Neutral Citation Number: [2009] EWHC 3912 (QB)

Case No: 8MA400071

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
MERCANTILE COURT

Manchester Civil Justice Centre
1, Bridge Street West,
Manchester
M3 3FX

Date: 10th June 2009

Before :

Judge Hegarty QC

- -

Between :

Excel Securities PLC	**Claimant**
- and -	
Masood and Others	**Defendants**

- -
- -

Mr Paul Lowenstein (instructed by **Hill Dickinson LLP**) for the **Claimant**
Mr David Berkley QC (instructed by **Levi Solicitors LLP**) for the **First and Second Defendants**

Hearing date: 25th March 2009

- -

JUDGMENT

Judge Hegarty QC:

Introduction

1. This is an application on behalf of the Claimant company, Excel Securities Plc ("Excel"), for summary judgment against the First and Second Defendants, Mr Aamer Masood and Mr Ijaz Ahmad who carry on practice together in partnership as solicitors under the name BM Solicitors.

2. The various claims made in the proceedings against Mr Masood and Mr Ahmad and the other Defendants arise out of what is said to have been a case of identity theft. It is alleged that an impostor, whose true identity as yet remains unknown, adopted the identity of a real individual named James Charles Whittaker Goulding in order to extract monies from Excel by deception. The manner in which the fraud is said to have been perpetrated and subsequently discovered is set out in some detail in the evidence adduced on behalf of Excel. Much of this evidence is not

challenged; and, even in so far as it is not admitted, no contrary evidence has been put forward on behalf of BM Solicitors.

The Alleged Fraud

3. Excel specialises in making short-term commercial loans on the security of real property. On 25th June 2008, one of its salesman received a telephone enquiry from a Mr Norman Wright of a registered finance brokerage known as Southern Mortgage Services, in order to ascertain whether Excel would be interested in advancing monies to one of his clients. After a comparatively brief discussion, it was agreed that Mr Wright should submit an application form on behalf of the client together with other supporting documentation. These were faxed to Excel on the same day; and, on their face, they identified the client as James Charles Whittaker Goulding, of 108 Midland Road, Luton, Bedfordshire, born on 4th February 1965. What was sought was a loan of £910,000 for a period of nine months with the first six months interest to be deducted from the advance. Mr Goulding's occupation was said to be that of a self-employed property developer with a gross annual income (before tax) of £225,000. There was offered by way of security a freehold residential property at 17 Richards Place, Chelsea, London SW3 2LA, which was said to be unencumbered and to be registered in Mr Goulding's name. The purpose of the advance was stated to be the "purchase of additional properties". The application was said to have been signed by Mr Goulding and was dated 17th June 2008. It was accompanied by a valuation report on the property at 17 Richards Place prepared by apparently reputable valuers and dated 14th May 2008. This valued the property in the sum of £1.7m or £1.4m on the assumption of various constraints on marketing. On the face of it, therefore, the property would have been ample security for the proposed loan.

4. In the light of these discussions with Mr Wright and the documentation provided, Excel indicated a willingness in principle to advance the sum of £950,000 on the terms set out in a document dated 25th June 2008. This incorporated various special conditions amongst which were included, in particular, satisfactory proof of identity and residence. What were required were copies of the passport or driving licence of the borrower certified by his solicitor, two original utility bills (no more than three months old) made out to the borrower's home address and three months original bank statements.

5. On the following day, 26th June 2008, Mr Wright confirmed by telephone and by fax that his client wished to proceed and gave details of his solicitors who were identified, at that stage, as Lords Solicitors of 466 Cranbrook Road, Ilford, Essex. On the same or following day Mr Wright wrote a further letter to Excel seeking urgent completion and enclosing the original of the mortgage application form and various other documents apparently relied on as establishing the identity of the client. These comprised copies of his driving licence, a council tax bill directed to the Luton address, correspondence with Three Valleys Water Plc, again

directed to the Luton address, and a British Gas bill directed to the property at 17 Richards Place. All of these were certified as true copies of the originals by Mr Wright.

6. On 27th June 2008, Excel instructed the original valuers to provide a valuation report in relation to the property at 17 Richards Place, though it was accepted that this could be based upon the previous valuation without the need for any further inspection. On the same day, one of Excel's employees carried out a telephone interview with the applicant who confirmed the essential details of the information previously provided, though he stated that the purpose of the borrowing was to enable him to pursue "a business opportunity in Singapore" rather than that set out in the application form itself.

7. On 4th July 2008, Mr Wright confirmed what he had apparently previously told one of Excel's employees the previous day, namely that his client considered that the solicitors originally nominated had not "come up to expectation" and that he had instructed BM Solicitors in their stead. The person dealing with the transaction on his behalf was said to be Mr Masood. Mr Wright also enclosed with the same letter bank statements for the previous three months in respect of an account in the name of Mr James C W Goulding with the Royal Bank of Scotland's branch at 14-16 The Mall, Sale, Greater Manchester. On the statements, Mr Goulding's address was given as 17 Richards Place.

8. It appears from the witness statement of Mr Masood in opposition to Excel's application that he received a telephone call from the person purporting to be Mr Goulding on 3rd July 2008. He was told that Mr Goulding had obtained details of his firm from an estate agency known as Regency Estate and Letting Agents Limited of Luton. Mr Masood does not say whether he had had any previous dealings with this company. However, he exhibits to his witness statement a fax on the letterhead of Regency Estate and Letting Agents Limited addressed to him personally and dated 3rd July 2008 referring to Mr James Charles Goulding and giving contact details for both Mr Wright and Excel. The letter also stated that certified copies of identification documents should be sent to Excel as soon as possible. It was signed by one Nadeem Sultan. As it happens, according to Mr Laurence Hoffman, the managing director of Excel, Mr Wright had told one of Excel's employees that Mr Goulding had been introduced to him by an estate agent called Nadeem Sultan, though he refused to give any further contact details.

9. It appears that at about the same time Excel had instructed Kuit Steinart Levy LLP, of Manchester, to act as its solicitors in connection with the proposed transaction and that they wrote to BM Solicitors in relation to the transaction on 4th July 2008. On 7th July 2008, Mr Masood, on behalf of his firm, replied to the letter from Kuit Steinart Levy by way of a letter which set out, at its head, the supposed name of their client, namely James Charles Whittaker Goulding, and the address of the property at 17 Richards Place which was the subject matter of the proposed transaction.

In the body of the letter he made the following statement: "We can confirm that we are instructed by the above named client".

10. Later on the same day, Mr Masood wrote a further letter to Kuit Steinart Levy which was similarly headed with the name of their client and the address of the property. The principal purpose of the letter was to provide a solicitor's undertaking to pay the professional fees and disbursements of Kuit Steinart Levy. But, in the very first paragraph, Mr Masood stated that: "We can confirm that we act for the Borrower in connection with the proposed grant of a Loan Facility by your client."

11. In yet a third letter of the same date under a similar heading, Mr Masood provided copies of a plan of the property and office copy entries and stated that their client was the registered proprietor of the property in question.

12. According to Mr Masood, he had asked the client to attend at his firm's offices and to bring with him his original identity documents. But the client claimed that he was too busy to attend immediately and would send him certified copies. Copies of his driving licence, British Gas statement and Luton council tax bill were subsequently received by BM Solicitors.

13. On 11th July 2008, Mr Masood sent out two copies of a client care letter addressed to Mr Goulding at 108 Midland Road, Luton and also at 17 Richards Place. On 15th July 2008, the client telephoned Mr Masood stating that he had received the letter; and on 16th July 2008, BM Solicitors received a signed copy of the letter which had been sent to 17 Richards Place.

14. On 15th July 2008, Kuit Steinart Levy sent to BM Solicitors a schedule setting out various standard enquiries and requirements. By Clause 1, it asked for details of the borrower, and in particular, for confirmation of the borrower's full name and private address; and by Clause 16.1, it made a series of requests for the purposes of compliance with money laundering guidance notes, asking amongst other things for details of the identity of the "ultimate borrower". The schedule also required the mortgage documentation to be signed by the borrower in the presence of the solicitor. In response to the first of these enquiries, on 17th July 2008, Mr Masood gave the full name of the borrower as James Charles Whittaker Goulding, but gave no further details as to his address; and in response to the subsequent money laundering enquiry, it enclosed a photocopy of Mr Goulding's driving licence.

15. On 17th July 2008, Excel made a formal offer of secured lending to Mr Goulding in the form of a facility letter which was forwarded to Mr Masood under cover of a letter of the same date, with copies to its own solicitors and to Mr Wright. The covering letter drew Mr Masood's attention to the fact that the facility letter was to be executed by the borrower and witnessed. The letter, duly executed, would then have to be returned to Excel prior to draw-down. It constituted an offer of a loan of £950,000 to be secured by way of a first legal charge over the property at

17 Richards Place; and it set out the detailed terms and conditions of the offer.

16. According to Mr Masood, the client attended his offices in person in order to execute the facility letter on 21st July 2008, bringing with him the originals of the identification documents, certified copies of which had already been provided to his firm. The client then executed and dated the letter in Mr Masood's presence; but Mr Masood himself omitted to sign the document as witness to Mr Goulding's signature. The document was then returned to Excel but sent back to Mr Masood with a request that it be duly witnessed. According to Mr Masood, he signed the letter as witness on 25th July 2008, initially inserting that date against his signature. On reflection, however, he decided that it would be more appropriate to date it 21st July 2008, since that was the date upon which he had actually witnessed his client's signature. Accordingly he altered the date before returning it to Excel.

17. On the same day, 25th July 2008, BM Solicitors requested Kuit Steinart Levy to provide the funds required for completion. But before completion, Excel carried out an on-line credit search against the name of Mr Goulding and asked Mr Wright to provide a copy of Mr Goulding's passport. The credit search disclosed various connections with the property at 17 Richards Place and also with the address at 108 Midland Road, Luton. Mr Goulding was not, however, shown on the electoral roll at this address; but this was assumed to be because he had recently moved in. After some apparent initial reluctance, a copy of the passport was provided by Mr Wright, albeit in uncertified form, having apparently been sent to him by Regency Estate Agents.

