdR, but that it was (once MdR had confirmed that the indemnity policy had been agreed, and the matter could proceed) permitted to use them for the purposes of completion in accordance with the rights and obligations set out in the Code.

109. The important question in the present case is accordingly whether, when the time came for the monies to be released for the purposes of completion, MMS was authorised to use them only for a genuine completion, or whether it could apply them for what Briggs LJ referred to as a "*pretended completion*". This question was posed and answered by Mr Dicker QC in *P&P* in [219] to [226] of his judgment. In the Judge's view, the provisions of paragraph 3 of the Code were "*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"*. On the basis of this conclusion, Owen White were entitled to release the funds to themselves (as the vendor's solicitors), or to their client, without receiving any genuine transfer document in return.

110. Mr Cousins submitted that Mr Dicker QC was wrong in that conclusion, and that accordingly I should not follow his decision. His primary argument was that in the context of a conveyance of property, completion (for all the reasons identified earlier in this judgment) means a genuine completion, and there is simply no reason to conclude that the terms of the trust concerning MMS would be any different in this respect from the terms of the trust between Dreamvar and MdR. The sole purpose of both arrangements was to enable a genuine completion to take place, with the Code applying so as to facilitate the completion process, as the "*postal equivalent*" of the former old-style completion meeting.

111. In support of these submissions, I was referred to the general scheme of the Code, and the numerous references which are made to "*completion*" in it. A central element of the Code is the appointment of the vendor's solicitor to act (without fee or disbursement) as the purchaser's solicitor's agent on completion (paragraph 3). This obligation is expressly limited to completion pursuant to paragraphs 10 to 12, which set out detailed provisions as to the position at and after completion. The prior paragraphs (paragraphs 4 to 9) deal with events before completion, and set out the pre-completion obligations on the vendor's solicitor (acting as such, and not as agent for the purchaser's solicitor), and the purchaser's solicitor.

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).

114. For the above reasons, I accordingly reject the allegations of breach of trust against MMS.

Breach of undertaking by MMS

115. The claim for breach of undertaking against MMS was originally made by MdR only, but was adopted by Dreamvar during closing submissions, and the Particulars of Claim were amended by agreement to make the allegation directly. The undertaking relied on is that contained in paragraph 7(i) of the Code which states that "*The seller's solicitor undertakes: (i) to have the seller's authority to receive the purchase money on completion*". It is contended that on its true construction, such undertaking is an undertaking that MMS had the authority of the registered proprietor of the Property, i.e. the real Mr Haeems, and that it was accordingly broken, because MMS had no such authority.

116. Mr Patten submits that on its true construction, the reference to "*the seller*" in paragraph 7(i) is a reference to the person agreeing to sell the Property, i.e. in this case, the fraudster, and is not a reference to the real Mr Haeems. He also relies again on the decision in *P&P*, where Mr Dicker QC accepted, in [241] to [247] of his judgment, an equivalent submission in relation to an equivalent allegation. Mr Patten contends that there is no powerful reason for me not to follow that decision, and that I should do so.

117. The principles of construction have been discussed on a number of occasions in the recent past by both the House of Lords and the Supreme Court, and were most recently revisited by the Supreme Court in *Arnold v. Britton* [2015] UKSC 36. As summarised by Lord Neuberger (with whom Lords Sumption and Hughes agreed), at [15]:

> *When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions...*

118. In approaching the construction of these provisions of the Code, it is also right to bear in mind the comments made by Millett LJ in *Mothew* at p.24A-B, by Chadwick J in *Bristol & West Building Society v. Fancy & Jackson* [1997] 4 All ER 582, at 612g-j, by Lord Woolf MR in *Midland Bank v. Cox McQueen* [1999] PNLR 593 at 603A-B, and in *Platform Funding Ltd v. Bank of Scotland* [2008] EWCA Civ 930 by Moore-Bick LJ at [30], and by Rix LJ at [48]. These are to the effect that clear words would be expected if an obligation were to be placed on a solicitor which had the effect of placing on it the risk of the transaction being a fraud. It is however clear that each case necessarily depends on its own facts.

119. The debate in the present case is not about whether any obligation assumed under paragraph 7(i) of the Code was absolute, or only to exercise reasonable care. As referred to above, the debate is rather as to whether the reference to "*the seller*" is a reference to the registered proprietor, or MMS's client, the fraudster, and the person purporting to sell the Property. The relevance of the cases cited is that if the undertaking were to be construed to apply to the authority of the registered proprietor, it would (it is submitted by MMS) have the effect of putting on it responsibility for the identity of its client. In circumstances where MMS admits that it was negligent in investigating the identity of its client, it was not contended that the obligation (if it applied to the registered proprietor) was to be construed as one to exercise reasonable care only.

120. In approaching the question of construction of the undertaking in paragraph 7(i) of the Code, it is important to keep in mind the wider context in which the undertaking is being sought, and given. This is to facilitate completion by post. Under paragraph 9 of the Code the purchaser's solicitor is to remit to the vendor's solicitor the sum required to complete. It will not do so if it is not confident that it is passing the necessary sum to someone who is authorised to receive it for the vendor. It is doing so in anticipation of a genuine completion, and indeed (as discussed above) would be in breach of trust in releasing the monies for anything else. In return for the purchase monies, it would be receiving, on completion, the necessary transfer document, which the vendor's solicitor will (from completion) hold as agent for the purchaser's solicitor under paragraphs 3 and 12 of the Code. In order for there to be a genuine completion, the transfer document necessarily must come from the genuine registered owner.

121. In such circumstances, it might be expected that parties adopting the Code would be proceeding on the basis that the authority of the "*seller"* referred to in paragraph 7(i) of the Code was the authority of the registered owner, i.e. that the purchase monies were being paid to someone authorised to receive them on behalf of the person who could provide a valid transfer document in return. Indeed, I did not understand it to be disputed that that was the basis on which solicitors adopting the Code would proceed, it of course being their mutual expectation that the person selling the relevant property was indeed the registered owner. But that, it is said, does not mean that the vendor's solicitor is undertaking that that is the case, or is saying anything about whether or not its client is in fact the registered owner.

122. In this context, I was referred to the cases cited in relation to the arguments concerning warranty of authority, and in particular the decision of HHJ Hegarty QC in *Excel Securities v. Masood* [2010] Lloyd's Rep. P.N. 165. That case concerned a claim by a lender against the borrower's solicitors for breach of warranty of authority. The lender had paid mortgage monies to the borrower's solicitors in reliance, it said, on an implied warranty by those solicitors that they had the authority of the registered proprietor of the property to be charged to secure the advance. In fact they did not, and the borrower was a fraudster.

123. HHJ Hegarty QC held that there was a triable issue on the question of reliance, so declined to grant summary judgment to the lender. In the course of his judgment, he did however consider (obiter) whether any warranty was given by the solicitors as to the identity of their client as the registered owner of the property, and concluded that they had not. The only warranty given, he considered, was that the solicitors had authority to act for someone identifying himself as having the name of the registered owner of the property, and claiming to be the owner of it, or (at most) a warranty that they had authority to act on behalf of the same individual with whom the lender had been dealing.

