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In Practice

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On the hook for another's fraud

In *Santander (UK) plc v R.A. Legal Solicitors* [2014] EWCA Civ 183, a firm of solicitors found themselves on the hook for a fraud in which they were not involved, but in which their substandard conduct had played a part. The law has always imposed a high standard on trustees but s 61 of the Trustee Act 1925 has provided for breaches to be excused where the trustee acted honestly and ought fairly and reasonably to be excused. In this recent mortgage fraud case the Court of Appeal decided that the "shoddy performance" by the firm meant that they could not claim the benefit of the section.

BACKGROUND

In May 2009 R.A. Legal were instructed by the purchaser and Santander in connection with the purchase of a residential property. The purchase price was £200,000 for which Santander were lending £150,000. Sovereign Chambers were apparently instructed by the vendor. Although a firm of solicitors in apparently good standing with the Law Society, Sovereign were in fact fraudsters. The funds disappeared from Sovereign's client account and were not used to purchase the property. The funds were never recovered.

THE CLAIM

The standard terms upon which Santander instructed R.A. Legal required the firm to hold Santander's £150,000 on trust until completion. As R.A. Legal released Santander's advance to Sovereign without "completion" (as defined by the Court of Appeal in *Lloyds TSB PLC v Markandan & Uddin* [2012] EWCA Civ 65) ever taking place, Santander sued R.A. Legal for breach of that trust.

The judge at first instance found that R.A. Legal had indeed been in breach of trust in releasing Santander's funds, whilst genuinely believing that completion of the purchase was to take place.

However, he also held that R.A. Legal should be relieved from all liability by virtue of s 61 of the Trustee Act 1925. Although he accepted that R.A. Legal's conduct had been wanting in a number of respects, he found that none of the conduct criticised was sufficiently connected with Santander's loss, nor was it sufficiently serious to deprive them of the court's discretion to relieve them of liability. He concluded that Santander's loss was caused by the fraud of Sovereign, for which R.A. Legal could not fairly be held responsible. Santander's claim therefore failed.

The Court of Appeal disagreed.

To invoke s 61 the "trustee" must show first, that he has acted both honestly and reasonably and secondly, that he ought fairly to be excused.

The Court of Appeal referred to *Davisons (Solicitors) v Nationwide* [2012] EWCA Civ 1626 which made clear that the requirement of reasonableness did not "predicate that he has necessarily complied with best practice in all respects". However

"the relevant action must at least be connected with the loss for which relief is sought ...".

The question of that connection caused considerable debate. The Court of Appeal concluded that it was too restrictive to apply a "but for" test which disregards conduct, however unreasonable, on the basis that even if the solicitor had acted reasonably in that respect, the fraud, and therefore the loss, would still have occurred. It did accept, however, that some element of causative connection will usually have to be shown but cautioned against an "over-mechanistic application".

The question of whether R.A. Legal ought fairly to be excused prompted further debate; this required consideration of the effect of the grant of relief not only upon R.A. Legal, but also upon the lender.

Crucially, there was no suggestion that R.A. Legal acted otherwise than honestly. However, the Court of Appeal concluded that the judge at first instance had taken too lenient a view of the seriousness of R.A. Legal's numerous departures from best practice. It instead believed that R.A. Legal's conduct had been "shoddy", unreasonable and sufficiently connected with Santander's loss, which led the court to conclude that it would not be fair to excuse the firm from liability. Santander's appeal was therefore allowed.

PRACTICAL TIPS

Where funds are lost to mortgage fraud, lenders should seek to obtain their solicitors' complete and original conveyancing file as soon as possible. Once the file is to hand the steps taken within the conveyancing process should be scrutinised. A complete understanding of the facts and the process undertaken from the beginning to the end of the transaction will be crucial. Any failings which are anything other than trivial could give rise to a claim for losses from that firm, which in the face of lost funds and no professional indemnity insurance afforded to the "vendor" firm, could be the lender's sole source of recovery. ■

Biog Box

Hugh Evans (Partner) and Sharon Duncan (Legal Director) are members of DLA Piper's banking litigation team. Both act regularly for major banks and financial institutions in respect of all their contentious requirements and have considerable experience in bringing both breach of trust and professional negligence claims for lenders.

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