

Lloyds TSB Bank PLC-v- Markandan & Uddin (14 October 2010)-Who can you trust?

The Message: Solicitors can be the victims of fraud on lenders.

The Case: The High Court has had to decide whether solicitors have to bear the whole loss suffered by a negligent lender who is defrauded by the borrower. In 2007, a Mr Victor Davies applied for a mortgage loan from Cheltenham & Gloucester plc to finance the purchase of a property in Barnet at a price of £1,150,000. He sought 90% of the price but C&G (now part of Lloyds TSB Bank) had the property valued at £825,000 and, notwithstanding the substantial difference between their valuation and the supposed purchase price, they then offered to lend £742,500 on the basis that Mr Davies had secured a price reduction to £825,000.

The Defendants were instructed to act as solicitors for Mr Davies and C&G. They were contacted by someone holding themselves out as Deen Solicitors trading from offices in Holland Park who stated they were acting for the sellers, Mr and Mrs Green. There is a firm called Deen Solicitors in Luton and it was falsely claimed they also had an office in Holland Park. A gentleman calling himself Mr Duphar actually attended at the Defendants' offices with supposed documentary proof of the existence of this branch office.

In an extraordinary sequence of events, the Defendants, prior to not only completion but before any contract was entered into, advanced the mortgage monies for the alleged Deen Solicitors to hold. The Defendants genuinely believed they were transferring the funds to solicitors.

Needless to say, the whole transaction was a fraud. Mr Davies invested no monies of his own. Mr and Mrs Green had no knowledge of any sale of their property. The funds disappeared and it became apparent that this was just one of a number of similar frauds carried out by the alleged Mr Davies. However, unlike other cases, the Defendants were not involved in the fraud.

C&G argued that the Defendants were in breach of trust and, accordingly, they were entitled to recover their entire losses from them. Unlike claims for breach of contract or negligence, damages for breach of trust cannot be reduced due to any contributory negligence by the claimant. Clearly, given their apparent carelessness in making the loan in the first place despite the suspicious circumstances, any damages recoverable by C&G could be substantially reduced if contributory negligence applied.

The Defendants had been instructed by C&G to act in accordance with the Council of Mortgage Lenders' Handbook and to provide a certificate of title in a specified form. The Handbook provides that solicitors shall hold mortgage monies on trust for the lender until completion of the purchase. Since the Defendants had released the funds not only prior to completion, but completion had never taken place, C&G argued there was a clear breach of trust and it did not even have to prove negligence by the Defendants. The Defendants argued that, once the mortgage documentation was completed, they were entitled to pay monies over in connection with the purchase prior to completion.

Upon detailed consideration of the documentation, the Court did not accept either party's arguments. It felt the answer lay in the middle. The Defendants were authorised to release funds prior to completion but only once they had received the necessary documents to register title or a

solicitor's undertaking to provide such documents. As they had received neither, they were in breach of trust.

The Defendants then sought relief under S.61 of The Trustee Act 1925. The Court can excuse a trustee from liability if it has acted reasonably and honestly. It was accepted the Defendants had acted honestly but the Court considered they had not acted reasonably in paying monies away without the necessary documentation and not establishing that Deen Solicitors did genuinely have a branch office in Holland Park.

Accordingly, notwithstanding C&G's approval of the loan without having seemingly made proper enquiries, they were entitled to recover all their losses together with interest thereon at 4% per annum.