124. *Excel* did not concern the construction of an express undertaking, or the construction of the undertaking given under paragraph 7(i) of the Code. In his judgment, HHJ Hegarty QC did however express views as to what he considered to be the likelihood of solicitors accepting the risk of their client not being who he purported to be, and (in effect) guaranteeing his identity and title. As he said, at [102] and [103]:

> *102. The point can be illustrated, as it seems to me, by considering what the position would have been if Excel or its solicitors had asked BM Solicitors to give some form of express warranty or undertaking. If they had been asked whether they warranted that they had authority to act on behalf of their client in connection with the loan agreement and the execution of the charge, it seems to me to be highly likely that they would have agreed, though they might have asked why it was necessary, given the usual implication of a warranty of authority. But if they had been asked to warrant the identity of the client and to guarantee that he was the same person as the registered proprietor of 17 Richards Place, I think it is almost inconceivable that they would have agreed to do so. The likely response would simply have been that Excel must rely upon their own enquiries.*
>
> *103. It is no satisfactory answer to these considerations, in my judgment, that BM Solicitors could have sought to exclude any liability for breach of warranty of*

> *authority. For my part, I have never, so far as I can recall, ever seen such a disclaimer; and when I asked Mr Lowenstein about it, I did not get the impression that his experience was any different from mine. Once again, it seems to me to be virtually inconceivable that a solicitor would seek to exclude any liability for breach of warranty of authority; and the absence of any common form of disclaimer of responsibility for the identity or other attributes of a solicitor's client is eloquent testimony to what would seem to be the prevailing view in the profession that no such exclusion is necessary since no such warranty would, in any event, be implied.*

125. This decision was given before the 2011 version of the Code had been published, but the undertaking appearing in paragraph 7(i) of the 2011 version is in materially identical terms to that appearing in the 1984 version (paragraph 3(i)), and the 1998 version (paragraph 4(i)). If indeed solicitors would not easily give undertakings amounting to a warranty that their client was the registered owner of the property being sold or mortgaged, it would militate against the construction of the undertaking now being asserted by Dreamvar and MdR.

126. HHJ Hegarty QC's views that it would be almost inconceivable that a solicitor would guarantee to a third party that he has a principal who is the same person as appears on a property register was approved by the Court of Session in *Cheshire Mortgage Corp v. Grandison* [2012] CSIH 66 at [30]. In *Stevenson v. Singh* [2012] EWHC 2880 (QB), HHJ Seymour QC, after considering *Excel*, went further, saying (at [99]): "*I incline to the view that in fact it is unarguable that a solicitor could give a warranty of authority which went further than that he had a client who had given the solicitor the name which the solicitor had identified to the opposite party, or other parties".* In *P&P*, at [123], Mr Robin Dicker QC agreed with HHJ Hegarty QC's observations, a position supported by the factual evidence he heard in that case.

127. No expert evidence was called in the present case, and the only evidence I heard from a conveyancer was from Ms Curtis-Goulding. She was clear in her evidence that she regarded the responsibility for verifying the vendor's identity as being on the vendor's solicitor, such solicitor having obligations to do so as a matter of reputation and regulation under the Money Laundering Regulations. As a matter of practice, unless something stood out, she would rely on the vendor's solicitor to carry out such checks as it considered necessary. She was equally clear that she recognised that a risk remained of the vendor's solicitor acting for a fraudster, even if proper checks were carried out by it into the identity of its client. When asked however as to the possibility of asking the vendor's solicitor for an undertaking as to its client's identity, she said:

> *I would find it hard to believe that any law firm would give an undertaking that they verify their client. It would be watered down -- sorry to interrupt you. It would be watered down. It would say "We have verified our client to the best of our ability" or, you know, "We have satisfied ourselves as to our client's identity but ..." and it will have the big caveat on it that every law firm puts on it, which says, you know "This confirmation will not have any fallback on this firm or its partners". It would be worthless, in my opinion.*

128. Such evidence may be strictly irrelevant to the true construction of the undertaking given by paragraph 7(i) of the Code, but taken with the observations referred to above,

it would suggest that the general understanding within the profession on a transaction for the sale of residential property is that solicitors for the vendor would not give, and would not be expected to give, an undertaking to the effect that their client is indeed the registered owner of the property.

129. It is right to record that the reported cases which I have been referred to do not appear to approach this matter with one voice. In *Zwebner v. Mortgage Corporation* [1998] PNLR 769, an issue arose as to whether the solicitors acting for the lenders and the borrowers in a mortgage transaction were liable for breach of an undertaking that "*all appropriate documents will be properly executed on or before completion"*. The mortgage document was not in fact properly executed, because (as it turned out) the signature of the borrower's wife had been forged by her husband.

130. In debating the true meaning of the undertaking (which the Court of Appeal concluded required the mortgage deed to be signed by or on the authority of the wife), it was submitted that the undertaking would also, on the lender's standard terms, be required to be given by the lender's solicitors on an initial purchase, where the lender's or purchaser's solicitors might know nothing of the vendors. In addressing this, Robert Walker LJ observed (at p.777D) that "*in such a case the solicitors who knew nothing of the vendors could seek an identical undertaking (in respect of the transfer or conveyance) from the vendors' solicitors; and if the undertaking was refused, they would be on inquiry"*. This would suggest that an express undertaking would not be either inconceivable or unusual, and the refusal of it would be a reason for concern by the purchaser's solicitors.

131. Similarly, in *LSC Finance Ltd v Abensons Law Ltd* [2015] EWHC 1163 (Ch) (which I consider further below), HHJ Hodge QC held that the undertaking given by the solicitor required a genuinely executed legal charge, by the real owner of the property. In *P&P*, the solicitors acting for the purchaser appear to have accepted that they could have asked for an undertaking from the vendor's solicitor that they had carried out proper client due diligence (see [149]), which again suggests an anticipation that some valuable undertaking might be available from the vendor's solicitor, even if not of an absolute nature.

132. It is also relevant to consider what is known about the reasons or purpose for the inclusion of the undertaking in paragraph 7(i) of the Code. The Notes to the Code say nothing about that undertaking, although they do refer to the background to the undertaking set out in paragraph 7(ii), namely the undertaking by the vendor's solicitor "*(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"*. The Notes (in paragraph 5) explain that this undertaking was introduced in view of the decision in *Edward Wong*. The Notes continue:

> *Such an undertaking remains an indispensable component of residential conveyancing. While the seller's solicitor will often not be specifically instructed by the seller's mortgagee, the course of dealings between the solicitor and mortgagee in relation to the monies required to redeem the mortgage should at the very least evidence implicit authority from the mortgagee to the solicitor to*

> *receive the sum required to repay the charge (if, for example, the mortgagee has given its bank details to the solicitor for transmission of the redemption funds).*
>
> *On the basis of those dealings (and in the absence of any contrary statements from the mortgagee), the seller's solicitor should be in a position to give the undertaking to discharge (in the Law Society's recommended form, adapted where relevant for electronic discharges) and, for paper discharges (DS1, etc.), to undertake that they have identified the seller's mortgagee to the extent necessary for the purpose of the buyer's solicitor's application to the Land Registry, on which the buyer's solicitor should be able to rely.*
>
> *The seller's solicitor should, if at all possible, receive an express confirmation from the seller's mortgagee that the paper discharge, or an acknowledgment of discharge (for electronic discharges) will be supplied to them. If the seller's mortgagee expressly prohibits the seller's solicitor from dealing with the redemption money, the seller's solicitor should notify the buyer's solicitor as soon as possible. The seller's solicitor and buyer's solicitor should consider whether in those circumstances they can adopt the code and, if so, the necessary variations.*

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.

134. One possible distinction that was suggested in argument between the undertakings in paragraph 7(i) and (ii) was that solicitors might well be willing to take a different view in relation to an undertaking concerning mortgage corporations, whose identity as mortgagee might be more readily capable of validation than that of their vendor clients. While it may well be that the risks of identity fraud with large financial institutions are less than might otherwise apply, the submission would seem to ignore the fact that the undertaking in paragraph 7(ii) covers the proprietor of "*each mortgage, charge or other financial incumbrance*", which would include any charge, however small, and of whatever origin, on the property. An example given in argument was a charge supporting a judgment debt.

