

Frauds and Fakes

Solicitors and Dishonesty

Simon Monty QC



PCL-R

FACTOR 1

- Aggressive Narcissism

FACTOR 2

- Socially deviant lifestyle

Some figures

- Mortgage fraud attempts 34 in every 10,000
- Mortgage fraud costs around £1 billion pa
- LR Anti-fraud scheme - £20 million
- SRA - £15-20 million; 222 reports in 2010; £700 million pa
- LS/Police – Fraud of £15 billion pa, 15 investigations
- CML concerns

What is mortgage fraud

- Borrower B obtains a loan in circumstances where, if the Lender L had known the true facts either about B or about the property upon which the loan was secured, or both, the loan would not have been made
- Typically, misrepresentations of personal circumstances by B; over-valuation of the property; back-to-back sales to associate of B; use of false documentation by B

Solicitors

- The source of funds
- Large cash transactions
- Mismatch between value of property and client's income

Solicitors

“Conveyancers are uniquely vulnerable to criminals. They are often under pressure to exchange contracts quickly rather than risk the collapse of a chain of transactions. Mistakes are made and due diligence neglected because of the need to avoid delays.”

Solicitors

“Professional criminals seek out and prey on conveyancing solicitors with a weakness requiring expenditure beyond their means, like an expensive drug habit. Such practitioners, out of desperation, can often be persuaded to collude with dubious deals. The number of conveyancers convicted of money laundering is low, however, although when one is caught the sums involved can be high.”

Warning Signs

- Back-to-back transactions
- Misrepresentation or changes to the purchase price
- Direct payments
- Reductions in purchase price
- Suspicious or unusual transactions

History

- The most productive source of solicitors' negligence litigation in the 1990s
- The collapse of the housing market from the early 1990s
- Bristol & West Building Society litigation
- Recovery of the market

Dishonesty

Derry v Peek (1889) 14 AC 337 at 376:

“First, in order to sustain an order of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (i) knowingly, (ii) without belief in its truth or (iii) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement from being fraudulent, there must I think, always be an honest belief in its truth.”

Dishonesty

Twinsectra v Yardley [2002] 2 AC 164

“...dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest...”

Dishonesty

Barlow Clowes International Ltd v Hamilton [2006] 1WLR 1476

“...his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were.”

Dishonesty

Starglade Properties Ltd v Roland Nash [2010] EWCA Civ 1314

“There is no suggestion in this case either that the standard of dishonesty is flexible or determined by any one other than by the court on an objective basis having regard to the ingredients of the combined test as explained by Lord Hutton in *Twinsectra* and Lord Hoffmann in *Barlow Clowes*”.

Dishonesty

Halliwells LLP v Nash

Secretary of State for Justice v Topland Group Plc and others
[2011] EWHC 983

Sham Partnerships

Partnership is defined by the Partnership Act 1890, section 1(1), as:

“The relationship which subsists between persons carrying on a business in common with a view of profit”

Sham Partnerships

M Young Legal Associates Limited v Zabid and others
[2006] EWCA 613

Sham Partnerships

Rowlands v Hodson [2009] EWCA Civ 1042

Sham Partnerships

Protectacoat Firthglow Ltd v Szilagyi [2009] EWCA

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Sham Partnerships

- The definition in section 1 of the 1890 Act is a core requirement – there must be a business in common carried on with a view to profit
- There is no requirement for participation in profit
- Evidence of an agreement that the acts of one partner within his authority would bind the other acknowledged partners
- A contribution of capital may be significant
- The existence of an apparent partnership agreement or other documentation, although not of itself conclusive; it is the evidence which will establish the true relationship, and not the description in a document

Sham Partnerships

- It is not a condition that a partner derives a benefit from the putative partnership, although there may be evidence of such benefits, for example insurance cover or use of bank accounts; it may be significant if there is evidence of benefit
- The absence of a direct link between payment and profit is usually a strongly negative pointer
- There should be evidence of active participation in the accounting, regulatory and supervisory functions
- The test for a sham partnership is context-sensitive and the court should consider the position at the inception of the arrangement and as time goes by, and take into account all the circumstances, to answer the question, what was the true legal relationship between the parties?

Sham Partnerships

Dishonest condonation

Zurich Professional Ltd v Karim and others [2006] EWHC 3355

“...it seems to me the reasonable person would be surprised if this clause allowed the Insurers to step aside from those within the firm who practised or condoned the specific forgery but not from partners who condoned persistent dishonest handling of money, breaches of the rules, and so forth, which allowed the specific act or omission to take place.”

Sham Partnerships

Dishonest condonation

Goldsmith Williams v Travelers Inse Co Ltd [2010] Lloyd's Rep IR 309

A solicitor insured can condone a dishonest course of conduct by a co-director (or partner) without being involved in, or specifically aware of, the fraudulent acts or omissions giving rise to the claim(s) in question.

In the context of the policy, the word “condone” was intended to convey a state of affairs where the non-dishonest director or partner knows of the dishonesty of his co-director or co-partner yet overlooks it and allows the business relationship to continue.

Coverage

Holding out

An honest partner (one who was not involved in the relevant transactions) would not be liable to L unless L can prove (a) holding out, (b) reliance thereon and (c) the consequent giving of credit to the firm.

Nationwide Building Society v (1) Lewis (2) Williams [1998] Ch 482

Coverage

Number of claims

“(a) All Claims against anyone or more Insured arising from: (i) one act or omission; (ii) one series of related acts or omissions; (iii) the same act or omission in a series of related matters or transactions; (iv) similar acts or omissions in a series of related matters or transactions; and (b) all Claims against one or more Insured arising from one matter or transaction, will be regarded as one Claim.”

Countrywide Assured Group plc v Marshall [2003] Lloyds’ Rep IR195

Some practical points

- What has become of the advance moneys
- Is the property occupied and if so by whom and on what basis
- What is the value of the security
- Is the security subject to a valid charge in favour of L – and (of course) what was the role of L's solicitor – did the solicitor and any valuer act honestly and competently
- Can B be found and is B worth suing
- Can the fraudsters be identified and are they worth suing

Some practical points

- L's file relating to the mortgage application
- The deeds
- Land Registry
- Valuer – who made arrangements for inspection, occupation details
- Brokers if relevant
- Information from innocent parties
- L's solicitors

Some practical points

- Investigate possible mortgage fraud
- Meeting/indemnity conference

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