

**\*190 Mortgage Express Ltd v Sawali**

Chancery Division (Birmingham District Registry)

22 November 2010

**[2010] EWHC 3054 (Ch)**

**[2011] P.N.L.R. 11**

H.H. Judge Simon Brown QC :

November 22, 2010

Conveyancing; Delivery up; Legal professional privilege; Mortgages; Privileged documents; Solicitors; Waiver

H1 *Solicitor—mortgage—solicitor acting for both borrower and lender—later claim by lender against solicitor—whether lender entitled to delivery up of whole file—borrower’s right to assert privilege—confidentiality—waiver of borrower’s right in mortgage application—interpretation.*

H2 The claimant mortgage lenders brought proceedings against the insurers of AWP & Co, a defunct firm of solicitors for which the defendant solicitor had previously worked. These proceedings concerned the allegedly unsatisfactory handling by AWP of a number of mortgage transactions in which that firm had acted for both the borrowers and the claimants. In each such case the borrowers had signed an agreement with the claimants when applying for mortgage finance containing a clause which stated “We irrevocably authorise my/our conveyancer to send their entire file relating to the whole transaction (not just the loan) to you at your request.”

H3 In the present litigation the claimant sought delivery up from the defendant under CPR Pt 8 of the whole of the files relating to the transactions concerned, which were in the defendant’s possession. This request was made pursuant to the inherent jurisdiction of the court and/or s.68 of the Solicitors Act 1974 . The defendant was prepared to hand over those parts of the file relating to work done for the claimants, but argued that the borrowers’ rights to confidentiality and/or to assert professional privilege precluded his surrendering those parts dealing with the borrowers’ own affairs.

H4 **Held:** the defendant should be ordered to hand over the files in their entirety. The general rule was that a borrower did not, merely by agreeing that his solicitor should also act for the lender, surrender his rights to assert confidentiality or privilege. However, this right could be surrendered by agreement. In the present case there could be no doubt that, properly construed in its commercial context, the clause signed by the borrowers had precisely that effect, and was apt to waive any rights the borrowers might have had to prevent the handing over of the files concerned. It therefore followed that the claimants were entitled to delivery of the complete files. ( *Nationwide Building Society v Various Solicitors* [1999] P.N.L.R. 52 and *Norwich Union Life & Pensions v Linpac Mouldings Ltd* [2010] L. & T.R. 5 discussed ). **\*191**

**H5 Cases referred to in the judgment:**

*Ross v Loughton* (1813) 1 Ves & B 349

*Miers v Evans* (1839) 3 Jur. 170

*Interfoto Picture Library Ltd v Stiletto Visual Programme Ltd* [1989] Q.B. 433

*Mortgage Express Ltd v Bowerman & Partners* [1996] 2 All E.R. 836; [1996] P.N.L.R. 62

*Nationwide Anglia Building Society v Various Solicitors (No.1)* [1999] P.N.L.R. 52

*Norwich Union Life & Pensions v Linpac Mouldings Ltd [2009] EWHC 1602 (Ch); [2010] 1 P. & C.R. 11; [2010] L. & T.R. 5*

H6 **Claim** for delivery up of documents under CPR Pt 8 .

## H7 Representation

John De Waal , instructed by Wright Hassall , Leamington Spa, for the claimants.

Charles Phipps , instructed by Kennedys , for the defendant.

H.H. Judge Simon Brown QC:

## Introduction

1 In this Pt 8 claim, the claimant seeks delivery up of a number of the files of a predecessor firm of the defendant solicitor, pursuant to the inherent jurisdiction of the Court as extended by s.68 of the Solicitors Act 1974 . The solicitors had acted for both the claimant and their borrowers (“the Borrowers”) in a number of separate mortgage transactions.

2 The defendant accepts that the claimant is entitled to production of documents created in the course of the claimant’s retainers of the defendant but contends that this does not extend to “the entire file” in each case where some of the documents are “the Borrowers” and are covered by legal professional privilege.

3 The defendant asserts no personal interest in, nor lien over, the documents sought by the claimant. However, the defendant submits that the Court would be exceeding its jurisdiction, or exercising its discretion wrongly, if it were summarily to override the Borrowers’ rights of privilege and/or confidentiality in the documents created in the course of *their* retainers of the defendant’s predecessor.

4 The claimant relies upon the witness statements of Jeremy Fowler on May 12, 2010 accompanying the claim form and a second dated July 5, 2010. The defendant relies upon two witness statements of Jeremy Collins, the first dated July 5, 2010 and the second dated October 13, 2010, as well the statement of the defendant himself, dated August 17, 2010.