135. As recorded at [243] of Mr Dicker QC's judgment in *P&P*, Mr Patten in that case submitted that the purpose of introducing paragraph 7(i) was to address the risk that if monies were forwarded to the vendor's solicitor that person might run off with them leaving the purchaser with no remedy against the vendor. He referred to *Edward Wong*, and to the passage at p.307H in which Lord Brightman commented 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 ". Mr Dicker QC accepted Mr Patten's submission that the reference to "*seller"* in paragraph 7(i) was to the person agreeing to sell the property, i.e., the vendor's solicitor's client, whether or not the registered proprietor, and considered that the passage quoted from *Edward Wong* was consistent with the submission made as to the purpose of the provision.

136. *Edward Wong* did not concern the issue of identity fraud by someone purporting to be the vendor, or mortgagee, but rather the problem of theft by the vendor's solicitor. The Privy Council was accordingly not considering the position of a fraudster pretending to be the vendor, or the mortgagee. It is in any event in my view debatable that the passage relied on by Mr Patten leads to the conclusion he contended for. The passage continued, at p.308A-B, by referring to the steps which could be taken in the case of a property already subject to a mortgage (the example given being paying the amount needed to discharge the mortgage directly to the mortgagee, as opposed to the vendor's solicitor), and concluded with Lord Brightman saying:

> *Simple precautions such as these would ensure that the purchaser or lender was placed by his solicitor in the favourable position which he ought to occupy when he parts with his money, that is to say, he would have an unanswerable claim against the other side for specific performance of that party's obligation to execute the appropriate assurances.*

137. This language appears to envisage a greater degree of protection for the purchaser or lender than simply an undertaking in respect of a person purporting to sell the property, or purporting to be the mortgagee of it. The fact that the Law Society's response to the decision was the introduction of undertakings which are equivalent to those in paragraph 7(i) and (ii), the latter of which is accepted before me as requiring an undertaking in respect of the genuine mortgagee (as opposed to someone pretending to be the mortgagee), would indicate that the undertaking in paragraph 7(i) was not as limited as Mr Patten submitted. Before reaching conclusions on paragraph 7(i), it is however convenient to consider the submissions made by the parties as to paragraphs 11 and 12 of the Code.

Paragraphs 11 and 12 of the Code

138. In *P&P*, Mr Dicker QC referred (at [246]) to the possibility that protection might be afforded to the purchaser by the route of the undertakings provided in paragraph 11 of the Code, which provides that *"When completing, the seller's solicitor undertakes: (i) to comply with any agreed completion arrangements and any reasonable instructions given under paragraph 8..."*. Paragraph 12 further states that "*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..."*. No separate claim for breach of undertaking under paragraph 11 or 12 was advanced by Dreamvar or MdR, but each relied on the completion arrangements agreed as a further reason for contending that MMS was wrong in its submission as to the scope of the undertaking given by paragraph 7(i).

139. The relevant instructions given and accepted as to completion were those referred to in paragraph 27 above, as set out in the Completion Information and Undertakings form,

sent by MMS to MdR on 15 September 2014. As will be recalled, the primary document listed to be provided at completion was the "*TR1 Executed by Seller*". The TR1 was, from Dreamvar's point of view, the critical document, being the transfer document which would enable it to be registered as owner of the Property. It was submitted by Mr Cousins that it was a nonsense in this context to talk of a TR1 being executed by someone who was not the registered owner. The process envisaged a genuine completion, which required a genuine TR1. A fraudulent TR1, it was submitted, was not a transfer document at all. Mr Patten, on the other hand, contended that the reference to "*seller*" in this context, was again simply a reference to MMS's client, i.e., the person purporting to sell the Property.

140. The primary question which accordingly arises here (as with the undertaking given under paragraph 7(i) of the Code) is who is the "*seller*" in the context of this undertaking. The issue, again, is not whether the undertaking is an absolute one, or one which only requires the exercise of reasonable care. Given its admitted negligence, such a distinction will not help MMS. I was however referred in this connection to cases which have considered the construction of words identifying the quality of the execution agreed in respect of particular documents, on the basis that such wording may be relevant in determining by whom the documents in question are to be executed.

141. In *Zwebner*, the undertaking by solicitors acting for the lender and the borrowers that "*all appropriate documents will be properly executed*" was held by the Court of Appeal to mean that the mortgage deed in question needed to be executed by or with the authority of all the proposed mortgagors. It does not appear to have been argued that the execution of the deed by anyone other than the real Mrs Zwebner was required; the debate was rather as to whether the obligation was an absolute one, or only one to exercise reasonable care. The forgery by the husband of his wife's signature meant that the mortgage deed had not been properly executed, and that the solicitors were accordingly in breach of their undertaking. As Robert Walker LJ said at p.777G, "... *I am not persuaded that ... the consequences of giving weight to the word "properly" are so unreasonable as to justify a construction which largely disregards it"*. As he observed, in the factual context it did not "*make the solicitors guarantors of proper execution of documents by persons who are not their clients*".

142. In *Cox McQueen* (another case where the signature of a wife was forged on a mortgage) the solicitors acting for the borrower and the lender were retained by the lender to obtain the signature of Mrs Dukes, and to certify that she understood the document and signed it of her own free will. There was again no debate as to the identity of the person whose signature was required; the issue was whether the obligation on the solicitors was absolute, or only to exercise reasonable care. The absence of the words "*properly executed*" was one of the grounds on which the Court of Appeal distinguished the *Zwebner* decision. As Lord Woolf said at p.602f, they were words "*which involve a statement as to the quality of the execution which is absent in the retainer here*". He further expressed the view (at p.602g) that "*the decision in Zwebner should not be given a wide application*", and that "*if commercial institutions such as banks wish to impose an absolute liability on members of a profession they should do so in clear terms so that the solicitors can appreciate the extent of their obligation which they are accepting"*.

143. In *LSC Finance Ltd v Abensons Law Ltd* [2015] EWHC 1163 (Ch) the defendant solicitors ("Abensons") were sued for (amongst other things) breach of undertaking in parting with mortgage monies without obtaining a valid legal charge over the property against which the loan was made. The charge had been signed by someone impersonating the owner of the property, and the intended borrower (a Mrs Boddice). Her signature on the charge was forged. Abensons had been purportedly acting for the borrower, and another firm of solicitors, Woodcocks, had been acting for the lender. The lender had sent a checklist to Abensons which required them to note that Woodcocks "*must either be holding the original, validly executed security prior to completion*", or Abensons were to "*provide an undertaking of the same*". The undertaking given was in the following form: "*We confirm the execution of ... the first legal charge by the Borrower in favour of LSC over the Property*".

144. HHJ Hodge QC (sitting as a Judge of the High Court) rejected the submission that the undertaking was to be construed as an undertaking that there was a legal charge validly executed by a person purporting to be Abensons' client. He held (at [98]) that, read in context, the undertaking required Abensons to confirm the execution of an original, validly-executed security in the form of a first legal charge by the borrower in favour of the lender over the property. In doing so he observed, picking up on comments made by Millett LJ in *Barclays Bank v Weeks, Legg & Dean* [1999] QB 309 at p.328a-f, that "*Woodcocks could take reasonable precautions to ensure that the legal charge was properly executed by [the lender], but it was difficult to see what steps they could take to ensure that the mortgage to [the borrower] was properly executed by her. Woodcocks had to rely on Abensons for that purpose*".