18. The transaction thereafter proceeded to completion. The net sum of £838,927 (representing the gross amount of the loan less retained interest, commission and other charges) was transferred to BM Solicitors on 29th July 2008, though it may only have been received into their account on the following day. A legal charge over the property at 17 Richards Place, apparently duly executed by Mr Goulding and dated 29th July 2008, together with a mortgagor's declaration, both witnesses by Mr Masood, were held by BM Solicitors for the purpose of completion, though it is not clear on the evidence whether these were said to have been executed on 29th July 2008 or earlier. Be that as it may, the monies were presumably released against this documentation, the originals of which were forwarded to Kuit Steinart Levy on 6th August 2008. The charge was then duly registered against the property 17 Richards Place.

19. However, prior to completion, on 23rd July 2008, BM Solicitors had received a letter from their client stating that he wished the proceeds to be forwarded to a company known as Cranbrook Solicitors Limited of 79 Cranbrook Road, Ilford, Essex; and the net amount of £835,535.49 was duly transferred in accordance with those instructions on 30th July 2008. This company is the Third Defendant in the proceedings; and a self-employed associate of the company, Mr Robert Offord, is the Fourth

Defendant. But terms have been agreed between Excel and those parties who are no longer concerned in the proceedings.

20. But it fairly soon came to the attention of BM Solicitors that the transaction may well have been fraudulent. On 26th August 2008, they received a telephone call from a person claiming to be acting on behalf of a firm of private investigators known as TAS Legal Services. This was followed by a letter from that firm dated 29th August 2008. These communications suggested that the entire transaction might have involved a case of identity theft by an impostor masquerading as the true James Charles Whittaker Goulding. A copy of the letter of 29th August 2008 was forwarded to Cranbrook Solicitors Limited; but, for reasons which are as yet unexplained, neither Excel nor its solicitors were advised of this development. Further discussions then took place between Mr Masood and TAS Legal Services, in the course of which copies of various documents were provided to TAS Legal Services for the purposes of their investigations.

21. In the meantime, Excel itself began to suspect that the transaction may have been fraudulent. On or about 10th September 2008, it received a very similar proposal through Mr Wright on behalf of a client identified by the name of Jane Anderson, of 9, Falkland Avenue, London N3 1QR. She, it was said, was looking for funds to invest in a business opportunity in Singapore and was proposing to offer security over an unencumbered property at 29, West Heath Avenue, NW11 7QS. This client had, apparently, been introduced to Mr Wright by Mr Nadeem Sultan, presumably the individual with the same name who was a director of Regency Estate and Letting Limited.

22. As in the previous case, Mr Wright was asked to provided proof of identification and he did so on 16th September 2008. Though it was not noticed at the time, the utilities bill and bank statements which he provided mis-spelt the applicant's address as "Falkand Avenue". A telephone interview took place on the same day and on 20th October 2008, a copy of what was said to have been the applicant's passport was provided to Excel by Mr Wright.

23. But a more serious anomaly came to light when the Land Registry documents relating to 29 West Heath Avenue were scrutinised. These indicated that one Jean Anderson, of 19 Harley Street, London, a spinster, had been registered as proprietor as long ago as 1954. But she could not have been a minor at the time when she was so registered, suggesting that she must have been born prior to 4th December 1933. However, the copy of what purported to be her passport provided by Mr Wright stated that she was a Portuguese citizen born on 9th March 1949. Furthermore, the computer readable section of the passport mis-spelt the holder's name as "Andreson". It was also considered that the photograph of the holder of the passport, which was said to have been issued on 1st June 2007, showed a woman rather younger than the date of birth might suggest. Yet further, as already noted, her address was mis-spelt in the other documentation

provided by Mr Wright; and, somewhat oddly, in one of the bank statements, a withdrawal of cash is said to have taken place at "Goulders Green", which was presumably intended to be a reference to Golders Green.

24. All this led to Mr Hoffman, the managing director of Excel, to instruct enquiry agents to attend the address at 9, Falkland Avenue. As a result of these enquiries, it was ascertained that this was a private dwelling-house divided into a number of bed-sitters in what was described as an "undesirable" suburb in North London. It was hardly the sort of home address of someone who claimed to be the owner of a substantial property in West Heath Avenue and to have the resources to fund substantial loan repayments. Furthermore, enquiries at the Land Registry failed to disclose any apparent connection between the property and a person named Jean Anderson. In addition, Mr Wright subsequently confirmed to Excel that he had never actually met Miss Anderson and that he was having difficulty in contacting her. Attempts to arrange a meeting between her and representatives of Excel proved unsuccessful.

25. In view of the obvious similarities between the Anderson application and that made in the name of James Charles Whittaker Goulding, further investigations were subsequently carried out by or on behalf of Excel. A copy of what is said to have been the passport of the "real" Goulding was supplied by TAS Legal Services which includes a photograph of someone quite different in appearance from the individual shown on the copy passport supplied to Excel at the time of the application made by the alleged impostor. The passport of the "real" Goulding also gives his place of birth as Bowden, Cheshire; whereas that of the supposed impostor states it to have been Ramsgate, Kent.

26. Further, the property at 108, Midland Road, Luton, which was the residential address given by the applicant, appears to be a property in what is described as an "undesirable" suburb of Luton, which is advertised as being to let by Regency Estate & Letting Agents Ltd. It is suggested that this is difficult to reconcile with the financial standing claimed by the Applicant.

27. Further information has come to light more recently. A solicitor claiming to act on behalf of Castelo Overseas Inc (a company to which the funds were later remitted) has informed Excel's solicitors that it had sold the alleged Goulding a quantity of steel for delivery in Nigeria. It also appears that the matter has been under investigation by the police for some time and that a number of arrests have already been made, though I do not know whether any charges have yet been laid. Finally, it seems that the "real" Goulding has successfully applied for the vacation of the charge registered in favour of Excel over the property at 17, Richards Place.

The Proceedings

28. It was in those circumstances that the present proceedings were commenced on 4th November 2008; and on 5th November 2008, I made an order for disclosure against BM Solicitors. As a result of that order, it became apparent that the monies advanced by Excel had been transferred to Cranbrook Solicitors Limited; and on 7th November 2008, I made a further order for disclosure against that company. After some initial difficulties, the order was complied with; and from the information provided it became apparent that a person identifying himself as James Goulding had contacted Mr Offord stating that he was proposing to purchase a property in Ilford and wished him to act on his behalf on the recommendation of a firm of estate agents known as Goldmine Estates, of Romford Road, Manor Park, London. An appointment was made to see him and the two men met later on the same day. It appears that he told Mr Offord that he was proposing to purchase the property by means of funds raised from the re-mortgage of his property at 17, Richards Place and that BM Solicitors were acting for him in relation to this transaction. Mr Offord asked for proof of identity and was provided with what seems to have been the same documentation as had been previously copied to Excel itself.

29. As previously noted, the net loan monies were transmitted by BM Solicitors to Cranbrook Solicitors Limited on 31st July 2008. But it seems that on the following day, 1st August 2008, Mr Offord received a telephone call from his client stating that he was no longer proceeding with the purchase of the property in Ilford and was intending to develop or invest in properties abroad. In those circumstances, he asked for the monies to be transferred to him. Mr Offord asked him to put this in writing and, on 4th August 2008, Cranbrook Solicitors Limited received from the client a letter dated 1st August 2008 requesting a transfer of the money to a bank in Cyprus for the credit of an account in the name of a corporate body named as Castelo Overseas Inc., with James Goulding being named as "beneficiary". After a discussion with one of the directors of Cranbrook Solicitors Limited, the transfer was authorised and implemented on 6th August 2008.

30. This letter from the supposed Goulding was described by Mr Peter James Oakes, the solicitor for Excel, as "remarkable". It certainly has some unusual features. It is written on unheaded paper, giving no address whatever for the writer. Some of the language is un-idiomatic; and capital and lower case letters are, on occasions, employed inappropriately. The name of the account to which the monies were to be transferred would also appear to be mis-spelt, since "Overseas" is spelt "Oversease". Even more strikingly, the name under which the client was operating was also mis-spelt under his signature, where it appears as "James C Goulging".

31. A further order was obtained requiring disclosure by Mr Offord himself, but I do not think that the information which he provided adds in any significant way to that which was apparent from the documents disclosed by Cranbrook Solicitors Limited. However, the discovery that monies had been transferred to an account with a bank in Cyprus led to further

investigations and applications for relief and to the joinder of Castelo Overseas Inc. as Fifth Defendant in the action.

32. Enquiries made on behalf of Excel suggested that at least some of the funds in question remained credited to the Cypriot bank account; and on 11th November 2008, I made a freezing order against Castelo Overseas Inc. and gave permission for it to be served upon the relevant bank which was identified as the Marfin Popular Bank Public Co Limited of Nicosia. Subsequently, I made various consequential orders, permitting Excel to take steps in Cyprus for the purposes of enforcing the freezing order. So far as I am aware those proceedings are still continuing, but there is some doubt as to whether the funds in question are still in the hands of the bank. It should also be noted that on 19th February 2009, English solicitors gave notice to the court that it has been instructed to act on behalf of Castelo Overseas Inc. But I do not know the current state of the litigation between Excel and that entity.

33. The nature of the case against BM Solicitors is set out in the Re-Amended Particulars of Claim for which permission was given on 11th November 2008. The main allegations, for present purposes are to be found at paragraphs 5 and 5a of the pleading which set out a case based upon breach of warranty of authority. Both paragraphs appear under the general heading "Warranty as to the identity of the borrower". Reliance is placed in particular on Mr Masood's initial response to the enquiries raised by Kuit Steinart Levy in the form of his letter of 17th July 2008, in which he stated that the firm's client was James Charles Whittaker Goulding, that he would be the borrower and that there were no other persons beneficially entitled; and also upon the fact that, under cover of the same letter, they had enclosed what was said to have been a copy of their client's driving licence. It is also alleged that they stated that they acted for James Goulding in various other communications sent to Excel or its solicitors, including the three letters of 7th July 2008 and their replies to the various enquiries raised by Kuit Steinart Levy. Then, at paragraph 7 of the pleading, it is alleged that on 25th July 2008, Mr Masood sent to Excel the facility letter purportedly signed by Mr Goulding and signed by Mr Masood himself as witness to his client's signature. Reference is also made to the change of date from 25th July 2008 to 21st July 2008.