## The uncontentious aspects of C’s application

5 In Mr Fowler’s statement of May 12, 2010 the claimant identified 16 mortgage transactions. Only 8 are now actively pursued in this Pt 8 claim.

6 The files were not created by the defendant, but belonged to a defunct practice, Alan Winter Peace & Co, in which he was for a time a salaried partner. The defendant had no personal involvement in the mortgage transactions in question: he was a litigator, not a conveyancer. Locating and retrieving the files has proved a difficult and time-consuming exercise. Of the eight files now sought by the claimant, the defendant has succeeded in locating six. \*192

7 On October 4, 2010, the defendant’s solicitors wrote to claimant’s solicitors confirming that:

“... our clients will happily provide you with those parts of the files which relate to work carried out for it. The practical reality is however that your client will already have the originals or copies of most if not all of those documents. Do you want us to provide those documents?”

8 The claimant responded to that letter on October 11, 2010, confirming that it required the documents to be produced.

9 The position in relation to the final two files sought is set out in Mr Collins's second statement: it may be possible to obtain one of the files (David Akigbogun), but the other (Shane Hutchings) has unfortunately been lost. It is submitted by the defendant and accepted by the claimant that:

(1) No order should be made in respect of Mr Hutchings's file, on the understanding that, if the file should be discovered by defendant at some future date, he will provide such documents from it as are appropriate to claimant.

(2) Any order in respect of Mr David Akigbogun's file should take into account the practicalities of the position described by Mr Collins.

### **The Borrowers' prima facie rights to privilege and confidentiality**

10 Where a solicitor is retained by both lender and borrower/purchaser in a mortgage transaction, two separate retainers are created. In *Nationwide Building Society v Various Solicitors* [1999] P.N.L.R. 52, Blackburne J. held (in the words of the headnote) that:

"... there was no implied waiver of confidentiality or legal professional privilege by the borrower in favour of the lender, nor any implied authorisation for the solicitor to make disclosure to the lender of documents passing between the borrower and the solicitor. Any implied authorisation was merely an authorisation to pass on the information and not to divulge the communication itself."

11 Paragraph 8(c) of the SRA's Guidance to r.4 of the Solicitors' Code of Conduct 2007 reflects this in its provision that:

"Where a lender asks for a conveyancing file and you have kept a joint file for both borrower and lender clients, you cannot, without the consent of the borrower, send the whole file to the lender, unless the lender can show to your satisfaction that there is a prima facie case of fraud. If the client does not consent, you should send only those parts of the file which relate to work done for the lender."

12 In the *Nationwide* case (supra) Blackburne J. also held at 69 that:

"I take the view that whether or not the client has any recognisable interest in continuing to assert privilege in the confidential communications, the privilege is absolute in nature and the lawyer's mouth is "shut for ever". I \*193 also agree ... that it follows from this that it is the lawyer's duty to claim the privilege on behalf of the client, or former client, whose privilege it is, at any rate where it is at least arguable that the privilege exists."

13 By letter dated August 31, 2010, the defendant's solicitors wrote to their counterparts stating:

"... if you require our client to try to obtain the borrowers' informed consent, please let us have their current addresses and attempts will be made to contact them accordingly"

14 This suggestion was reiterated on October 4, 2010, but the claimant declined to do this.

15 The claimant accepts the principles of law (above) advanced by the defendant but contends that an express agreement in each case between the Borrower and the Lender overrode that default position and anticipated the current situation.

### **The "Declarations" relied on by the claimant**

16 The claimant relies on the fact that each of the Borrowers signed a form when applying to the Lender for a loan, which contained the following declaration ("the Declaration"):

"I/We declare and agree that ... 17. I. We irrevocably authorise my/our conveyancer to send their entire file relating to the whole transaction (not just the loan) to you at your request."

17 Accordingly, the claimant contends that it is simply unarguable that the Borrowers, having signed the Declaration, retain any right of privilege or confidence as against the claimant.

18 The defendant felt it incumbent upon it to refer the Court to the following potential arguments which the Borrowers might wish to raise:

(i) The effect of the Declaration is doubtful from the outset. It cannot straightforwardly amount to the actual and irrevocable authorisation which it purports to be, given that it involved no communication from the Borrower to the defendant's predecessor. Bowstead's Law of Agency (19th edn, para.3-001) suggests that an agent's authority may be actual:

... where it results from a manifestation of assent that he should represent or act for the principal *expressly or impliedly made by the principal to the agent himself* ... [Emphasis added]

(ii) Moreover, the usual purpose of an irrevocable authority is to confer a benefit on a principal's agent, rather than on the principal or a third party. As *Bowstead* says at para 10-007:

"Authority *can* be irrevocable; but this is only where the notion of agency is employed as a legal device for a different purpose from that of normal agency, to confer a security or other interest on the "agent". In such a case it is intended that the agent use the authority not for the benefit of his principal but for his own benefit, to achieve the objects of the arrangement." \*194

(iii) The Declaration on its proper construction may not extend to privileged material, bearing in mind the following considerations:

(a) The Declaration does not expressly refer to privilege.