145. In HHJ Hodge QC's view, the case was on all fours with *Zwebner*. As he explained (at [100]), there was no material difference between a requirement to have a "*validly executed security*" and a "*properly executed security*". Although it was apparently not contended that the person signing was in fact the borrower, and Abensons' client, it appears from the Judge's reasoning that he regarded these words as being important to his conclusion as to the identity of the person who was to execute the charge over the property, namely (as he found) the real Mrs Boddice. This appears to have been on the basis that a validly or properly executed charge could only be granted by the person who was the owner of the relevant interest in the property. On this approach, descriptive words of this nature may be relevant not just to the absolute nature of the obligation undertaken, but also to the identification of the person from whom the security is to be taken.

146. In the present case, the words "*properly*" or "*validly*" were not used as a description of the quality of the execution of the TR1 to be provided by the seller. The fact that undertakings including such words are agreed by solicitors acting for borrowers, does though cast further doubt on the views which have been expressed in some of the cases as to the likelihood of solicitors ever being willing to accept an absolute responsibility in respect of the identity of their client as the registered owner of the property in question.

147. The absence of such words cannot however be conclusive as to either the nature of the obligation undertaken, or the identity of the "*seller*" to whom the obligation relates. What is usually meant by the word "*seller*" in the context of a residential conveyance (as elsewhere) is a reference to the person selling the property in question. In the

ordinary course, it would be expected that that person would be the registered owner, and that the TR1 would be executed by him. If the seller turns out not to be the registered owner, and not able to transfer title by a valid TR1, he will (in so far as such agreement has any validity) be in breach of the agreement for the sale of the property. But the contractual commitment by the person purporting to sell the property is not to be confused with any contractual commitment (by undertaking or otherwise) given by the solicitor acting for him.

148. While it is correct, as cautioned by Mummery LJ in *Cox McQueen* at p.605c-f, that precedent is of "*extremely limited value*" on a question of construction of a document, it would in my view be wrong for me to ignore factors which have been considered relevant in previous decisions, and indeed the repeated warnings that clear words are needed before a solicitor assumes what is in effect responsibility for fraud by his client. Against this background, the language used in the undertaking is not in my view sufficiently clear to impose on MMS an obligation (whether absolute, or otherwise) to provide a TR1 executed by the registered owner. The obligation is to provide only a TR1 executed by the seller, i.e. its client.

149. As a result, there was in my view no breach by MMS of the undertakings given by paragraphs 11 and 12 of the Code, and the route envisaged by Mr Dicker QC at [246] of his judgment in *P&P*, whereby the purchaser might be protected from the risk of a fraudulent vendor by means of the instructions given under paragraph 8 of the Code, has not been achieved in this case.

Conclusions on paragraph 7(i) of the Code

150. With that diversion, it is however necessary to return to the true construction of the undertaking given by paragraph 7(i) of the Code. If the undertaking to provide the "*TR1 Executed by Seller*" had referred to the registered owner, I would agree with Mr Cousins that it would provide relevant factual context for the construction of paragraph 7(i), and the determination as to who was referred to by "*the seller"* in that paragraph. The undertaking in paragraph 7(i) is however a standard form undertaking, and it would in my view be unfortunate if its true construction from case to case turned on whether or not other undertakings not recorded in the Code used the word "*seller"* in the same or different sense.

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.

153. Furthermore, if it is right that there is no implied warranty by the vendor's solicitor in circumstances such as the present which extends to the identity of the vendor as the registered owner (a matter I consider further below), it is likely to confirm that in general terms references to the *"seller"* in such contracts (and the Code) are indeed references to the person purporting to sell, and not to the registered owner. It is also likely to confirm that if the position is to be changed by an express undertaking, the express undertaking should be unambiguous in its reach, and put beyond doubt the precise extent of the contractual obligation being assumed by the vendor's solicitor.

154. In my view, the wording of paragraph 7(i) is not, in all the circumstances, sufficiently clear to impose on MMS an obligation (whether absolute, or otherwise) to have the authority of the registered owner to receive the purchase money on completion. In the result therefore, I am not persuaded that there is a powerful reason for departing from the decision of Mr Dicker QC in *P&P*, and I decline to do so. The allegation by Dreamvar and MdR that MMS was in breach of the undertaking in paragraph 7(i) of the Code accordingly fails.

Breach of warranty of authority

155. As recorded above, the claim by Dreamvar for breach of warranty of authority is put in two ways. The first is an allegation that MMS warranted that it had the authority of the registered owner of the Property, i.e. the real Mr Haeems, and the second is that MMS warranted that it had exercised reasonable care and skill in establishing its client's identity as the registered owner. If either such warranty were given, it was broken; MMS did not act for the registered owner, and had not taken reasonable care to establish that the person instructing it was the registered owner.

156. MMS accepts that it warranted that it had a client (which was true), but denies that it gave any wider warranty in respect of him. Mr Patten again relies on the decision in *P&P*, in which Mr Dicker QC held that no warranty of the first type contended for here was given (see [70]-[133] of his judgment). While it was not argued in *P&P* that a warranty of the second type contended for here applied, P&P had alleged that Owen White owed it a duty of care in tort, which contention was rejected by Mr Dicker QC at [134]-[154]. Mr Patten contends that the second type of warranty is not only antithetical to the first type of warranty, but that if any responsibility of this sort were to arise, it would do so in tort, which is not alleged here, and would in any event be misplaced for the same reasons as set out by Mr Dicker QC.

157. In relation to the first type of warranty alleged, Mr Halpern's primary submission was that the law has taken a wrong turn in the cases since *Penn v. Bristol & West Building Society* [1997] 1 WLR 1356, and in particular that the decision in *Excel* misread and misunderstood that earlier binding authority of the Court of Appeal, which was itself based on a long line of cases, and that the decisions since *Excel* which have endorsed the approach in it, have made similar errors of analysis. He accordingly submits that I

am not bound by, and should not follow, the line of first instance decisions starting with *Excel*, including the recent decision of Mr Dicker QC in *P&P*. On the contrary, he contends, I am bound by *Penn*, and should follow that decision. Mr Patten, on the other hand, contends that *Excel* and the cases that have followed it, are simply applications of well established principle, are not inconsistent with *Penn*, and are decisions which I should accordingly follow.

158. I have referred to a number of the relevant cases above, in the context of considering whether in the present case there was the equivalent, in effect, of an express warranty of authority, either by reason of the undertaking in paragraph 7(i) of the Code, or by the further undertakings in paragraphs 11 and 12 of the Code. Although I have concluded that there was no such express warranty, and that the reference to the "*seller*" in paragraph 7(i) of the Code (and in the Completion Information and Undertakings form) was in context a reference only to MMS's client, Mr Halpern's submissions on the implied warranty did not depend on him succeeding on the breach of undertaking case which he adopted at the end of the trial.

159. The law concerning the implied warranty of authority given by an agent when acting for another was fully reviewed by Mr Dicker QC in his judgment in *P&P* at [74] to [108]. In order not to lengthen further an already lengthy judgment, and in view of the further factual conclusions which I reach below, I hope I can do justice to the detailed submissions of each party by confining my comments to the following observations.