34. The case is further developed at paragraph 15.1 of the Re-Amended Particulars of Claim under the general heading "breach of warranty of authority and negligent misrepresentation". At this stage, however, I am not concerned with any allegation of negligence but only with the case formulated on the basis of breach of warranty of authority. What is alleged is that BM Solicitors did not, in fact, act for James Goulding and that they therefore wrongly warranted that the identity of their client was James Goulding and/or that the facility letter had been duly executed by James Goulding. It is alleged that by witnessing the signature on the facility letter Mr Masood warranted that the document had been duly executed by James Goulding and, furthermore, that he thereby warranted the authenticity of such signature.

35. But, in addition to the claim based upon breach of warranty of authority and negligent misrepresentation, the Re-Amended Particulars of Claim allege, at paragraph 16, that BM Solicitors were in breach of fiduciary duty and/or in breach of an undertaking given to Kuit Steinart Levy on 23rd July 2008. For present purposes I need refer only to the allegation of breach of fiduciary duty. The duty itself is formulated at paragraph 9 of the pleading in fairly laconic terms, namely that, upon receipt of the advance, BM Solicitors came under a duty to Excel as fiduciaries to hold the monies for the purposes of the offer of secured lending to Mr Goulding only and either to apply the whole of the monies to that transaction or to return such part of it as may not have been so applied. The allegation of breach is pleaded in equally laconic terms to the effect that if and in so far as BM Solicitors had paid the monies away to any persons other than James Goulding or had utilised or applied the monies for a purpose other than the transaction in question, then they were in breach of their fiduciary duty.

36. In their Defence, BM Solicitors admit the existence and transmission of the documents referred to at paragraphs 5 and 5a of the Re-Amended Particulars of Claim and the execution of the facility letter by the client and its signature by Mr Masood as witness. No admissions are made as to the fiduciary duty alleged; and the allegations of breach of warranty of authority and breach of fiduciary duty are denied. At paragraph 18 of the Defence it is admitted that it was "likely" that the advance had been provided by fraud.

The Application for Summary Judgment

37. Notwithstanding the service of the Defence, on 6th February 2009, Excel issued an application for summary judgment against BM Solicitors relying in particular on the alleged breach of warranty of authority. The application was supported by a witness statement from Excel's solicitor, Mr Peter James Oakes dated 5th February 2009 which sought to summarise the essential outlines of Excel's case against BM Solicitors and referred to the earlier affidavits and witness statements in the proceedings. Evidence in opposition was subsequently filed in the form of a witness statement from Mr Masood dated 20th February 2009; and further evidence in reply was filed on behalf of Excel by way of a further witness statement from Mr Oakes dated 17th March 2009 and two witness statements of Joanne Ogden dated 2nd March 2009 and 24th March 2009 respectively.

38. I have already endeavoured to summarise the salient aspects of the evidence on each side. It is perhaps necessary to note only one or two further matters raised in these witness statements. Firstly, it is asserted on behalf of Excel that it relied upon the statements which are said to have amounted to warranties on the part of BM Solicitors in deciding whether to carry the transaction through to completion. Secondly, Mr Masood states that he genuinely believed that his client was the person he represented himself to be; and he summarised the steps which he took to verify his identity, asking, rhetorically, what else he could have done. Indeed, at

least for the purposes of the present application, it is accepted that, if the matter were to go to trial, BM Solicitors may well establish that they had complied with all relevant money laundering requirements in connection with the transaction. Finally, Mr Masood does not admit that his client was, in fact, an impostor. But he does not seek to put forward any positive evidence on this issue, contenting himself with a limited critique of some of the evidence adduced on behalf of Excel.

39. The question which I have to determine at this stage is whether, on the material before me, there is any real prospect of BM Solicitors being able to defend the claim insofar as that claim is based upon breach of warranty of authority. That was the basis of the application as set out in the application notice; and, in his witness statement in support, Mr Oakes likewise made it clear that, for the purposes of the application, reliance was essentially placed upon breach of warranty of authority.

40. But in his skeleton argument, Mr Lowenstein, counsel for Excel, also sought to advance a case based on breach of trust on the part of BM Solicitors. That was not a case which was explicitly pleaded in the Re-Amended Particulars of Claim, though there was, as previously noted, a claim based upon breach of fiduciary duty. Furthermore, it was not a cause of action relied upon in the application notice itself or in the evidence in support. In those circumstances, Mr Berkley QC, on behalf of BM Solicitors, took a formal objection to any application for summary judgment on these grounds; and, in any event, he told me that he did not consider that he had had adequate time to consider and properly prepare a response to a case of this kind. He nonetheless put forward some limited arguments on the point. On the other hand, Mr Lowenstein submitted that I should not be bound by procedural formalities and that I should therefore deal with this aspect of the case.

41. For my part, I consider that the breach of trust question may well become academic in the light of my decision on Excel's primary case of breach of warranty of authority. Nonetheless, I will deal briefly with certain aspects of the breach of trust claim later in this judgment. But I will stand over this particular aspect of the application for further argument on another occasion if either party wishes me to do so.

Breach of Warranty of Authority

42. I turn, therefore, to the fundamental question as to whether Excel has made out its case based on breach of warranty of authority and whether, on the basis of the material before me, there is any real prospect that such a claim might be successfully defended by BM Solicitors.

43. The competing arguments can, in fact, be summarised fairly briefly. Mr Lowenstein submits that by stating that they were acting on behalf of Mr James Charles Whittaker Goulding, the proposed mortgagor of the property at 17 Richards Place, by answering the enquiries raised by Kuit Steinart Levy in the way in which they did and by returning the signed and

witnessed facility letter, BM Solicitors warranted that they had authority to act on behalf of the person so identified, namely James Charles Whittaker Goulding, the registered proprietor of the property at 17 Richards Place. He submitted that it was established in law that such a warranty of authority was absolute, in the sense that it did not merely require the supposed agent to take reasonable care to ascertain the identity of his client. So it was immaterial to consider the subjective beliefs of Mr Masood or the steps which he had taken to ascertain his client's identity. Yet further, he submitted that the overwhelming inference from the evidence was that, in fact, BM Solicitors' client was an impostor and not the "real" James Charles Whittaker Goulding of 17 Richards Place, so that there must inevitably have been a breach of the warranty of authority. In those circumstances, he contended that Excel was entitled to judgment against BM Solicitors, though he conceded, perhaps a little reluctantly, that the quantum of damages would have to be ascertained on another occasion.

44. Mr Berkley QC, on the other hand, submitted that there was a fundamental fallacy in the claim as formulated against BM Solicitors. He did not seek to argue that no implied warranty of authority could arise in the circumstances of this case. But he emphasised that any such warranty would be as to the authority of the agent to act on behalf of the principal. Such a warranty did not, however, extend to the identity of the principal. All, therefore, that BM Solicitors were warranting was that they had authority to act on behalf of a client who represented himself to be James Charles Whittaker Goulding, the registered proprietor of the property at 17 Richards Place. In those circumstances, there could be no breach of any absolute warranty of authority, whatever arguments might remain in relation to a case based upon negligent misrepresentation.

45. But Mr Berkley also raised questions as to whether it could properly be said at this stage that there could be no real prospect of a successful defence, on the facts, on the issue as to whether BM Solicitors' client was, in truth, an impostor rather than the "real" James Charles Whittaker Goulding. Furthermore, he contended that this issue of identity, in itself, might justify the refusal of the application for summary judgment on the footing that the nature of the issue and the difficulties involved in investigating it meant that there was a compelling reason why it should be disposed of at trial as contemplated by Rule 24.2(b) of the Civil Procedure Rules.

46. He also submitted that the issue as to whether Excel relied upon the implied warranty of authority in paying over the balance of the loan monies was not a matter which could be disposed of summarily. There was a real prospect, he suggested, that, under cross-examination, it might well be revealed that, in reality, Excel had relied upon its own enquiries as to the identity of the borrower. So, he submitted, there was a real prospect of successfully defending the claim on this basis; and, in any event, the need for Excel's evidence to be properly tested by cross-examination in

itself amounted to a compelling reason why the matter should be disposed of at trial.

47. Though most of the argument was directed towards the legal issues arising out of the application, I think it would be helpful to deal first with the factual matters identified by Mr Berkley, since, if there was merit in his submissions, there would have to be a trial of at least some of the factual issues arising in connection with the claim based on breach of warranty of authority.

Fraud

48. It will be recalled that, at paragraph 18 of the Defence, it was admitted that it was "likely" that the advance had been procured fraudulently. That admission seems to me to be entirely justified in the light of the material placed before the court on behalf of Excel. But it does not quite amount to a full admission. Nonetheless, it seems to me that the facts and matters relied upon by Excel, taken together, give rise to a virtually irresistible inference that BM Solicitor's client was an impostor, in the absence of any evidence to the contrary. Indeed, at every stage along the route which Excel has had to follow in an attempt to recover its money, every additional feature seems to give added support to the inference.

49. It is true that there are some loose ends in the factual material gathered by Excel and relied upon as the basis of the inference of fraud. Mr Berkley raised a number of questions about such matters. How, he asked, did the valuers gain access to 17 Richards Place; how did the alleged impostor manage to receive the letters sent to him at that address; and what was the role of Mr Wright? He also pointed out that the legal charge prepared by Kuit Steinart Levy gave Goulding's address as 50, Drayton Gardens; and yet, according to Excel's evidence, that address came to light only after 4th October 2008. He observed that TAS Legal Services appeared to have been investigating the matter prior to any involvement on the part of the police. Indeed, he pointed out that the first reference to any investigation by the police appeared only in Mr Oakes' witness statement of 5th February 2009. He also commented that the "real" Mr Goulding seems to have delayed considerably in seeking to set aside the charge.

50. It is obviously true that no evidence has been adduced on behalf of Excel from either the "real" Mr Goulding or from Mr Wright. Indeed, it seems to be the case that no representative of Excel has ever actually met the "real" Mr Goulding. Nor has any material from the police been put before the court at this stage. It is obviously open to a Defendant against whom summary judgment is sought to argue that further and more detailed evidence could and should have been obtained and placed before the court. However, it is not incumbent upon a Claimant to bring forward the entirety of his evidence at the summary judgment stage. All he needs to do is adduce sufficient and credible evidence to support his belief that the Defendant has no real prospect of success on the relevant issue. If he does so the Defendant must put sufficient material before the court to rebut that

statement of belief. But in assessing the material before it, the court is entitled to take into account any evidence which could reasonably be expected to be available at trial. See the notes in the current edition of the White Book at paragraph 24.2.5.

