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Case No: B2/2016/1768

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT
AT CENTRAL LONDON
HHJ WALDEN-SMITH
Claim No: A10CL170

Royal Courts of Justice
Strand, London, WC2A 2LL
13 September 2018

B e f o r e :

LADY JUSTICE GLOSTER
Vice President of the Court of Appeal, Civil Division
and
LORD JUSTICE FLAUX

Between:

STOFFEL & CO — **Appellant / Cross-respondent**

- and -

MS MARIA GRONDONA — **Respondent/ Cross-appellant**

Mr Dan Stacey (instructed by Levi Solicitors LLP) for the Appellant/Cross-respondent
Mr Maurice Rifat (instructed by Ms Maria Grondona) for the Respondent/Cross-appellant

Hearing dates 14 March 2018 - 15 March 2018

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Lady Justice Gloster:

Introduction

1. This is an appeal by the defendant, **Stoffel** & Co, solicitors ("**Stoffel**" or "the defendant"), to a Part 20 Claim brought by Ms Maria **Grondona** ("the claimant") against the order of HHJ Walden-Smith ("the judge") dated 11 April 2016 ("the order") in which, after a 4-day trial, the judge found in favour of the claimant in her claim for damages against the defendant for negligence and/or breach of retainer in failing to register in her favour a Land Registry transfer document form ("the TR1"), a legal charge and a Land Registry cancellation of entries for lenders form ("the DS1") in relation to a leasehold property at 73b Beulah Road, Thornton Heath, Surrey CR7 8JG ("the property"), which the claimant was purporting to purchase from a Mr Cephas Mitchell ("Mr Mitchell").

2. The claimant cross-appeals against the same order in which the judge determined that she was entitled to damages of £78,000, plus interest from 30 November 2009 at 3% over the Bank of England base rate in a total sum of £17,591.76 as at 11 May 2016. She contends that the judge should have awarded her damages calculated by reference to the amount of her continuing indebtedness to the chargee of the property, Bank of Scotland plc, as successor to Birmingham Midshires ("Birmingham Midshires") (as a result of the former's merger with the Halifax Building Society), rather than, as the judge decided, by reference to the loss in **value** of the property at the time the negligence/breach of duty was apprehended.

3. The issue on the appeal is whether the fact that, as the judge found, the claimant was a participant in an illegal mortgage fraud designed to obtain monies for Mr Mitchell, precludes the claimant from recovering against the defendant on the basis of the illegality principle. The issue on the cross-appeal is the method of the calculation of the quantum of damage.

Factual background

4. The relevant facts as found by the judge may be summarised as follows.

5. The claimant had had a business connection with Mr Mitchell. She had first known him when he had become her landlord some 15 years earlier. The judge held that in 2000 the claimant signed a document ("the 2000 document") bearing the date 1 March 2000 which referred to four properties: 73b Beulah Road; 362 High Road, "Tottingham" (sic); and 12 and 12A Cator Road; and provided as follows:

> *"I Maria **Grondona** agree to have in my name mortgage loans in the above mentioned properties with the understanding and agreement that Mr CJ Mitchell of Flat 2, Silverdale, London SE264SZ will carry out the following tasks:*
>
> 1. *To pay all monthly mortgages on each of the properties as and when they become due*
>
> 2. *Receives from the tenants in these properties the due rents*
>
> 3. *Carry out all repair work on the properties*
>
> 4. *Deals with all financial matters on these properties*
>
> 5. *Decides when to sell all or any of these properties*
>
> 6. *Mr Mitchell to pay to me 50% of the net profit when any of the above properties are sold*

This is a binding agreement enforceable by law between Mr Mitchell and myself"; see judgment at [42].

6. The freehold of 73 Beulah Road was purchased by a Ms Loretta Headley on 27 November 2001 for £82,000 with the assistance of finance from BM Samuels Finance Group plc ("BM Samuels") which apparently obtained a registered charge in its favour. There was apparently also a subsidiary restriction in favour of Moneypenny Investments Ltd and Gemforce Investments Ltd: see judgment at [19].