160. It is apparent that the modern law of warranty of authority is based on a collateral contract between the agent and the third party with whom he deals on behalf of his principal. Whether any, and if so what, warranty arises in any particular situation is accordingly a factual question. This was made clear by Waller LJ in *Penn* at p.1363B-D:

> *In truth as I see it, the question whether a warranty of authority has been given rests on a proper analysis of the facts in any given situation, and not on any preconceived notions as what is essential as part of the factual analysis. Of course there is no issue that to establish a warranty of authority as with any other collateral warranty there must be proved a contract under which a promise is made either expressly or by implication to the promisee, for which promise the promisee provides consideration. But consideration can be supplied by the promisee entering into some transaction with a third party in a warranty of authority case just as it can in any other collateral warranty case... It follows... that the plaintiff... has to establish that the promise was made to him. There is also no doubt that what he has to establish is that a promise was made to him by the agent, to the effect that the agent had the authority of the principal, and that he provided consideration by acting in reliance on that promise.*

161. There is no reason in principle why an agent could not be held, on particular facts, to have warranted that his principal had a particular identity, or particular attributes, such as being the owner of a painting, or a property, or being credit-worthy or in sufficient funds for a particular purpose. While the mere fact of acting as an agent is likely, without more, to give rise to what has been referred to as the basic representation or warranty that the agent acts for another, it is not generally a sufficient basis on which to imply a wider warranty in respect of any particular supposed identity or attribute of the

principal. The particular facts and circumstances of a particular case may of course show that the agent has assumed some wider responsibility, but the starting point is the basic warranty.

162. In this connection I respectfully agree with Mr Dicker QC in *P&P*, who, after reviewing the relevant authorities, expressed his conclusions as follows, at [121]:

> *The basic representation is only that the agent has authority to act for another, a matter which arises between him and his principal and is something which is usually peculiarly within his own knowledge. An agent does not, simply by acting as agent, represent that his principal will perform the contract or is solvent or make any other representation as to the principal's attributes or characteristics. The court should not imply a warranty of authority which has an effect going beyond the basic representation, save where it is clear that the necessary promise is properly to be implied. This is particularly so in relation to professionals, including solicitors, who do not normally undertake an unqualified obligation.*

163. The fact that professionals, including solicitors, do not normally undertake an unqualified obligation (as referred to in cases such as *Platform Funding*), is part of the context in which on any particular facts a determination would need to be made as to whether something more than the basic warranty has been implicitly agreed by such a person. It would however be necessary to consider all the circumstances of any particular transaction. The objective likelihood of a solicitor implicitly promising that a certain state of affairs did or did not exist, and the objective expectations of those engaged in transactions in the relevant field, would be relevant factors in such consideration.

164. How these principles are to be applied in the present circumstances is ultimately the principal issue in this part of the case. It is not alleged by Mr Halpern that the facts relating to this transaction are any different to those in an ordinary residential conveyance, and that the issue therefore applies to any standard residential conveyance where (absent any particular facts, or an exclusion of responsibility) the vendor's solicitor purports to act for the seller of property. In the ordinary run of each such case, it is contended, the vendor's solicitor implicitly warrants that its client is the registered owner of the property being conveyed.

165. As Mr Dicker QC observed in *P&P* (at [103]), the reported cases which have considered the extent of the warranty of authority given by a solicitor in such a transaction can be said to lead to potentially fine distinctions. In *Penn*, it appears to have been common ground that the solicitor warranted to the purchaser that he had the authority to act on behalf of the vendors of the property, Mr and Mrs Penn. The primary issue on appeal was whether that warranty had been given to the purchaser's building society as well, and it was held that it had. The warranty was broken because, unknown to the solicitor, he had not in fact been instructed by Mrs Penn, and Mr Penn had forged her signature on the documents relating to the sale, which went ahead without her knowledge. It is clear that the warranty was treated as a warranty that the solicitor was acting for the Mrs Penn who in fact owned the property, and damages were awarded on that basis (see p.1364D-E, per Waller LJ).

166. Mr Patten submitted that in fact the only warranty in play in *Penn* was the basic warranty as to the solicitor having a client known as Mrs Penn, and that the damages awarded (which were based on the counterfactual that the solicitor had been instructed by the real Mrs Penn) are explicable on the basis that in assessing damages the Court will take a realistic approach as to who the solicitor is saying he is acting for. In *Penn*, it was submitted, the only realistic answer was the Mrs Penn who was the joint owner of the property, and it was not open to the solicitor to say it could have been any other person. He did not in fact have any client going by the name of Mrs Penn at all. It was implicit in this submission, that in cases such as the present, where there is another individual who is identifiable as the person instructing the solicitor, the warranty relates to that person, and is not broken.

167. In my view, this is a difficult rationalisation of *Penn*. The solicitor did have someone, who he accepted as a client, and for whom he was purporting to act, who was pretending to be Mrs Penn. That was in fact Mr Penn, who forged her signature, and sent the documents purporting to be from her. The solicitor was only able to act in the way he did because of his understanding as to the identity of his client. It is not obvious why the position would have been different if Mr Penn had introduced someone to impersonate his wife, who had either met the solicitor, or spoken to him, or signed and sent the documents to him. In each case that person would have been presented as Mrs Penn. And in each case, the representation that the solicitor would make to the purchaser or the lender in relation to his client is likely to have been exactly the same. The fact of forgery would mean that there was necessarily someone other than Mrs Penn pretending to be the real Mrs Penn. While the matter was not debated in *Penn*, I would agree with Mr Halpern that the warranty found would seem to have been in respect of a principal named Mrs Penn who owned the property, and not in respect of the person who was purporting to instruct the solicitor in the name of Mrs Penn.

168. A warranty along these lines appears to have been envisaged by Chadwick J in *Fancy & Jackson* at p.613b (in the context of the *Cooke & Borsay* case), when he said, in relation to the acceptance by solicitors acting for a lender of a forged mortgage deed, "*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 of the Court of Appeal in Penn v Bristol & West …*". In circumstances (as in *Fancy & Jackson*), where the same solicitor acted for both the borrowers and the lenders, Chadwick J considered that the position would be the same. As he said, at p.613c-d:

> *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. If the deed had been delivered with the authority of Mrs Barton as security for the*

> *advance which was made by the society, the fact that it did not, in fact, bear her signature would be relatively unimportant. She would clearly be bound by its terms.*

169. In *Zwebner*, Robert Walker LJ (with whom Waller and Hobhouse LJJ agreed), considered that an implied warranty of authority would generally be given by a vendor's solicitor. As he said at p.777E :*"Moreover even in the absence of an express undertaking, the vendors' solicitor would normally be liable on an implied warranty of authority if on completion they handed over a transfer or conveyance with a forged signature. The finding of such a warranty depends on the facts of a particular case, but that would be the general rule: see Penn v Bristol & West …"*. Furthermore, his conclusion (at p.780B-781D), that the solicitors who were acting in that case for both the borrowers and the lenders were liable for negligence in their capacity as the lenders' solicitors, was based on the premise that if they had been acting solely for the lenders, there would have been a implied warranty of authority from a separate firm acting for the borrowers.

170. Both *Zwebner* and *Fancy & Jackson* were on similar facts to those in *Penn*. In each of these cases the signature of the wife had been forged. There does not appear to have been any debate in either of them as to the identity of the person for whom the solicitor was purporting to act, and her attributes, or status, as the person who in fact had the relevant interest in the relevant property. There is though force in Mr Halpern's submission that the underlying fact pattern, of someone pretending to be the wife (the owner of the property), and forging her signature, is substantially the same as someone pretending to be Mr Haeems (the owner of the Property), and forging his signature.