(b) The public policy in favour of protecting privilege is so strong that the courts do not readily assume that it has been overridden.

(c) The Declaration may have been intended to refer to (non-privileged) documentation relating to the Borrower's *purchase* of the property – hence the reference to "the whole transaction (not just the loan)" – and may not have been aimed at privileged material at all.

(d) The Declaration may have been intended to operate only during the course of the transaction in question, and/or for the purpose of concluding that transaction.

(iv) The Declaration may be regarded as so unusual or onerous as to require further steps to be taken to bring it to the attention of the Borrower if it was to be incorporated in a binding contract between C and the Borrower: see *Interfoto Picture Library Ltd v Stiletto Visual Programme Ltd* [1989] 1 QB 433 ..

(v) The Borrowers (even if buying to let) may have been dealing as consumers with the Lender for the purposes of the Unfair Terms in Consumer Contracts Regulations 1999 . If so the Declaration may be "unfair" and therefore unenforceable.

(vi) In cases involving two separate transactions (a purchase funded by a different lender and a subsequent re-mortgage of the same property on the same day to the claimant), the Borrowers'

potential objections to the claimant's demand for the purchase file (relating to a transaction which it did not even fund) would be yet stronger.

19 These arguments were very ably and admirably advanced by Mr Phipps. However, in my judgment, even if advanced by the Borrowers and with the exception of [18](vi) above, they would have "no real prospect of success" in the light of the terms of the Declaration they signed up to and the context of a mortgage transaction where the solicitor was acting for both Lender and Borrower.

20 In my judgment, cl.17 is unambiguous, irrevocable and binding on both Borrower and Lender. It has to be read in its context of a mortgage transaction where the Solicitor is acting on behalf of both parties to it and where there needs to be frank disclosure. In this context the Solicitor's Terms and Conditions were therefore expressed as:

"To assist the efficient progression of a transaction and to minimise costs you agree ... to authorise disclosure of information and instructions to any mortgage lender to which you have applied and which also instructs us."

21 Mr de Waal for the claimant submits that the duties the Solicitor owes the Lender requires him to report on matters that might otherwise be the subject of legal professional privilege. Instructions to conveyancing solicitors therefore usually incorporate the provisions of the Council of Mortgage Lenders' Handbook ("the CML Handbook"). Part I of the Handbook contains 17 substantive paragraphs. Relevantly: \*195

## "5. TITLE

### 5.1 Circumstances

5.1.1 Please report to us ... if the owner or registered proprietor has been registered for less than six months or the person selling to the borrower is not the owner or registered proprietor unless the seller is:

5.1.1.1 a personal representative of the registered proprietor; or

5.1.1.2 an institutional mortgagee exercising its power of sale; or

5.1.1.3 a receiver, trustee-in-bankruptcy or liquidator; or

5.1.1.4 developer or builder selling a property acquired under a part-exchange scheme.

5.1.2 If any matter comes to your attention, which you should reasonably expect us to consider important in deciding whether or not to lend to the borrower (such as whether the borrower has given misleading information to us or the information which you might reasonably expect to have been given to us is no longer true) and you are unable to disclose that information to us because of a conflict of interest, you must cease to act for us and return our instructions stating that you consider a conflict of interest has arisen."

22 In addition, it is submitted that solicitors owe lenders 'the *Bowerman* duty', i.e. a duty to report information which a reasonable solicitor would realise might have an effect on the valuation or some other ingredient of the lending decision: see *Mortgage Express Ltd v Bowerman & Partners* [1996] 2 All E.R. 836; [1996] P.N.L.R. 62 .

23 Thus, the argument runs, the lender needs to put on notice if there are any features of the transaction which typically might suggest mortgage fraud—recent purchase of the property by the

vendor, sub-sales, back-to-back transactions etc. In this case, it appears from para.17.6 in the defendant's skeleton argument that four of the six files in the defendant's possession involve a purchase funded by a different lender and a subsequent re-mortgage of the same property on the same day to the claimant. This, Mr de Waal submits, is precisely the kind of information the claimant should have been given by the Solicitors.