7. In or about July 2002 Mr Mitchell paid the sum of £30,000 to Ms Hedley, the freehold owner of 73 Beulah Road, for the grant of a 125 year lease of the property, which comprised a rear ground floor flat. The commencement date for the lease was 24 June 1990. On 26 July 2002 Mr Mitchell entered into a loan facility of £45,000 for a period of 6 months secured by a legal charge over the property with BM Samuels to enable him to purchase it ("the BM Samuels charge"). On the same date a leasehold interest in the property was registered in the name of Mr Mitchell at the Land Registry under title number SGL 638702. The BM Samuels charge was also duly registered at the land registry.

8. In October 2002 the claimant purported to purchase the leasehold interest in the property from Mr Mitchell for the sum of £90,000 - i.e. three times the price paid when the leasehold had been created a few months before. She did so with the assistance of an advance from Birmingham Midshires in the sum of £76,500 and the plan was that the advance was to be secured by a charge over the property entered into by the claimant on 31 October 2002 ("the Birmingham Midshires charge"); see judgment at [14]. The defendant acted for the claimant, the chargee, Birmingham Midshires, and the **vendor,** Mr Mitchell, in connection with the transaction.

9. The defendant paid the sum of £76,500 received by way of loan from Birmingham Midshires to BM Samuels as the existing chargee of the property, in order for the BM Samuels charge to be discharged. BM Samuels duly provided a DS1 releasing the BM Samuels charge. However, the defendant failed to register at the Land Registry either the TR1 transferring the property from Mr Mitchell to the claimant, or the DS1 releasing the BM Samuels charge or the Birmingham Midshires charge granted by the claimant. According to the judge's finding, that was because the TR1 submitted by the defendant had not been impressed with stamp duty and the procedural stamp and it was therefore returned by Croydon District Land Registry on 28 November 2002. Croydon District Land Registry apparently wrote again on 7 and 13 April 2003 and on 14 April 2003 to the defendant to notify it that the application for registration had been cancelled. A further application for registration was rejected on 2 July 2003 due to errors on the transfer and that application was cancelled on 5 August 2003.

10. As a result of the defendant's admitted negligence and breach of duty in failing to register the relevant forms, Mr Mitchell remained the registered proprietor of the property and BM Samuels remained the registered proprietor of the BM Samuels charge. On the basis of that charge, further advances were made to Mr Mitchell following the transactions in 2002; see [25] of the judgment.

11. The claimant defaulted on payments under the Birmingham Midshires charge and Birmingham Midshires brought proceedings against her in order to obtain a money judgment. The claimant (i.e. Ms **Grondona)** defended the claim and brought proceedings against the defendant (i.e. **Stoffel** & Co) by means of a CPR Part 20 claim for an indemnity and/or a contribution and/or damages for breach of duty and/or breach of contract.

12. The defendant defended the Part 20 claim on the basis that, while, by the date of trial, it admitted that the failure to register the TR1, the DS1 and the Birmingham Midshires charge constituted negligence or breach of duty, it contended that there were no damages recoverable by Ms **Grondona** because the purpose of the transaction to put the property into her name and to obtain a mortgage from Birmingham Midshires was illegal, in that it was a conspiracy to obtain finance for Mr Mitchell by misrepresentation and, accordingly, the principle of *ex turpi causa non oritur actio* applied. Alternatively, the defendant raised quantum defences.

13. Birmingham Midshires amended its claim in order to claim directly against **Stoffel** &Co, BM Samuels, the prior chargee and Mr Mitchell. The claims brought by Birmingham Midshires against BM Samuels and against **Stoffel** & Co were settled. Summary judgment was obtained by

Birmingham Midshires against Ms **Grondona** in May 2014. That judgment was for £70,000 with the balance to be subject to an account.