171. Against that background, it is necessary to consider *Excel*, and the cases that have followed it (in particular *Stevenson*, *Grandison* and *P&P*). Each of these cases concerned a fraudster impersonating the true owner of a property. I have already referred to my doubts as to the factual assumptions made in *Excel* and elsewhere as to the extent of the lack of willingness of solicitors to assume contractual responsibility for the identity of their client. An express undertaking is however of a different nature to what can properly be implied, and the fact that some solicitors are willing to give such undertakings does not mean that they are willing to assume such responsibility in the absence of an express provision. Indeed, on one view, the perceived need for an express warranty might indicate an assumption that the same responsibility was not otherwise undertaken implicitly.

172. In each of these cases (*Excel*, *Stevenson*, *Grandison* and *P&P*), the implied warranty of authority by the solicitor was held to be the basic one only, i.e. that the solicitor had a principal. These decisions are, on the face of them, difficult to distinguish satisfactorily from the decision in *Penn*. But, unlike in *Penn*, the nature and extent of the warranty impliedly given was fully argued in these cases, and considered decisions reached on that very question. They amount to a significant body of authority against the proposition for which Mr Halpern argues. As such, and had it been necessary to reach a decision on this, I would not have been persuaded that there were adequately powerful reasons for me to depart from these decisions.

173. In the event however, it is not necessary for me to decide this aspect of Dreamvar's case on this basis. This is essentially for two reasons. First, as I have already decided,

the references to the "*seller*" in paragraph 7(i) of the Code and the Completion Information and Undertakings form do not in this case amount to a reference to the registered owner of the Property, but only to the person purporting to sell it. That is a strong indication that the other references to the "*seller*", or to MMS's client, in the exchanges relating to the transaction, were not implicitly meant, or taken, as a warranty that MMS was acting for the registered owner.

174. But secondly, and more importantly, a significant element of the claim for breach of warranty of authority is that the recipient of the warranty understood it as such, and relied on it (see, for example, *Penn* at p.1363D, per Waller LJ; *Knight Frank v. du Haney* [2011] EWCA Civ 404, at [23], per Tomlinson LJ). On the strength of the decision of the High Court of Australia in *Leggo v. Brown & Dureau* [1923] 32 CLR 95, Mr Halpern and Mr Cousins submitted that reliance was not in fact necessary. The decision in *Leggo* shows that it is not necessary for the person to whom the warranty is addressed to believe it to be true. As Knox CJ observed (at p.99), the absence of belief may afford strong reasons for insisting on the promise that the agent was in fact authorised to do what he was doing on behalf of the principal. But I do not understand the decision to be suggesting that the third party need not rely on the promise. On the contrary, the decision confirms the need for it (see Knox CJ at p.99; Isaacs J at p.104-5, and Rich J at p.110-111). It is the reliance on the promise which provides the consideration for it.

175. I have referred above to the evidence given by Ms Curtis-Goulding as to the possibility of her asking a vendor's solicitor for an undertaking as to its client's identity. As will be recalled, she recognised that a risk remained of the vendor's solicitor acting for a fraudster, even if proper checks were carried out by it into the identity of its client. But she did not expect a vendor's solicitor to assume a contractual obligation that its client was who he said he was. She would not expect any such warranty to be given, if sought, and that anything in relation to the client's identity which was warranted by the vendor's solicitor would, in her view, be so watered down as to be worthless. Consistent with this evidence, she did not assert that she understood MMS to be warranting that its client was the registered owner of the Property. Nor did she assert that she relied on any such warranty in carrying forward her instructions as to the purchase of the Property for Dreamvar. In my view that evidence is fatal to the claim for breach of warranty in the first way it is put.

176. Dreamvar's alternative claim is that MMS warranted that it acted for the person claiming to be Mr Haeems, and that it had exercised reasonable care and skill in establishing his identity. This is in effect, as Mr Halpern described it, a watered down version of the primary way in which the claim for breach of warranty is put. I agree with Mr Patten that this case is inconsistent with the first way in which the claim for breach of warranty is put, although in circumstances where (as I have held) that claim has failed, this may not matter.

177. But there are in my view greater difficulties with the allegation. In the first place, it is again not supported by Ms Curtis-Goulding's evidence. While Ms Curtis-Goulding was clear that she regarded the responsibility for verifying the vendor's identity as being on the vendor's solicitor, she did not consider that to be a matter of obligation owed by the vendor's solicitor to the purchaser. In other words, her evidence did not support the contention that MMS had promised to exercise reasonable care to establish

its client's identity, or that she had relied on that promise in the transaction. There is a world of difference between an assumption that someone will do something in its own interests, and a contractual commitment by that person, to its counterparty, that it will.

178. It is in any event in my view inappropriate to consider an implied assumption of contractual responsibility to exercise reasonable care separately from the circumstances in which such an assumption of responsibility would arise in tort. It was not suggested that any such duty in tort arose here, and for good reason. The jurisprudence in this area was reviewed by Mr Dicker QC in the *P&P* case (at [134] to [154]) in connection with the allegation that the vendor's solicitor, Owen White, owed a duty of care to the purchaser. As referred to by Mr Dicker QC, the general position is that no such duty of care is owed. If the facts do not support an assumption of responsibility in tort, it is difficult to see how they could give rise to an implied contractual warranty to similar effect.

179. I accordingly reject Dreamvar's claim that MMS was in breach of warranty, on each of the bases on which it is put.

Section 61

180. Having considered Dreamvar's claims against MMS, it is now appropriate to return to its claim against MdR, and MdR's application for relief from personal liability for breach of trust under s.61, Trustee Act, 1925. That section 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.*

181. The principles to be applied in relation to s.61 in the context of conveyancing transactions have been discussed by the Court of Appeal in the three recent decisions of *Markandan*, *Davisons* and *RA Legal*. I gratefully adopt the summary of the applicable principles as set out by Mr Dicker QC in *P&P*, at [252]:

> *The relevant principles governing the application of section 61, as they appear in particular from the three authorities referred to above, can be summarised for present purposes as follows:*
>
> > *(1) The section requires the solicitor to have acted reasonably. Section 61 must be interpreted consistently with equity's high expectations of a trustee discharging fiduciary obligations; [RA Legal] per Sir Terence Etherton C at [108]. It requires the trustee to have acted "… with exemplary professional care and efficiency" and to have been "careful, conscientious and thorough"; [Markandan] per Rimer LJ at [60]-[61]. This does not however predicate that he has necessarily complied with best practice in all respects and the requisite standard is that of reasonableness not perfection; Davisons per Sir Andrew Morritt C at [48] and [RA Legal] per Briggs LJ at [30].*

> *(2) A strict causation test casts the net too narrowly for the purposes of identifying relevant conduct. It would not be appropriate to exclude as irrelevant conduct which consisted of a departure from best or reasonable practice which increased the risk of loss caused by fraud, even if the court concludes that the fraudster would nonetheless have achieved his goal if the solicitor had acted reasonably. On the other hand, the court's jurisdiction to grant relief is not precluded by conduct of the trustee which, although unreasonable, played absolutely no part in the occasioning of the loss; [RA Legal] per Briggs LJ at [25] and Sir Terence Etherton C at [109]-[110].*
>
> *(3) The burden of proving that he acted reasonably lies squarely on the solicitor; [RA Legal] per Briggs LJ at [54]. The onus is on the trustee to place before the court a full account of his or her conduct leading to the breach of trust; per Sir Terence Etherton C at [111].*
>
> *(4) Even if the trustee ought fairly to be excused, the court still retains a discretionary power to grant relief from liability, in whole or in part, or to refuse it. 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 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;[RA Legal] per Briggs LJ at [33].*

182. The first stage of the s.61 analysis is that the trustee, MdR, must show (the onus being on it), that it has acted both honestly and reasonably. No question of dishonesty arises in the present proceedings. I have already concluded, in connection with the allegations of negligence against MdR, that MdR was not in breach of duty to Dreamvar, in that it did not fail to exercise reasonable care and skill in the respects alleged against it. Mr Halpern contended that that is not conclusive of the question of reasonableness under s.61, because the onus in relation to s.61 is reversed, and is on MdR, and not (as in the case of the negligence allegations), on Dreamvar.