24 Mr de Waal submits that lenders can have no means of knowing whether their retained solicitors have complied with their contractual or tortious duties unless they can see the whole of the file. Hence the rationale for the requirement of cl.17 by which borrowers consent to the provision of the file to the lender. Without such a clause lenders could not police the transaction or obtain the documents necessary to consider whether, in circumstances where a borrower has defaulted and the lender has suffered a loss, the solicitor or possibly the valuer is in breach of duty. Without agreement as to this it would be impossible for purchasers who require a mortgage and their lenders to retain the same solicitors. And unless the clause is construed so as to authorise the solicitor to provide documents within the file that would otherwise be covered by the borrower's legal professional privilege it would be toothless.

25 The Court is obliged to take the background of fact and "commercial commonsense" into account when construing a contractual provision. This was recently and succinctly restated by Lewison J. in *Norwich Union Life & Pensions v Linpac Mouldings Ltd* [2009] EWHC 1602 (Ch); [2010] 2 P. & C.R. DG16; [2010] L. & T.R. 5, Lewison J. said this at [43]–[44]: **\*196**

"The relevant background knowledge would also, in my judgment, include the general nature of a break clause. A break clause is ... [then defined].

...

The language of the licence must also be interpreted in a way that makes commercial sense. Commercial commonsense is not merely a cross-check; it is an essential part of the process of interpretation. Commercial commonsense must also be considered from the perspective of both parties."

26 In my judgment, Mr de Waal's submissions are well founded. As a matter of "commercial commonsense" against the background knowledge that this clause is essential to make the transaction work, cl.17 must be objectively construed to mean exactly what it says—the Borrower expressly authorises his conveyancer to provide "the entire file" to the Lender for the purposes of entering into the transaction notwithstanding the implied default position otherwise at law.

27 In my judgment, the potential arguments put forward by the defendant concerning the law of agency are not to the point. Authority can be given in these circumstances and often is, for example, by analogy, when a client changes solicitors. When that happens the authority is not given to the old firm but comes via a third party (the new firm) but authority is nevertheless given.

28 Similarly the clause must be construed as a clear waiver of privilege, not unduly onerous or unfair.

### **The Court's jurisdiction**

29 It is finally submitted by Mr Phipps for the defendant that the Court's inherent jurisdiction to supervise the conduct of its officers does not extend to requiring a solicitor summarily to deliver up his file in circumstances where:

- (a) the applicant was not the solicitor's client in relation to the documents which the applicant seeks;
- (b) the documents sought by the applicant do not belong to the applicant;
- (c) the applicant has no underlying substantive cause of action against the solicitor for delivery up of the file; and

(d) the solicitor's client is not a party to the applicant's application.

30 He referred the Court to Halsbury's Laws of England (Vol.65, para.758) stating that:

"Under the inherent jurisdiction of the court over its officers a solicitor may be ordered upon summary application by the client, his personal representatives or his trustee in bankruptcy, by summons to deliver up to his client in proper condition all documents in the solicitor's custody or power belonging solely to the applicant."

31 *Halsbury* continues in para.759:

"The relationship of solicitor and client must have existed between the applicant, or the person whom the applicant represents, and the solicitor. Thus, delivery of papers will not be ordered where the applicant is a trustee and the employment was by a beneficiary; or where it has already been established that the relationship did not exist ... or where the applicant is interested jointly with the client under the document but is not the solicitor's client." \*197

32 In *Miers v Evans* (1839) 3 Jur. 170 , Patteson J. said:

"... it would be a dangerous doctrine to lay down, that we can compel an attorney, because he is an attorney, to give a copy of, or produce, a document in his hands belonging to a client, except at the instance of the client himself ... when an attorney holds a document for a client, it is not competent to the court, in an action by a third party against the attorney, to order him to give a copy of it ..."

33 It is submitted that the only exception apparent from the authorities is a person who "stands in the shoes" of the client, such as the client's trustee in bankruptcy: *Ross v Loughton* (1813) 1 Ves & B 349.

34 Mr de Waal submits that s.68 of the Solicitors Act 1974 provides the jurisdiction and the dicta cited in *Miers* (supra) envisages the client authorising disclosure if one notes the exception (as underlined). "It would be a dangerous doctrine to lay down, that we can compel an attorney, because he is an attorney, to give a copy of, or produce, a document in his hands belonging to a client, *except at the instance of the client himself*". Such authority was given in cl.17.

35 In my judgment, Mr de Waal is correct in his submissions and any Borrower would have no prospect of success if he/she appeared before the court and launched the interesting, ingenious and well-researched submissions ably made by Mr Phipps.

## Conclusion

36 Accordingly, in my judgment the claimant is entitled to the "entire files" sought relating to its mortgage transaction in each case that the defendant has in his possession or control.

37 There should be judgment for the claimant upon the Pt 8 claim.

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