51. In this case, BM Solicitors have wholly failed to put forward any significant factual material which might tend to rebut the inference which Excel invites the court to draw. Nor has it adduced any material to suggest that further enquiries might disclose information which might rebut the inference. Indeed, they do not seem to have embarked upon any enquiries on their own account in order to see whether there might be any relevant material. They could themselves have attempted to contact the "real" Mr Goulding or, perhaps more readily, Mr Wright. But there is no evidence that they have done so. Nor have I been asked to stand the matter over for a period to enable such enquiries to be made.

52. In reality, in the absence of any counter-balancing material or even of any serious enquiries into these matters on behalf of BM Solicitors, I see no reason why I should assume that something might turn up in the period leading up to trial which might cast a different light on these matters. In the circumstances, I can see no real prospect that, if the matter were to go to trial, BM Solicitors would be able to resist the inference that their client was indeed an impostor and not the same James Charles Whittaker Goulding as was the registered proprietor of the property at 17 Richards Place.

Reliance

53. That leaves the question of reliance. As I have said, the essential point raised by Mr Berkley is that Excel may well have relied upon its own enquiries in determining whether to hand over the loan monies to BM Solicitors and that this is a matter which should be tested at trial by way of cross-examination.

54. Now, at least for the purposes of the application for summary judgment, Mr Lowenstein did not challenge the proposition that, in order to recover damages for breach of warranty of authority, Excel would have to show that it relied upon the warranty. So the concept of reliance, in this context, was not the subject of any detailed analysis. Without the benefit of argument on point, I confess that I remain unsure as to whether the concept of reliance, in this context, merely represents one aspect of causation or whether it constitutes some separate requirement akin to that of inducement in relation to misrepresentation. Be that as it may, Mr Lowenstein submitted that it was "self-evident" that Excel must have relied upon the implied warranty said have been given by BM Solicitors and that, if it had not been given, they would not have advanced the monies to the impostor. He placed particular weight on Excel's letter of 24th July 2008 by which it was made clear that it would not proceed with the transaction without having received a copy of the facility letter, duly initialled, executed and witnessed. Only once this had been received was

it willing to hand over the funds. He also invites me to test Mr Berkley's argument by asking whether, on the evidence, it could seriously be argued that Excel would have proceeded with the transaction if Mr Masood had not confirmed in correspondence and in his answers to the enquiries raised by Kuit Steinart Levy that his client was James Charles Whittaker Goulding, the registered proprietor of the property at 17 Richards Place, or if he had not attested the signature of James Goulding on the facility letter before returning it to Excel.

55. The answers to those rhetorical questions may well be obvious. It seems highly unlikely that Excel would have proceeded with the transaction if Mr Masood had refused to give the requisite confirmation or return the facility letter duly signed and witnessed. But it may also be the case that Mr Lowenstein's questions beg a further question as to the nature of the warranty. If all that BM Solicitors were warranting was, as Mr Berkley contends, that they had actual authority to act in the transaction on behalf of a client who claimed to be James Charles Whittaker Goulding, the registered proprietor of 17 Richards Place, then I entirely accept that the overwhelming inference is that Excel must have relied upon that warranty of authority. But, if the warranty extended to the identity of the client, as contended for by Excel, it seems to me that the position would be much less clear.

56. The point may be illustrated by posing a supplementary question to those formulated by Mr Lowenstein. What would the position have been if Mr Masood had said that, though his client had produced evidence of his identity, his firm could not give an absolute warranty that he was, in fact, the same James Charles Whittaker Goulding as was the registered proprietor of the property at 17 Richards Place? Would Excel then have refused to go through with the transaction? As Mr Berkley emphasised, Excel had carried out its own enquiries into the identity of the individual concerned and had apparently satisfied itself that he was, in truth, the "real" Goulding before making the offer of an advance to him. It should be borne in mind that, at least for present purposes, it is accepted that BM Solicitors may well have carried out reasonable enquiries into the identity of their client before the transaction was completed.

57. I have to say that, in those circumstances, I do not think that it is sufficiently clear, at this stage, that Excel must have relied upon a warranty as to the identity of Mr Masood's client (as opposed to his authority to act on behalf of the client) as to enable me to conclude that BM Solicitors would have no real prospect of success on that issue. So, even if I were to come to the conclusion that the implied warranty of authority given by BM Solicitors extended to the identity of their client, I would nonetheless hold that there would have to be a trial of the issue of reliance in order to determine whether Excel is entitled to substantial damages for breach of the warranty.

The Scope of the Warranty

58. But I must now return to the primary question which I am required to determine for the purposes of the present application. Strictly, I am not asked to resolve this question as a preliminary issue of law. Furthermore, Mr Berkley QC, on behalf of BM Solicitors, does not seek "reverse" summary judgment. Yet further, though there is not and could not be any real dispute as to most of the material facts, I have already held that there would have to be a trial of the issue of reliance, whatever the correct resolution of the legal issues. But, in case I am wrong in my conclusion on the question of reliance, and since I have heard full submissions on these matters, it seems to me that I should nonetheless determine the legal question which divides the parties. From a strict procedural standpoint, that question is whether, on the undisputed or undisputable facts (and, for this purpose, on the assumption that Excel would succeed on the issue of reliance) there is any real prospect of BM Solicitors successfully defending the claim for damages for breach of warranty of authority.

59. The essential legal principles applicable to such a claim are not in doubt. An agent acting on behalf of an identified principal will not normally incur any personal, contractual liability so long as he acts within the scope of his authority. Anyone contracting with such an agent must look to the principal for any redress to which he is entitled as matter of contract. However, it is now well established that, in such circumstances, the agent will normally be regarded as giving an implied warranty as to his authority. If, therefore, he never had authority to act on behalf of the principal, or if his authority has terminated or if he exceeds the scope of his authority, he will be in breach of the implied warranty and will be liable in damages to any person to whom the warranty was given. In the common case, where the principal refuses to accept liability, the right of action against the agent for breach of his warranty will be an effective substitute for the loss of any right of action against the principal.

60. The law on this matter was established, at least in its modern form, by the decision of the Court of Exchequer Chamber in Collen v Wright (1857) 8 El. & Bl. 647, affirming the decision of the full court of the Queen's Bench (1887) 7 El. & Bl. 307. That was a case in which a claim was brought against executors on the basis that the deceased had purported to enter into an agreement with the plaintiff for the lease of a farm as agent for the owner. It was assumed or proved that the deceased had honestly believed that he had authority to act on behalf of his supposed principal; but, as a matter of fact, he did not have such authority. Though Cockburn CJ gave a lengthy dissenting opinion, the judgment of the court was delivered by Willes J, who summarised the law in the following terms at pages 657 to 658:

> "I am of opinion that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. This is not the case of a bare misstatement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority

affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise. Indeed the contract will be binding upon the person dealing with the professed agent if the alleged principal were to ratify the act of the latter."

61. In the case of Yonge v Toynbee [1910] 1 KB 215, the Court of Appeal held that the same principle would apply to a case in which solicitors purported to act on behalf of a client for the purposes of litigation. In this particular instance, the solicitor was undoubtedly instructed to act on behalf of the client but, before the commencement of the proceedings, the client became of unsound mind and, therefore, lacking in the capacity to authorise any steps to be taken in the litigation on his behalf. The court held that there could be no distinction between a case in which the agent never had authority and one where his authority subsequently terminated, albeit without the agent having the knowledge of its termination or even the means of knowledge. Two further points arising from this case should also be noted. Firstly, as Buckley LJ observed at page 227 of his judgment, the implied contract might be excluded by the facts of the particular case. Thus, the agent might specifically say to the other party that he did not know whether the warrant of attorney under which he was acting was genuine or that his principal was abroad and that he did not know whether he was still alive. Secondly, as had previously been pointed out by Lord Esher MR in Firbank's Executors v Humphreys (1886) 18 Q.B.D. 54 at p.60:

> "The principle of *Collen v Wright* extends further than the case of one person inducing another to enter into a contract. The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is personally liable for the damage that has occurred."

62. In the circumstances, therefore, it was held that the solicitor was personally liable to pay the Plaintiff's costs of the action which were incurred in reliance on the implied warranty that he had authority to act on behalf of the Defendant.

63. In the rather more recent case of Penn v Bristol & West Building Society [1997] 1 WLR 1356, the Court of Appeal had to consider a situation in which a husband had instructed a solicitor to act on behalf of both himself and his wife in connection with the sale of the matrimonial home. In fact,

the proposed sale was a fraudulent device concocted by the husband in concert with the supposed purchaser for the purpose of raising money from the Bristol & West Building Society in the form of a mortgage advance to be secured on the property in the usual way. The wife knew nothing about any of these matters; and the husband forged her signature on all the documents. The solicitors for the purchaser were also instructed to act on behalf of the Building Society in relation to the mortgage. When the fraud subsequently came to light, the wife brought proceedings against both the purchaser and the Building Society seeking declarations that the contract and transfer to the purchaser and the purported charge over the property were null and void, together with various further heads of relief. The declarations were granted and it was held that the Building Society was subrogated to the rights of the previous mortgagee of the property. More importantly, for present purposes, it was held, at first instance, that the solicitors instructed by the husband were liable in damages to the Building Society for breach of an implied warranty as to his authority to act on behalf of the wife as well as the husband. It was this last finding which was the subject of the appeal.

64. The leading judgment upholding the decision at first instance was given by Waller LJ, with whom Waite and Staughton LJJ agreed. It was contended on behalf of the solicitor that, in order to establish the necessary warranty of authority, it had to be proved that such a warranty, whether express or implied, had actually been given to the party claiming damages for breach and that he had thereby been induced into entering into some form of transaction with the supposed principal. But these arguments were rejected. The leading judgment was given by Waller LJ who summarised his conclusions in these terms at page 1363:

> "In truth as I see it, the question whether a warranty of authority has been given rests on a proper analysis of the facts in any given situation, and not on any preconceived notions as to what is essential as part of the factual analysis. Of course there is no issue that to establish a warranty of authority as with any other collateral warranty there must be proved a contract under which a promise is made either expressly or by implication to the promisee, for which promise the promisee provides consideration. But consideration can be supplied by the promisee entering into some transaction with a third party in a warranty of authority case just as it can in any other collateral warranty case. Furthermore, a promise can be made to a wide number of people or simply to one person, again all depending on the fact. It follows, as Mr Jackson has submitted, that the plaintiff, whether as one of the wide number of people to whom the offer is made or by virtue of being the only person to whom the offer is made, has to establish that the promise was made to him. There is also no doubt that what he has to establish is that a promise was made to him by the agent, to the effect that the agent had the authority of the principal, and that he provided consideration by acting in reliance on that promise."

