

## PROFESSIONAL NEGLIGENCE

# Lenders vs lawyers

Recent mortgage lender cases against solicitors have emphasised breach of trust



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The principal theme running through the recent mortgage lender cases against solicitors is lenders' continuing desire to transcend tort/breach of contract, and to allege breach of trust or fiduciary duty, following the key earlier cases of *Target v Redferns* (HL) and *Bristol & West v Mothew* (CA). The advantages of this approach are that contributory negligence cannot run and that establishing causation may pose fewer obstacles.

There have been four decisions in the past few months. In *Mortgage Express v Iqbal Hafeez Solicitors* [2011] EWHC 3037 (Ch), 10.10.2011, D had advanced C's money for the intended purchase of three properties. It turned out that the transactions were fraudulent – the owners of the properties were not selling them, the vendors' 'solicitors' did not exist and the monies vanished. J Randall QC found D liable for breach of trust, applying the *Lloyds v Markandan & Uddin* (first instance, later affirmed in the Court of Appeal – see below). He was prepared to accept ignorance, incompetence and naivety on D's part, rather than actual dishonesty, but concluded that the parting with money on what was in fact a non-transaction without making any of the appropriate checks had been in breach of trust.

In *AIB Group (UK) plc v Mark Redler & Co (A Firm)* [2012] EWHC 35 (Ch), 23.1.2012, C was lending some £3.3m secured over a property valued at £4.25m. D (C's solicitors on the remortgage) was to discharge the borrowers' previous lending by Barclays, but inadvertently only enquired about, and so only discharged, one of the two accounts. As a result – in rough figures – D paid Barclays £1.2m instead of £1.5m and forwarded £300,000 too much to the borrowers, who were eventually unable to repay. The secured property was sold for about £1.2m, at a substantial loss. On a preliminary issue, Judge David Cooke accepted that D's (admittedly negligent) actions had amounted to breach of trust (relying on the *Iqbal Hafeez* and *Markandan* cases as well as a December 2010 Chancery Division decision of Judge Dight in *UCB v Grace*), but rejected C's claim for reconstitution of the entire advance (the putative trust fund) so as to permit C to recoup all its loss. In a detailed judgment – in which he signalled his approach early on by contrasting the "common sense view" with the prospect of a "fortuitous windfall" – he held that the only relevant breach of trust was to the extent of the £300,000 wrongly paid away, so D need only reconstitute that part of the trust fund, which in practice required payment of the sum due to Barclays

when the property was sold (but allowing credit for actual mortgage repayments received).

Very shortly after, on 9 February, in *Lloyds TSB Bank plc v Markandan & Uddin* [2012] EWCA Civ 65, the Court of Appeal rejected the appeal of solicitors who had been found in breach of trust to the lender in circumstances similar to the *Mortgage Express* case mentioned above, ie spurious transaction, false vendors and solicitors, and ignorance on the part of the property's true owners. It concluded that the trial judge had correctly held that 'completion' (and the underlying "contract") had been a nullity, and accordingly that D had not had authority to transfer the money. D's alternative application for relief under s 61 of the Trustee Act 1925 had been rightly refused as D had acted unreasonably in failing to obtain the appropriate documents and to establish that the 'solicitors' acting for the vendors actually existed.

## Fiduciary duty

In *Mortgage Express v Abensons* [2012] EWHC 1000 (Ch), 20.4.12, there was a reminder that breach of fiduciary duty can be inadvertent. C sought – after limitation had expired – to amend to include a claim for breach of fiduciary duty, asserting that D had preferred the interests of the borrower to those of the lender. Master Price allowed the amendment on the basis that, on the facts proposed to be pleaded, there must have been deliberate concealment (s 32 Limitation Act 1980) so as to extend limitation, but Judge David Cooke (again) allowed D's appeal, considering *Cave v Robinson Jarvis & Rolf* and *Mothew* on the mental element of deliberate concealment.

He held that, as some of the proposed new allegations involved breach of the "actual conflict" rule, that "the fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other" (see Millett LJ in *Cave*) – it was possible for this to have been merely negligent, and so not to have been deliberately concealed. He allowed the appeal and refused permission to amend, holding that C could instead proceed with a fresh action in which D could run (and so not be prejudiced by deprivation of) those limitation arguments.