



Mortgage Fraud Update

JAYNE WILLETTS | SOLICITOR ADVOCATE | JAYNE WILLETTS & CO | SPECIALISTS IN PROFESSIONAL REGULATION

Not without reason does conveyancing work remain high risk for both the firm and its indemnity insurers alike. The importance of following best practice at all times was highlighted in a recent case in the Court of Appeal.

In *Santander UK Plc v R.A. Legal Solicitors* [2014] EWCA Civ 183 it was held that a conveyancer's careless performance contributed to the loss suffered by Santander when completion monies were misappropriated by the vendor's solicitor ("Sovereign"). The court refused to grant RA Legal ("RA") relief under section 61 of the Trustee Act 1925 and found it liable to the lender for the loss of the mortgage funds.

RA acted for the lender and for the lay purchaser in the purchase of a residential property. The transaction was unremarkable save that the real vendor was entirely unaware that the property had been sold on her behalf. Similarly RA was unaware that the transaction was not a genuine one.

RA was due to exchange contracts and complete the transaction simultaneously on 29 July 2009. However, it released funds to Sovereign the day before on 28 July prior to exchange of contracts. There was no letter notifying Sovereign that the money had been released nor any requirement that the funds were to be held to the order of RA. RA did, however, check with the Law Society that Sovereign was registered as a law firm.

The court emphasised the fundamental principle that solicitors who hold a loan advance on trust until completion necessarily commit a breach of trust if they part with the advance otherwise than upon completion.

In his judgment, Lord Justice Briggs undertook a forensic examination of the standard practice for completion by post, the purpose, meaning and effect of the standard Requisitions on Title and the non-standard replies by Sovereign. He concluded that the following departures from best practice were connected with the lender's loss:

1. Making and receiving inadequate Requisitions on Title

Sovereign answered "CONFIRMED" to the whole of Paragraph 4(B) of the Requisitions which raises a series of questions about the discharge of the mortgage including details of the terms of the undertaking to be provided. Under Paragraph 5 (A) regarding the arrangements for completion, Sovereign answered "FORMULA B". This was a meaningless answer in relation to completion as it was a reference to a standard method for exchange of contracts. RA did not question any of these inadequate replies, nor did they raise any supplemental Requisitions.

2. Failure to obtain the vendor's solicitors written commitment to follow the Completion Code before transferring the completion money to them

Sovereign did not answer Paragraph 7(D) of the Requisitions where they were asked to confirm that they would comply with the Law Society Completion Code. This meant that the completion money was transferred to Sovereign the day before completion without RA imposing any written obligation upon Sovereign to hold it to its order.

3. Failure to appreciate that completion had gone seriously wrong when no confirmation that the mortgage had been discharged was received in the post

The fact that their client had not received the keys by 4 August 2009, and they had not received the mortgage discharge form, did not alert RA to the possibility that there was a problem with the transaction. RA's post completion correspondence with Sovereign was confused in that on the one hand they stated that the sale had been completed and on the other they served a notice to complete on 10 August. The completion monies remained in client account from the date of purported completion until the misappropriation took place on 13 August.

His Lordship was also very critical of the practice of submitting an unqualified Certificate of Title before investigation of title had been completed. RA had yet to inspect a 1986 transfer when it sent off the COT. This was on the basis that it could halt the transaction if a defect in title was subsequently discovered. Leading Counsel for RA submitted that this practice was common amongst conveyancers to minimise delays by lenders in releasing mortgage monies. This explanation was noted unenthusiastically by his Lordship who regarded the practice as a deliberate misrepresentation to the lender but not one which in this case had contributed to the loss.

Ironically, his Lordship was prepared to assume that even if RA had followed best practice the fraud would probably have succeeded but that was not in his view the legal basis for granting relief under s.61.

Whatever pressures are imposed by clients or by others in the chain, conveyancers should adhere meticulously to the correct procedure. Close attention should be paid to the Requisitions and to the arrangements for completion. The fact that duties are owed to two clients, namely the lay purchaser and the lender, can often be overlooked in the strain of complying with unrealistic timescales.

This judgment provides a stark reminder that residential conveyancing is not a purely administrative process. It is a legal transaction upon which legal advice and expertise is required.

As Lord Justice Briggs stressed: *"Departure from best practice by making inadequate requisitions and accepting inadequate replies before transferring completion money was serious and consequential"*

Trusting other solicitors in order to assist your clients would sadly no longer seem to be an option. ■

Jayne Willetts is also a director of Infolegal Ltd – providing the Colpline practice advice helpline and consultancy advice for law firms – www.infolegal.co.uk