65. On the facts, the Lord Justice had little difficulty in holding that the Building Society's claim was made out. The solicitors on the other side

were acting in two capacities, on behalf of the Building Society as well as on behalf of the supposed purchaser, as the solicitor instructed by the husband was well aware. He must have known that in their capacity as solicitors for the Building Society they would rely on his having the wife's authority to bring the transaction to fruition just as much as they would have done in their capacity as solicitors for the purchaser. The Building Society likewise relied on his authority to act on behalf of the wife in advancing and releasing the mortgage monies upon the execution of a charge in its favour by the purchaser. Accordingly, there was an implied warranty in favour of the Building Society that the solicitor instructed by the husband was also acting with the authority of the wife. It was that warranty of authority which was broken; and causation was established since, if the solicitor had, in fact, obtained the wife's authority, either the transaction would have collapsed, or it would have been completed in a satisfactory manner so as to give the Building Society the security which it was entitled to expect.

66. That decision establishes that the implied warranty of authority is a particular example of a collateral contract, the consideration for which may be supplied by the party to whom it is given entering into some form of transaction other than a contract with the supposed principal. But Mr Lowenstein relied upon it particularly as demonstrating that it was not enough for the supposed agent to show that he was acting with the authority of the person from whom he was taking instructions. He is also deemed to warrant that he has the authority of any other person on whose behalf he purports to act.

67. Though the point was not in issue in that case, the effect of the decision seems plainly to be as Mr Lowenstein suggests. But it should also be recalled that, in the passage which I have cited from his judgment, Waller LJ emphasised that whether a warranty of authority has been given rests on "a proper analysis of the facts in any given situation". In that case, there could be no real doubt as to the identity of the person on whose behalf the solicitor was purporting to act, namely the wife of the person instructing him. Furthermore, it was clearly established that he did not, in fact, have any authority to act on her behalf. As it seems to me, it does not follow that, in every case, an agent must be regarded as warranting the identity of his client and not merely the fact that he has authority to act on the client's behalf.

68. Mr Lowenstein also relied on the decision of Chadwick J (as he then was) in Bristol & West Building Society v Fancy and Jackson [1997] 4 All ER 582. This involved a number of conjoined actions in which solicitors were instructed both on behalf of the borrower and the Building Society in relation to various mortgage transactions. In one of the cases in question, the solicitors were instructed, once again, by a husband, purportedly on behalf of both himself and his wife. The proposed transaction was a re-mortgage of their house to secure an advance from the Building Society. Yet again, it appears that the wife knew nothing about these matters and that her signature on the mortgage deed had been forged. It was alleged on

behalf of the Building Society that the solicitor was not only in breach of his retainer but also in breach of his implied warranty of authority. The judge dealt with these matters at pages 612-3 of his judgment where he said this:

> "It was not suggested in argument that the effect of the society's instructions to solicitors was to shift onto those who accepted its retainer in relation to domestic mortgage transactions the whole risk of an undetected forgery - in effect, to make them insurers in respect of that risk. I do not doubt that that could be done by an appropriate provision in a solicitor's retainer; but I would expect to see such provisions spelt out in clear words if that was indeed the intention. Nor do I doubt that it would be possible to include in the instructions under which a solicitor was retained to act for a lender a provision which required him to ensure that the mortgage deed was executed in his presence by mortgagors who provided some proof of their identity. But the society's instructions contained no provision which could have that effect. In my view, the obligation on Mr Borsay, as the solicitor instructed by the society, was to take such care as a competent solicitor, acting reasonably, would take in the circumstances.
>
> In circumstances where the lender and the borrower instruct separate solicitors, I am not persuaded that a competent solicitor, acting for the lender, would be acting unreasonably if he accepted from the borrowers' solicitor a mortgage deed which appeared on its face to have been executed by the mortgagors and witnessed. If there were nothing irregular on the face of the document the lenders' solicitor would be entitled to accept it without question. He would not be required to enquire into the circumstances in which it was executed. But - and this is, of course, an important safeguard - the lender would have the benefit of the implied warranty of authority given by the borrowers' solicitor that he has the authority of the borrowers to complete the mortgage by delivering the mortgage deed - see the judgments in the Court of Appeal in *Penn -v- Bristol & West Building Society* [1997] 3 All ER 470, [1997] 1 WLR 1356.
>
> I can see no reason why the position should be different in the circumstances that the same solicitor acts for both lender and borrowers. I do not hold that the duty of the solicitor, as solicitor for the lender, is increased by the fact that he acts also for the borrowers; but, equally, I can see no reason why, as solicitor for the borrowers, he should not be taken to warrant to the lender that he is acting for them in the transaction with their authority. That does not, necessarily, mean that he is warranting that the signature on the mortgage deed is authentic; but it has much the same effect. Mr Borsay must be taken to have warranted to the society that the mortgage deed which he delivered on completion as solicitor for the borrowers was delivered with the authority of both Mr and Mrs Barton. If the deed had been delivered with the authority of Mrs Barton as security for the advance which was made by the society, the fact that it did not, in fact, bear her signature would be relatively unimportant. She would clearly be bound by its terms.

> For these reasons, I am satisfied that this defendant is liable to the society for breach of his implied warranty of authority."

69. Mr Lowenstein appeared to suggest in his skeleton argument that this was authority for the proposition that, in such circumstances, a solicitor was warranting the authenticity of the signature of any instrument which he forwarded on behalf of his client to the party with whom he was dealing, though he did not put it in this way in the course of his oral submissions. But if and in so far as such an argument might be sought to be advanced on the basis of this case, it does not, in my judgment, represent the correct interpretation of this passage in the judgment. Quite the contrary, the judge was at pains to emphasise that by delivering such a document the solicitor was not warranting the authenticity of the signature. What he was doing was to warrant that it was delivered with the authority of the apparent signatory. If it had been delivered with her authority, there would have been no breach of the solicitors' warranty, even if the signature had not, in fact, been authentic. But it is no doubt correct to say that, in many, perhaps most cases, such a warranty of authority would have "much the same effect" as a warranty as to the authenticity of the signatures.

70. Mr Berkley, for his part, branded Mr Lowenstein's arguments as "heretical". He pointed out, correctly, that the rule as formulated in Bowstead and Reynolds on Agency, 18th edition (2006), emphasised that the warranty which the agent is deemed to have given is as to his authority to act on behalf of his principal. He referred in particular to the commentary at paragraph 9-065 of the text which is in these terms:

> "**What is warranted?** The basic warranty is only that the agent has authority from his principal: this is something peculiarly within the agent's knowledge. If the principal proves unreliable, that is something in respect of which the third party could have made inquiries. Merely as agent, therefore, the agent does not warrant that his principal is solvent, or will perform the contract (if any)."

71. At the end of the same paragraph, the learned editors make the following further observations:

> "A situation could arise where an agent is authorised to sell goods by one whom he believes to be, but is not, their owner. If he warrants that he has the owner's authority, he is liable if he has not such authority. If, however, he warrants only that he has the authority of a principal (even unnamed), he is not liable because he has such authority, even though his principal is not the owner. The second interpretation seems clearly preferable: the buyer has bought from a non-owner and should have recourse accordingly. The warranty of authority is only to protect him if there is no principal against whom he can have recourse."

72. Mr Berkley relied heavily upon these passages in support of his fundamental proposition that the implied warranty extends only to the authority of the person purporting to act as agent and not to any other attributes of the principal, most notably his identity. In this context, he

also, of course, relied upon the distinction drawn by Chadwick J (as he then was) in Bristol & West Building Society v Fancy and Jackson.

73. Mr Berkley also drew my attention to the decision of the Court of Appeal in SEB Trygg Liv Holding Aktiebolag -v- Manches and others [2006] 1 WLR 2276. The facts in that case were complex. Essentially, however, they arose out of a situation in which three firms of solicitors had purported to act on behalf of a named company for the purposes of arbitration proceedings when, unknown to them, the company had been dissolved and ceased to exist, even though its assets and liabilities had been transferred to a successor company. The other party to the arbitration proceedings then commenced an action in the High Court seeking damages for breach of warranty of authority against all three firms of solicitors. At first instance, Gloster J held that the arbitration proceedings were not a nullity and that the successor company was bound by the award. She declined to hold that the solicitors were in breach of their warranty of authority, since the person from whom they received their instructions had had actual authority to act on behalf of the original company prior to its dissolution and at least ostensible authority thereafter to act on behalf of its successor. However, she held that the solicitors were in breach of a more limited warranty that the client for whom they acted bore the name in which they had pursued the proceedings. Various appeals arose out of the proceedings, one of which was an appeal by the solicitors against the decision that they were liable for breach of this more limited warranty.

74. The judgment of the Court of Appeal was delivered by Buxton LJ. The relevant section of the judgment is to be found at paragraphs 56 to 69. At paragraph 57, Buxton LJ formulated the issue in these terms:-

> "57. It is common ground that a solicitor who starts, defends or continues litigation or arbitration on behalf of a client warrants that he has authority to do so. Such a warranty necessarily involves the solicitor representing that he has a client who exists. The question is whether he also represents that he has named his client correctly. Here, on the judge's findings, the solicitors had authority to act for their client, AMB, which existed. So the question is whether they were in breach of warranty by mistakenly naming or continuing to represent that their client was Old Aachener Re."