183. While Mr Halpern is right that the onus in establishing reasonableness in connection with s.61 is on MdR, I do not consider that that assists him in the present circumstances. I have already found, on the balance of probabilities, that MdR was not negligent. That finding does not depend on the onus being on Dreamvar, and Dreamvar not being able to discharge that onus, but is rather a finding as to the reasonableness of MdR's conduct based on the material before me. In these circumstances MdR has discharged the onus on it, that its conduct was reasonable. It was not suggested that the standard by which reasonableness should be assessed in this context is any different to that applicable in considering the allegations of negligence against MdR.

184. The second stage of the s.61 analysis involves deciding two related discretionary matters. The first is whether MdR ought fairly to be excused for the breach of trust; the second is whether, even if MdR ought fairly to be excused, the court should in its discretion grant relief (in whole or in part) or refuse it. Although the structure of the section separates these two matters, it was not suggested, on the facts of this case, that different factors fall to be considered for each. It was accepted (as per Briggs LJ, in *RA*

Legal at [33]) that the position of Dreamvar, as the beneficiary of the trust, and the effect or consequences of the grant or refusal of relief on it, were relevant matters to be considered. It was also accepted that the comparative financial consequences to both MdR and Dreamvar were relevant considerations.

185. As will be apparent from my recital of the facts at the start of this judgment, the effect of the breach of trust on Dreamvar has been disastrous. It has lost the purchase price, and in return received nothing. It did not have insurance, or any ability (or knowledge) to enable it to self-insure against the risk of fraud, of which Mr Vardar was unaware. Its abbreviated balance sheet as at 31 March 2015 shows it to be solvent, but with creditors of more than £1.2 million, the bulk of which I infer to be attributable to the catastrophic transaction concerning the Property.

186. It was suggested by Mr Cousins that I could take into account the fact that Dreamvar's solicitors had, at an interlocutory stage of these proceedings, asserted in correspondence (in connection with contentions by the Defendants that Dreamvar should provide security for costs) that Mr Vardar was "*an individual of high personal net worth*". The correspondence was unsuccessful in its objective, in that Dreamvar was ordered to provide security for the Defendants' costs, but more importantly, this was not a matter explored at all in evidence with Mr Vardar. While I accept that the circumstances of the sole shareholder and director of Dreamvar could in principle be relevant to the exercise of this discretion, I am unable on the evidence to reach any conclusions other than that the loss of the purchase price has had a very significant financial effect on Dreamvar (and Mr Vardar).

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.

Dreamvar's remedies

189. In the result therefore Dreamvar succeeds in its claim for breach of trust against MdR, and is entitled to have the trust fund restored, or compensation paid in respect of it. I do not understand there to be any dispute as to the amount recoverable on this basis, which is the amount of the purchase price paid, £1.1 million, less the sum of £19,800,

being the commission charged by the estate agents, D&G, which D&G returned when becoming aware of the fraud. The balance amounts to £1,080,200.

190. In circumstances where Dreamvar's claims against MdR in negligence, and against MMS for breach of warranty of authority and breach of undertaking, have failed, it is unnecessary for me to lengthen this judgment by considering the further submissions which have been made to me as to the loss which would have been properly recoverable by Dreamvar in respect of such claims had they succeeded. These included submissions as to the elements of Dreamvar's loss which depended on the hypothetical actions of third parties, being either the fraudster, or (as between MdR and Dreamvar) MMS, in respect of which it was contended that Dreamvar's loss was to be assessed on the basis of the loss of a chance.

191. It is however right that I make findings in relation to two items of loss claimed by Dreamvar as part of its claim for damages in contract or tort, but which do not arise in relation to the claim for breach of trust. The first concerns the sum of £6,691 which Dreamvar paid by way of fees to MdR in connection with the purchase of the Property. The second concerns the sum of £11,400 claimed by the invoice raised by Ms Yeoh's company, GIA, for the aborted work carried out in relation to the Property.

192. As to MdR's fees, Mr Halpern points to the fact that on other aborted transactions, MdR had reduced its fees, and that I should conclude that had the right advice been given at the right time, the invoice would probably have been halved. It was apparent from Ms Curtis-Goulding's evidence that MdR's view as to any reduction in fees would depend on the stage at which a transaction was aborted, and the time spent on the matter at that time. I am not satisfied that had any advice been given which led to the transaction being aborted, that it would have been given at such a time as to give rise to any material savings in fees. Had it arisen, I would not therefore have found that Dreamvar's loss included any part of MdR's fees.

193. As to Ms Yeoh's invoice, it was contended by Mr Cousins that the exercise Ms Yeoh was engaged on at the Property was preparatory work for quoting for the refurbishment works to be carried out, and that the remuneration for her work was to come from the refurbishment itself, if the quote she tendered was accepted by Mr Vardar (which, in the event, it was not, because of the discovery of the fraud). It was therefore suggested that the work she carried out was not work that she was ever intended to be paid for separately, and that she was not entitled to invoice Dreamvar for it. It also became apparent in Ms Yeoh's evidence that the disbursements identified in the invoice, for the work of various tradesmen at the Property, have not yet been paid by Ms Yeoh, and indeed she (and the tradesmen) are not expecting to be paid unless Dreamvar is successful in these proceedings. In those circumstances it was also suggested that Dreamvar does not in fact have a liability to Ms Yeoh, or her company, at all.

194. While Mr Cousins was right to explore these matters, in the result I do not consider that the combination of factors to which he refers means that Dreamvar has not suffered loss in the amount of the invoice. It was never in issue that Ms Yeoh would be asked to carry out the work at the Property. The quoting exercise was part of the costing and budgeting process, and not a procedure to determine whether or not Ms Yeoh would be engaged. She had a close and trusting working relationship with Mr Vardar, and in turn had a close and trusting relationship with the tradesmen she used, and who had been

used on other of Mr Vardar's projects. In these circumstances she would in my view be able to claim for the wasted work on a *quantum meruit*. On the basis of her evidence, I am satisfied that the sum claimed is reasonable. The fact that she (and in turn the tradesmen involved) are currently willing not to press for payment unless Dreamvar succeeds in this litigation is a measure of the relationship between them, and their recognition of the devastating effect the fraud has had on Dreamvar and Mr Vardar.

195. Were it to arise, I would accordingly hold that Dreamvar has suffered loss in this additional sum of £11,400, representing its liability to Ms Yeoh's company for the abortive works carried out at the Property between its purported acquisition, and the discovery of the fraud.

Contribution

196. In view of the conclusion I have reached that MMS is not liable to Dreamvar, the question of contribution between MdR and MMS under the Civil Liability (Contribution) Act, 1978 does not arise. Further, it follows from the findings I have made as to the extent of the obligations assumed by MMS as agent under the Code, that MMS was not in breach of its duty to MdR as agent, and accordingly the parallel claim by MdR against MMS for damages for breach of that duty fails.