75. He then referred to Yonge v Toynbee [1910] 1 KB 215 and to a more recent decision of the Court of Appeal in Nelson v Nelson [1997] 1 WLR 233 in which solicitors had started proceedings on behalf of a plaintiff who was (unknown to them) an undischarged bankrupt. But he did not consider that the older authorities shed any real light on the question which the court had to determine. That question, as he said at paragraph 64 is whether, as a matter of principle, a "warranty as to name" was justified. He addressed this question in the following paragraphs in these terms:-

> "65. Mr Matthews QC for SED says it is. Such a warranty, he submits, should be considered as part of the warranty of authority or something akin to it. The opposing party is entitled to be told the correct name of the client from whom the solicitor has authority and

entitled to rely on the name put forward in the proceedings. This is the basis on which litigation or arbitration is conducted. It should not be difficult for a solicitor to ascertain the correct name of his client. The opposing party on the other hand has no right or obligation to do so.

66. In considering these submissions it is important to bear in mind that generally a solicitor conducting proceedings does not warrant what he says or does on behalf of his client. Thus he does not warrant that his client, the named party to the proceedings, has title to sue, is solvent, has a good cause of action or defence or has any other attribute asserted on his behalf. The solicitor relies upon his client's instructions for all these things, as he will normally do for naming his client correctly. As he gives no warranty as to the accuracy of his instructions generally, it is difficult to see why the naming of his client should be treated as an exception. Why should this be any different, for example, from the naming of a client who has no title to sue? There is an obvious distinction between such matters and the solicitor's own authority to act because the solicitor will usually know whether he has such authority or not. The imposition of strict liability on a solicitor for breach of warranty of authority is justified because otherwise the opposing party will be left without remedy against his supposed client.

67. The warranty which a solicitor gives is that he has a client who has instructed him to assert or deny the claims made in the proceedings against the opposing party. We do not think he warrants that the client has the name by which he appears in the proceedings. As a matter of principle it would not be right to impose strict liability upon a solicitor for incorrectly naming his client. Otherwise solicitors could be made liable for any case of misnomer including, for example, typographical errors or change of corporate name without a change of rights.

68. A further consideration is that the sort of loss caused by misnomer is unlikely to be large and in most cases the opposing party will be compensated by an order for costs against the party whose mistake it is likely to be. Mr Matthews argued that the existence of the warranty should not be dependant upon the size of the likely loss. In any event, he said, the losses could be significant because a claim might become time-barred or recovery against the solicitors' client might not be possible. In this case SEB says that as a result of the misnomer enforcement of any award against AMB in Germany might not be possible because it could argue that it had been unable to present its case during the arbitration (see art V (1)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (10 June 1958; UNTS 3320 (1959); (Cmnd 6419)). However, these arguments do not persuade us that the imposition of strict liability is justified. If the solicitor is really at fault a claim for wasted costs order or even for negligence is possible.

69. For these reasons we conclude that solicitors conducting proceedings should not be held to warrant that they have correctly named their client and that the judge reached the wrong conclusion on this point. The defendant solicitors' appeals should therefore be allowed. No doubt the parties can agree appropriate declarations (if

required) to be substituted for those made by the judge to reflect this result."

76. Though he did not, I think, entirely exclude the possibility that, in appropriate circumstances, an agent might be regarded as giving some more extensive form of implied warranty in relation to his principal, Mr Berkley submitted that normally any more extensive liability of this kind would require clear and express wording. He cited various cases in which it was emphasised that a solicitor or other professional man was normally to be regarded as undertaking only qualified obligations to exercise reasonable care rather than giving absolute warranties. He relied in particular, on the powerful observations of the Court of Appeal in Midland Bank Plc v Cox McQueen [1999] PNLR 593.

77. That was yet another case in which the husband purported to act on behalf of his wife in order to obtain an advance secured by way of a charge on a house of which he was the sole owner. Initially, he had obtained an increase in his family company's overdraft on the security of a deposit of the deeds of the property together with a letter of consent purportedly signed by the wife but in fact signed by some other person in her name. Subsequently, he obtained a valuation of the property which he used to persuade the plaintiff bank to lend him further money secured by a fresh charge over the property. The defendant solicitors were then retained by the bank to carry out certain steps on their behalf, as set out in a letter of retainer. They were required to explain various documents to the wife and to obtain the husband's signature to various documents and the wife's signature to the mortgage. The mortgage itself made provision for the wife's signature to be witnessed and for a certificate to be signed by the solicitors in the following terms:-

"We hereby certify that the contents of this document have been fully explained to Constance Jean Dukes that she fully understands the portent and has signed this document of her own free will."

78. The documents were returned to the bank, apparently properly completed. The wife's alleged signature had been witnessed by a legal executive of the solicitors; and the certificate was duly signed on their behalf. But it subsequently became apparent that the husband had introduced an impostor to the legal executive purportedly as his wife; and it was the impostor who had executed the document in the wife's name.

79. Proceedings were then commenced by the bank against the solicitors seeking, amongst other things, damages for negligence or breach of an implied contractual obligation to carry out their retainer with reasonable skill and care, breach of warranty of authority, non-performance of the retainer and breach of the warranty said to have been embodied in the certificate. At first instance, all the claims were dismissed; and the case was taken to the Court of Appeal only on the allegations of non-performance of the retainer and the breach of warranty contained in the certificate. Primary reliance was placed on the alleged non-performance of the solicitors' retainer which, it was submitted, imposed an absolute

obligation upon them to obtain the signature of the wife to the charge and for which they were liable in damages notwithstanding the finding that they had not been negligent. It was common ground that this issue was to be resolved as a matter of construction of the letter of retainer.

80. Lord Woolf MR approach this issue by referring to the commercial background to the retainer. A commercial organisation like the plaintiff bank had to make a commercial judgment as to the risks which were inevitably associated with transactions of this kind. On the other hand, solicitors providing their professional services are not normally required to take commercial risks of that kind but merely to exercise a standard of care which is normally to be expected from a competent member of their profession. Furthermore, the bank would normally be in a better position than the solicitors to form a judgment as to the customer's trustworthiness. Against that background, at page 598, he formulated the issue for determination in these terms:-

> "The question is, did the bank intend to ask for and did the solicitors intend to give a promise to answer for the fraud of the customer even if that fraud could not be detected by exercising all proper care? In my view the answer to the question should be no, unless the language used compellingly indicates otherwise."

81. He then examined the language of the retainer letter, observing that it could not have been intended to impose an absolute obligation in all circumstances, and concluded that it did not compel the conclusion for which the bank contended. The same approach was fatal to the subsidiary contention that there was a breach of warranty arising from the terms of the certificate signed by the solicitors.

82. In his judgment, the Master of the Rolls also dealt with two earlier decisions of the Court of Appeal which had been cited in the course of argument. Counsel for the solicitors particularly relied on the decision of the Court of Appeal in Barclays Bank plc v Weeks Legg and Dean [1998] 3 WLR 656 in which the Court of Appeal had declined to construe a solicitors undertaking literally in such a way as to impose an absolute obligation. On the other hand, counsel for the bank relied upon the decision of the Court of Appeal in Zwebner v Mortgage Corporation [1998] PNLR 769. That also was a case in which a lender had advanced money against the security of a mortgage deed on which the wife's signature had been forged. The instructions to the solicitors on behalf of the mortgagees included an undertaking which they were required to give that all appropriate documents would be "properly executed" on or before completion. The Court of Appeal, upholding the decision at first instance, held that, as a matter of construction, this undertaking imposed an absolute, rather than a qualified, obligation on the part of the solicitors who were, therefore, liable in damages since the charge had not been "properly executed" by the wife and that her signature was a forgery. It is clear that the Court of Appeal placed considerable weight on the use of the word "properly" in the undertaking in question; and Lord Woolf MR was able to distinguish it on those grounds.

83. Mummery LJ, who gave a concurring judgment in Midland Bank Plc v Cox McQueen, was, perhaps even more robust. At page 604 he referred to the nature of the transaction in question. He put it in this way:-

> "The letter was a retainer by the bank of a firm of solicitors to perform professional services of an advisory and ministerial kind for the bank. Professional services provided by the solicitors would not normally involve the guaranteeing of a result by them, such as verifying the identity of Mrs Dukes, let alone providing the bank with what would amount to an insurance policy against the risk of fraud occurring in a transaction entered into by the bank with its customer, Mr Dukes; a transaction about which the solicitors were told little by the Bank and in which they had no input or influence."

84. For the same reasons, therefore, as the Master of the Rolls, he agreed that the appeal should be dismissed. He then went on to deal with the authorities which had been cited to them. At page 605 of his judgment, he said this:-

> "The rival arguments of the parties also underline the extremely limited value of precedent on a question of the construction of a document. The Bank relied on the recent decision of the Court of Appeal in *Zwebner*. The solicitors relied on another recent decision of the Court of Appeal in *Weeks Legg*. In the former case solicitors were held to have expressly undertaken to perform an absolute obligation. In the latter case solicitors were held to have agreed to perform a qualified obligation. Those cases are interesting illustrations of the approach of the court to the construction of a solicitor's retainer, but the respective texts and contexts were significantly different from the relevant material in this case. Neither decision governs this case.
>
> As had been repeatedly remarked, every document must be construed according to its particular terms and in its unique setting. Detailed comparisons of one document with another and of one precedent with another do not usually help the court to reach a decision on construction. Indeed, that exercise occupies a disproportionate amount of valuable time which would be better spent on the arguments that really count: those which focus on the precise terms of the relevant documents and the illuminating environment of the transaction. The court gratefully received that assistance from Counsel on this appeal."

85. I will say a little more about the case of Barclays Bank plc v Weeks Legg & Dean later in this judgment in the context of a brief discussion of the claim based upon breach of trust. But before moving on, I should add a post-script to my discussion of Midland Bank plc v Cox McQueen, since that case has itself recently been the subject of further consideration by the Court of Appeal in Platform Funding Limited v Bank of Scotland plc [2009] 2 WLR 1016.

86. That was a somewhat unusual case in which a surveyor and valuer had been instructed to inspect and value a specified property for mortgage purposes but, in error, prepared a valuation and report on a neighbouring

property. Monies were advanced on the basis of the erroneous valuation, but security was taken over the property which he had been retained to inspect. When the security was realised, the lender recovered less than the mortgage debt and brought proceedings against the valuer for breach of contract. It appears, however, that there was no allegation of negligence on the part of the valuer. The judge at first instance nonetheless held that he was liable in damages to the lender on the footing that he had simply failed to carry out his contractual obligation to inspect and value the property which he had been retained to inspect and value. By a majority, the Court of Appeal upheld the decision at first instance. The principal judgment in favour of dismissing the appeal was given by Moore-Bick LJ who considered and cited both Zwebner v Mortgage Corporation Ltd [1998] PNLR 769 and Midland Bank plc v Cox McQueen [1999] PNLR 593, citing extensively from the latter case. At paragraph 30 of his judgment, he summarised the outcome of his review of the authorities in these words:-

> "A number of conclusions may be drawn from these decisions. Perhaps the most obvious is that although there is a presumption that those who provide professional services normally do no more than undertake to exercise the degree of care and skill to be expected of a competent professional in the relevant field, there is nothing to prevent them from assuming an unqualified obligation in relation to particular aspects of their work. Whether a professional person has undertaken an unqualified obligation of any kind in any given case will depend on the terms of the contract under which he has agreed to provide his services. However, cases such as *Greaves & Co (Contractors) Limited v Baynham Meikle & Partners* [1975] 1 WLR 1095 and *Midland Bank v Cox McQueen* [1999] Lloyds Rep PN 223 demonstrate that the very nature of the obligation on which the client relies may itself make it more or less likely that it was intended to be qualified or unqualified, as the case may be. I am not sure that it is helpful in a case such as the present to ask whether the professional person gave a promise to answer for the fraud of a third party (where that is the origin of the eventual loss), since in most cases neither party will have had that particular risk in mind. In my view it is better to ask whether, having regard to the facts and matters known to both parties when the instructions were accepted, the professional person assumed an unqualified obligation in relation to the particular matter in question. It does not follow, as was suggested in *Midland Bank v Cox McQueen* that, because the solicitors could not have assumed an absolute obligation to obtain Mrs Duke's signature in all eventualities, their duty was simply to exercise reasonable skill and care. They could still have undertaken an unqualified obligation to ensure that the person to whom they explained the significance of the documents and whose signature they obtained (if they obtained one at all) was the real Mrs Dukes, as the solicitors in *Zwebner v Mortgage Corpn Ltd* [1998] PNLR 769 in effect did. Finally, I think these authorities support the conclusion that, although the court should be cautious about holding that a professional person has undertaken an unqualified obligation in

the absence of clear words to that effect, there is no reason not to give effect to the language of the contract where it is clear."

87. He went on to point out that the surveyor's instructions were couched in clear and unqualified terms and that there was no obvious reason why his obligation to inspect the property to which his instructions related should be qualified since, unlike the process of inspection and valuation itself, it did not call for the exercise of professional skill and judgment. In the circumstances, he considered that, as a matter of construction, the surveyor undertook an absolute obligation for breach of which he was liable in damages. He also held that the certificate which the surveyor was required to give to the effect that he had inspected the property in question must be construed in the same way so as to impose an absolute, rather than a qualified obligation upon him.

88. Rix LJ, gave a concurring judgment. He also referred to various authorities cited, the effect of which he summarised at paragraph 48 in these terms:-

> "I see no reason to give any of these cases, all of them in this court, any prominence over any other. They all turn on their own particular facts. They nevertheless allow the following conclusions: (1) that the default obligation is one limited to the taking and exercise of reasonable care; (2) that it requires special facts or clear language to impose an obligation stricter than that of reasonable care; (3) that a professional man will not readily be supposed to undertake to achieve a guaranteed result; and (4) that if he is undertaking with care that which he was retained or instructed to do, he will not readily be found to have nevertheless warranted to be responsible for a misfortune caused by the fraud of another. It follows from the jurisprudence and from these conclusions to be derived from them, however, that it is not possible to support a blanket approach whereby, even in the absence of an express warranty, a professional's responsibility is nevertheless always limited to the taking of reasonable care."

89. Before departing from this consideration of the authorities, I should perhaps add that neither counsel considered that any assistance was likely to be gained from the case-law relating to mistake of identity in the formation of contacts; and no cases on the topic were cited to me.

Discussion and Analysis

90. The fundamental reason why a person purporting to act as agent for another would normally be deemed to have warranted his authority so to act is to ensure that any person dealing with the supposed agent is protected against the risk that he does not have the authority which he claims. The supposed agent will normally know whether he has the authority which he claims, or the ability to determine whether he has such authority; whereas any party dealing with him will not. So it is only right that the risk of lack of authority should be borne by the agent by way of an implied warranty. That risk normally manifests itself in the fact that, if the

agent does not, in truth, have the authority which he claims, the other party will be deprived of any effective redress against the assumed principal. In such circumstances, the warranty of authority will give equivalent redress against the agent. This appears to have been a major consideration in the emergence and development of the doctrine. But its application is not limited to cases where a transaction entered into in reliance on the supposed authority of the agent was with the alleged principal himself. That is demonstrated by a number of reported cases, most recently Penn v Bristol & West Building Society [1997] 1 WLR 1356. But I nonetheless I agree with Mr Berkley that the core problem sought to be addressed by the imposition of a warranty of authority is whether the person acting as agent did or did not have authority so to act.

91. On the other hand, a person acting on behalf of another will not normally be deemed to warrant any particular attributes of his principal or any other aspects of the transaction in which he claims to be acting on his behalf. That proposition is well illustrated by the observations of the Court of Appeal in SEB Trygg Liv Holding Aktiebolag v Manches and others [2006] 1 WLR 2276, though it must be remembered that, in that case, the solicitors had, in fact, authority to act in the arbitration proceedings on behalf of the successor company and that the use of the name of the defunct company in those proceedings was no more than a misnomer which did not render them a nullity. A further example of such a limitation is that given at paragraph 9-065 of Bowstead and Reynolds on Agency, where an agent is authorised to sell goods on behalf of someone whom he believes to be their owner. In those circumstances, he would not be regarded as warranting that his principal was, in fact, the owner of the goods but merely that he had authority to act on his behalf. Indeed, one of the cases particularly relied upon by Mr Lowenstein, namely Bristol & West Building Society v Fancy and Jackson [1997] 4All ER 582 also seems to me to illustrate the limits on the doctrine. In that case, the solicitor was not held to have impliedly warranted the authenticity of his client's signature, though it made no difference, since he was in breach of his warranty of authority.

92. Furthermore, as Mr Berkley emphasised, the default position in analysing the obligations undertaken by a professional man is that they are limited to the exercise of reasonable care, so that it would require special facts (or clear language) to impose any stricter obligation upon him. I refer to the helpful summary of the various cases cited to me by Mr Berkley which is to be found at paragraph 48 of the judgment of Rix LJ in Platform Funding Limited v Bank of Scotland plc [2009] 2 WLR 1016.

93. So, Mr Berkley submits, it is "heretical" to assert that the warranty of authority extends to the identity of the principal. But I have some difficulty in accepting this as an unqualified and general proposition of law. It seems to me that the extent of the agent's authority and the identity of his principal will normally be interlinked to some degree. The identity of the principal on behalf of whom the agent purports to be acting may well be wholly immaterial where he is not named or otherwise identified.

But Mr Berkley submitted that if, for example, Smith purports to be acting on behalf of Jones whereas, in fact, he is acting on behalf of Evans, there can be no breach of any implied warranty of authority, since Smith would have the authority of somebody, albeit Evans rather than Jones. So, anyone entering into a transaction with a principal through Smith's agency would have a perfectly good cause of action against his actual principal. He concedes, however, that, in those circumstances, Smith might be liable in misrepresentation.

94. Furthermore, Mr Berkley's submission does not seem to me to grapple with the implications of some of the cases which were cited before me. A not uncommon situation with which the courts have had to deal was that where a husband had instructed solicitors and had deceived them into believing that they were also instructed on behalf of his wife. The solicitors were nonetheless held to be in breach of their warranty of authority, since they did not, in fact, have authority to act on behalf of the wife. But they nonetheless had authority to act on behalf of the husband against whom there would normally be a right of recourse, whatever the value of that right might be. See Penn v Bristol & West Building Society [1997] 1 WLR 1356 and Bristol & West Building Society v Fancy and Jackson [1997] 4 All ER 582.

95. These do not seem to me to be trivial difficulties in the way of Mr Berkley's argument that a hard and fast distinction is to be drawn between authority, on the one hand, and identity, on the other. Mr Lowenstein, of course, sought to argue the contrary proposition, namely that authority and identity were no more than the two sides of the same coin. One could not answer the question as to whether an agent was acting within his authority without also asking who it was that he was purporting to act on behalf of.

96. For my part, I do not think that questions of this kind can be answered in the abstract or at a high level of generality. A warranty of authority is an implied obligation arising as a matter of contract in appropriate circumstances. Whilst the core nature of the warranty is well established, its precise limits in any particular case must, in my judgment, be determined by reference to the specific circumstances which have given rise to the warranty. That is an objective question to be determined by reference to the circumstances prevailing and known to the parties at the time when the warranty is deemed to have arisen and not in the light of subsequent developments. It is in this context that considerations similar to those expressed by the Court of Appeal in Midland Bank plc v Cox McQueen [1999] PNLR 593 are likely to be of considerable relevance, particularly since the Court is dealing with the extent of an implied obligation rather than with the construction of a written document.

97. The relevant background in the present case can, I think, be summarised fairly briefly. Excel carries on business in the financial sector, specialising in making short-term commercial loans. It must be well aware of the commercial risks involved in making such loans, including the risk of fraud and, in particular, identity theft. When the impostor was introduced

to it as a prospective client, it carried out certain checks in order to satisfy itself that he was the person whom he represented himself to be, that he lived at the address at which he claimed to be living and that he was indeed the registered proprietor of the property at 17 Richards Place. Having done so, it decided to proceed with the proposal and enter into a transaction with the impostor, albeit on the mistaken footing that his name was James Charles Whittaker Goulding, the owner of the property in question.

98. BM Solicitors, on the other hand, were a firm providing professional services and, as such, would not normally be expected to do more than carry out those services with reasonable professional skill and care. Indeed, in ordinary circumstances, they would owe no duty whatever to the opposite party in connection with any transaction in which they were instructed save through the usual mechanism of an explicit solicitor's undertaking. The implied warranty of authority is, of course, an exception to this general proposition.