Interest

197. Dreamvar contends that it should be awarded interest pursuant to s.35A, Senior Courts Act, 1981 or in equity on the amount payable to it at the rate of 10% per annum. The basis of this contention is that that was the rate at which companies of the type that Dreamvar was, and is, were able to borrow at during the relevant period. The evidence to support this contention is that (i) this was the rate at which Mr Vardar's father had agreed to lend the sum of £700,000 to Dreamvar to enable it to buy the Property, and (ii) Dreamvar had received in September 2014, after it had believed it had acquired the Property, an offer from Lendinvest (a loan company) to lend it £566,000 for up to 12 months to be used for refurbishment costs, at a rate of 0.75% per month, plus a 2% arrangement fee, which it is said amounts in total to 11% per annum.

198. The principles on which an award of interest under s.35A is to be made have recently been reviewed by Mann J in *Sycamore Bidco Ltd v. Breslin* [2013] EWHC 174 (Ch) at [44]-[50], by Hildyard J in *Challinor v. Juliette Bellis* [2013] EWHC 620 (Ch) at [30]-[46], and by Warren J in *Reinhard v. Ondra* [2015] EWHC 2943 (Ch). The broad object of the exercise is to compensate the claimant for being kept out of his money. It is not however a measure of the claimant's actual loss, whether in the form of the actual costs (if any) which the claimant has incurred by borrowing the sum of which he has been deprived, or the loss of profit (if any) which he has suffered by not being able to use and earn profits from that sum. While such matters would be relevant to a claim for damages, they are not part of the enquiry in relation to a claim for interest under s.35A. The enquiry under s.35A is intended to identify the rate of interest which would fairly compensate a person in the position of, and having the same general attributes as, the claimant.

199. In a commercial context, the general assumption which is applied is that the sum lost would have to be replaced by money borrowed to maintain the claimant's business, and

that accordingly the right proxy to adopt is that of the cost of borrowing by those in the position of the claimant. In non-commercial contexts, where the principal sum awarded by the Court is an accretion to the funds of the claimant, rather than the replacement of monies previously used, it may be more appropriate to look at potential investment returns in the form of deposit rates. In other cases still, where the claimant's activities do not depend on credit, but equally, where he would not simply place the monies on a deposit account, a different approach might be justified, being somewhere between borrowing and deposit rates (see *Challinor* at [31]-[35]; *Reinhard* at [19]-[22]).

200. The attempted purchase by Dreamvar of the Property was part of its business, and its business was one which depended, to a significant extent, on borrowings. In these circumstances, the appropriate enquiry is to identify, in the relevant period (i.e. from September 2014 to date), the cost of borrowing a sum of the order of £1 million by a business in the same class, or having the same general attributes, as Dreamvar. As the cases recognise, in embarking on this enquiry, the Court necessarily adopts a broad brush.

201. As the current edition of the Commercial Court Guide notes, by reason of recent interest rate developments, the historic approach of the Commercial Court (as articulated in cases such as *Shearson Lehman Hutton Inc v Maclaine Watson (No 2)* [1990] 3 All ER 723) to award interest at base rate plus 1%, unless that was shown to be unfair or otherwise inappropriate, is no longer the necessary starting point in commercial cases such as the present. There is no longer a presumption that 1% over base is the appropriate measure of a commercial rate of interest.

202. In principle, the particular personal borrowing characteristics of the claimant are irrelevant to the enquiry, but in practice evidence of the rates at which the claimant has been able to borrow is evidence (and sometimes the best evidence) of the rate at which borrowers of the class to which the claimant belongs could borrow (see *Sycamore* at [46]-[47]). In the absence of any presumption, it is for the claimant to establish any particular rate at which it contends that interest should be awarded.

203. While there have been historical differences in the approach to an award of statutory interest, on the one hand, and an award of interest in equity, on the other, it is not contended before me that there is any material difference between them in the approach I should adopt here. The relevant principles to apply are accordingly the ones relating to statutory interest, in other words the determination of an appropriate simple rate of interest in accordance with the principles summarised in the cases I have referred to.

204. There was no general evidence before me as to the rate at which a small residential property company could borrow sums of about £1 million in the period September 2014 to date. The only evidence was evidence specific to Dreamvar's position, namely the agreement which Mr Vardar entered into with his father, and the offer from Lendinvest. For these purposes I do not consider it right to place any significant weight on the terms of the loan from Mr Vardar's father. The evidence does not show that it was an arm's length transaction, and the rate of interest agreed could easily be influenced by a number of factors which would not be appropriate to take into account for the present exercise.

205. I do however consider the offer of a loan from Lendinvest as some (albeit limited) evidence of the terms on which a company of the nature of Dreamvar could borrow at the relevant time. There was no evidence before me as to the course of negotiations for this loan, or as to what other (if any) lenders were approached by Mr Vardar, or the terms on which they might be prepared to lend. The loan offered by Lendinvest was to be fully secured, not just by a guarantee from Mr Vardar, but also by a charge over the Property. The fact that the loan was for refurbishment costs does not change its value as evidence of the borrowing costs of companies of this nature, whose business is the acquisition, refurbishment, and resale of residential properties.

206. There was no direct evidence before me as to whether terms such as those offered by Lendinvest remained a true reflection of the terms on which loans were available to Dreamvar, or to companies of the same class, throughout the period from September 2014 to date, or whether there was any material improvement or deterioration in such terms in such period. Similarly (for what worth), there was no evidence before me as to the rates at which Dreamvar in fact borrowed during the relevant period, or indeed what its borrowings were (if any) throughout the period.

207. Mr Cousins objected to the rate claimed on the basis that the evidence put forward by Dreamvar did not relate to any particular class of borrower (even if there were an identifiable class of which Dreamvar formed part), and was of limited value. He also submitted that the reality is (as Mr Vardar had himself said at a time when Dreamvar was pursuing a claim for consequential loss), that Dreamvar would have invested the purchase monies lost in another property, and as the claim for consequential loss has now been withdrawn, it can be inferred that no material return would have been made from it. He also contended that while no claim for recovery of interest as damages had been made, a rate of interest at the level claimed of 10% would not be recoverable as damages on the basis that it was not reasonably foreseeable.

208. As already mentioned, the exercise of determining an appropriate interest rate for the purposes of s.35A does not require an investigation into what the successful claimant would have done with the money had it not been deprived of it. Similarly, factors which may be relevant to a challenge to a claim for interest as damages, had any such claim been made, are not (without more) relevant to the exercise of ascertaining the notional cost of borrowing of persons in the same class as the claimant.

209. If further evidence as to the borrowing costs of companies of the same character and class as Dreamvar had been adduced, and that evidence indicated a consistent rate of 10% per annum as the basis on which they could borrow during the relevant period, then I would have been prepared to award interest on that basis. The evidence adduced by Dreamvar on this, while consistent with a 10% rate, does not however satisfy me that it is the right rate to award in the present case. It is also substantially higher than any previous award of interest which I have been referred to under s.35A, and in my view (in the absence of further evidence), an award of interest at that level would be unfair to MdR.

210. Doing the best I can on the material available, and taking account of the historically low level of base rates during the relevant period, I conclude that the appropriate rate of interest is 4.5% per annum, simple, to run from the date of breach of trust (17 September 2014) to the date of judgment.

Conclusions

211. For the reasons set out above, MdR is liable to Dreamvar for breach of trust, and fails in its application for relief under s.61, Trustee Act, 1925. As a result, it is liable to pay Dreamvar £1,080,200, plus interest at 4.5% per annum from 17 September 2014 until the date of judgment. Dreamvar's other claims against MdR, and its claims against MMS, fail. MdR's claims for contribution and damages against MMS also fail.