99. In the present case, BM Solicitors were almost certainly instructed by the self-same impostor as had been dealing directly with Excel itself. Though they may not have had any specific knowledge of the inquiries made by Excel, they could reasonably have assumed that Excel would have carried out sufficient investigations to satisfy itself as to the identity and creditworthiness of the individual concerned. But they nonetheless carried out their own checks, which were, in fact, similar to those which had previously been carried out by Excel; and, after they had done so, like Excel, they were content to accept that their client was the person whom he represented himself to be. It is not suggested, at this stage, that they failed to take reasonable care in checking the identity of their client; and it appears to be accepted, for present purposes, that they complied with any relevant money laundering requirements. The matter thereafter proceeded as an ordinary conveyancing transaction, albeit in the mistaken belief on both sides that the impostor was the person he claimed to be; and neither Excel not its solicitors sought any express warranty or undertaking as to the identity of BM Solicitors' client or as to his title to the property at 17 Richards Place.

100. In those circumstances, I am quite unpersuaded that BM Solicitors impliedly warranted either the identity of their client or his title to the property in question. They would, of course, have warranted that they had authority to act on behalf of their client. That was a person identifying himself by the name of James Charles Whittaker Goulding and claiming to be the registered proprietor of the property at 17 Richards Place. Furthermore, he was almost certainly the person with whom Excel itself had been dealing on the basis of the same misapprehension as to his name and identity. In my judgment, the implied warranty of authority given by the solicitors in this case would simply be that they had authority to act on behalf of a person going by the name of James Charles Whittaker Goulding and claiming to be the same individual as the person of that name who appeared to be the registered proprietor of the property at 17

Richards Place. At most, they might be regarded as having warranted that they had authority to act on behalf of the same individual as the one with whom Excel itself had been dealing. But, of course, they would not have been in breach of any such warranty.

101. My conclusion on this matter seems to me to be consistent with both authority and good sense. It is true that, in both Penn v Bristol & West Building Society [1997] 1 WLR 1356 and in Bristol & West Building Society v Fancy and Jackson [1997] 4 All ER 582 a solicitor was held liable for breach of warranty of authority, since he did not have any authority whatever to act on behalf of the wife, even though he clearly had authority to act on behalf of the husband. But, in cases of that kind, there could really have been no question as to the identity of the person on whose behalf the solicitor was claiming to be acting, namely the wife; and no point of a kind similar to that which I have resolve in this case appears ever to have been raised in either of those cases. On the other hand, SEB Trygg Liv Holding Aktiebolag v Manches [2006] 1 WLR 2276 is clear authority that, at least in general, a solicitor does not warrant the name of his client or any other attribute asserted on his behalf; and, as the learned editors of Bowstead and Reynolds observe at paragraph 9-065, the preferable view is that an agent acting for a seller of goods does not impliedly warrant his principal's title.

102. I need not repeat the considerations set out, perhaps most clearly, in Midland Bank plc v Cox McQueen [1999] PNLR 593. But, as I have previously indicated, they seemed to have a particular relevance both to the facts of this case and as to the boundaries of the implied warranty of authority in such circumstances. They strongly suggest that the court should not readily impose upon a person rendering professional services an absolute, unqualified obligation amounting, in effect, to a guarantee of his client's identity and title. The risk that the law has sought to address by the implication of a warranty of authority is that the agent may not have the authority which he claims; and the justification for such an allocation of risk is that the agent is in much the better position to know or ascertain whether he has the requisite authority. But the risks against which Excel is seeking to be protected in these proceedings are the commercial risks involved in lending to a person who may not be all that he claims to be. For my part, I can see no justification why risks of this kind should be transferred from the shoulders of a commercial concern such as Excel on to those of a professional firm such as BM Solicitors.

103. The point can be illustrated, as it seems to me, by considering what the position would have been if Excel or its solicitors had asked BM Solicitors to give some form of express warranty or undertaking. If they had been asked whether they warranted that they had authority to act on behalf of their client in connection with the loan agreement and the execution of the charge, it seems to me to be highly likely that they would have agreed, though they might have asked why it was necessary, given the usual implication of a warranty of authority. But if they had been asked to warrant the identify of the client and to guarantee that he was the same

person as the registered proprietor of 17 Richards Place, I think it is almost inconceivable that they would have agreed to do so. The likely response would simply have been that Excel must rely upon their own enquiries.

104. It is no satisfactory answer to these considerations, in my judgment, that BM Solicitors could have sought to exclude any liability for breach of warranty of authority. For my part, I have never, so far as I can recall, ever seen such a disclaimer; and when I asked Mr Lowenstein about it, I did not get the impression that his experience was any different from mine. Once again, it seems to me to be virtually inconceivable that a solicitor would seek to exclude any liability for breach of warranty of authority; and the absence of any common form of disclaimer of responsibility for the identity or other attributes of a solicitor's client is eloquent testimony to what would seem to be the prevailing view in the profession that no such exclusion is necessary since no such warranty would, in any event, be implied.

105. I conclude, therefore, that Excel is not entitled to summary judgment against BM Solicitors on its claim for damages for breach of warranty of authority. Far from BM Solicitors having no real prospect of succeeding on this issue, it seems to me that it is Excel itself which is unlikely to succeed. Given the procedural background to my decision and, in particular, the absence of any application for reverse summary judgment on this issue, it seems to me that, at this stage, all I need do is dismiss Excel's application in so far as it seeks summary judgment on this particular issue. But, if appropriate, I will consider at a later stage whether summary judgment on the issue should instead be granted to BM Solicitors.

Breach of Trust

106. For reasons which I have already given, I propose to deal with the application for summary judgment on the basis of breach of trust comparatively briefly. As I have already indicated, the matter will be stood over for further argument if required. But it seems to me that the strict rule contended for by Mr Lowenstein as to the distribution of trust monies is likely to raise very similar issues as to the identity of the person to whom BM Solicitors were entitled to pay the monies as those which arise in connection with the claim based upon breach of warranty of authority.

107. It was Mr Lowenstein's submission that a solicitor who receives a mortgage advance in anticipation of a secured lending transaction holds the money on trust for the lender to apply it solely for the purposes of completing the transaction. If he pays the money away to a person who is not the intended recipient, then he is in breach of his duty as trustee to distribute to the correct beneficiary of the trust. This he submitted was a strict duty which is not ameliorated by evidence of lack of dishonesty or lack of negligence.

108. Mr Lowenstein relied particularly upon the observations of Millett LJ (as he then was) in Bristol & West Building Society v Mothew [1998] 1 Ch 1 at page 22. He also drew my attention to the observations of Laurence Collins J. (as he then was) in Re Ahmed and Co (unreported) 14th March 2006. At paragraph 102 of the approved judgment in that case, the judge referred to the duty of a trustee to distribute to the correct beneficiaries of the trust fund as being a "strict obligation".

109. But I was also referred to the decision of the Court of Appeal in Barclays Bank plc v Weeks Legg and Dean [1999] QB 309 to which I have already made reference earlier in this judgment. That was a case in which solicitors acting for the purchasers of various properties gave to the bank which had provided the purchase money on the security of the properties an undertaking that the sums received from the bank for the purpose of the purchases would be applied solely for acquiring a "good marketable title". At page 328, Millett LJ set out his reasons for deciding the appeal in favour of the solicitors in these words:-

> "(1) It is inconceivable that the parties should expect the solicitor to assume a more onerous obligation to the bank, which is not his client and is not being charged for his services, than he has assumed towards his own client.
>
> (2) The undertaking relates to the investigation of the vendor's title as well as to the due execution of the conveyance by the vendor. But it is impossible for the purchaser's solicitor to give an unqualified guarantee of the vendor's title. He is not entitled to call for evidence of the vendor's title earlier than the pre-root title, yet a defect in his title may be discoverable only by examining the pre-root title. If such a defect is discovered before completion, the purchaser may refuse to complete; but he may well not discover it and complete in ignorance of its existence. The purchaser's solicitor should not readily be assumed to have accepted liability in such circumstances.
>
> (3) Similarly the purchaser's solicitor can take reasonable precautions to ensure that the legal charge is properly executed by his own client. But it is difficult to see what steps he can take to ensure that the conveyance to his client is properly executed by the vendor. He must rely on the vendor's solicitor for this purpose.
>
> (4) Given that the purpose of the undertaking is to prescribe the terms on which the solicitor is authorised to part with trust money which belongs in equity to the bank, it is difficult to see why he should assume a more onerous obligation in contract than he assumes by virtue of the trust. Theoretically his liability as a trustee is strict, but in practice it is not, for if he acts honestly and reasonably and ought to be excused from liability, the court will grant him relief under section 61 of the Trustee Act 1925. The court has no similar relieving power in contract; but it is not to be supposed that, by entering into the undertaking, the solicitor was intending to disentitle himself to such relief.
>
> In my judgment, therefore, the undertaking ought to be construed as subjecting the solicitor to qualified obligations only. This will bring

his obligations under the undertaking into conformity of his obligations to his own client as well as with his trust obligations to the bank and will not involve exposing him to a liability which no solicitor could be property advised to accept."

110. This passage was, in fact, cited in full by Lord Woolf MR in Midland Bank plc v Cox McQueen [1999] PNLR 593 at page 599; and it is entirely consistent with the views expressed by Lord Woolf in that case. But for present purposes, what is more important is the observation made by Millett LJ that, if the solicitor has acted honestly and reasonably, he can expect to be relieved from liability by the exercise of the court's statutory discretion.

111. So, on a preliminary appraisal of the point, I can see two significant difficulties in the way of Excel's application for summary judgment on the basis of breach of trust, even assuming that such a claim was properly pleaded. Firstly, there would seem to be an issue as to who was in fact the intended recipient of the monies - the person with whom both sides were in fact dealing (albeit under a common misapprehension) or the person with whom Excel believed it was dealing. Secondly, though not yet pleaded, there would seem to be obvious scope for an application by the solicitors to be relieved from any liability which they might otherwise have incurred.

Conclusions

112. For the reasons which I have endeavoured to set out at some length, I have come to the clear conclusion that the application for summary judgment on the claim for breach of warranty of authority must be dismissed. As for the claim for summary judgment for breach of trust, a preliminary appraisal of the application suggests that it may face certain difficulties. However, for reasons which I have earlier given, I propose to stand over that part of the application for further argument if that is required by the parties. All other questions as to costs or otherwise consequential upon this judgment will also stand over for further consideration at a time convenient to the court and to the parties.