14. At the trial of the Part 20 claim there was some confusion as to whether the claimant had purchased the leasehold interest or the freehold *and* the leasehold interest in 73b Beulah Road; see [19] and [20] of the judgment. However, the judge appears to have accepted the claimant's evidence that, in fact, all she had purchased was the leasehold interest in the property for £90,000 and the judge proceeded on that basis. For the purposes of the appeal and the cross-appeal on quantum, this court was not concerned with any issues relating to the freehold reversion of the property or whether it had been bought by the claimant.

15. By the time of the trial it appeared that Mr Mitchell had died, although the judge had not seen any documentary evidence to that effect [26]. On 22 April 2014, the leasehold interest in 73b Beulah Hill was sold by BM Samuels for £110,000 in order to satisfy the sum owed by Mr Mitchell under the BM Samuels charge.

The judgment

16. The judge held that the claimant had, together with Mr Mitchell, been a participant in a mortgage fraud to deceive Birmingham Midshires into making the advance to the claimant to purchase the property. She held that the following dishonest misrepresentations had been made by the claimant in the mortgage application form:

i) that the sale from Mr Mitchell to the claimant was not a private sale, when in fact it was a private sale;

ii) the deposit monies were from her own resources, when in fact they came from the proceeds of a loan to the claimant from BM Samuels;

iii) that she was managing the property (and the other properties referred to in the mortgage application) herself, when in fact Mr Mitchell was doing so pursuant to the terms of the 2000 agreement and the claimant had had no involvement whatsoever in the collection of rents or any other aspect of the management of the properties.

See [50] – [61] of the judgment.

17. The judge also made the following findings in relation to the 2000 document, the purchase transaction and the mortgage transaction:

i) in signing the 2000 document

> "the claimant was agreeing to act as Mr Mitchell's nominee" [46];

ii) the effect of the 2000 document was that:

> "Mr Mitchell remains the de facto owner of the Property" [47];

and that

> "Ms **Grondona** was not, and never was, the de facto owner of this property. Mr Mitchell owned the property throughout. He managed the property: attracting tenants, collecting rents, paying the mortgage and other financial outgoings, and carrying out any maintenance." [48]; and
>
> "73b Beulah Road was purchased by Mr Mitchell and it remained in the ownership of Mr Mitchell" [49];

but

> "What she [Ms **Grondona]** was (and is) legally responsible for is the mortgage which was to be charged over the property. She has a personal covenant to fulfil and if, as has happened here, matters have not progressed as they should have progressed and there is now an indebtedness under the mortgage which cannot be fulfilled by the sale of the property, then Ms **Grondona** is responsible. That is a substantial liability and a risk that she undertook." [49];

iii) so far as the mortgage application was concerned

> "I am satisfied that this was a sham arrangement whereby Ms **Grondona** lent her good credit history to Mr Mitchell to enable him, behind the scenes and out of sight of the potential lender, to obtain finance. This finance was not in fact for the purpose of enabling Ms **Grondona** to purchase the property. It was in order for Mr Mitchell to raise further finance. It does not matter whether he could have raised finance in another way. On the evidence I have heard and seen, Mr Mitchell could raise finance from BM Samuels, but such lending was at a higher rate and for a much shorter term than that offered by a High Street lender, Birmingham Midshires. There was, therefore, a reason for him to act in the way he did through Ms **Grondona.** Even if that motive is not made out, it does not detract from the finding I make that Ms **Grondona** was acting as a name for Mr Mitchell." [54];
>
> "I am satisfied that the mortgage application and agreement was a sham. The advance was not being sought and obtained for the purpose of enabling Ms **Grondona** to purchase the property at 73b Beulah Road. It was being sought and obtained for the purpose of raising capital finance for Mr Mitchell from a High Street lender on a property he already **owned and for which there was no intention that Ms Grondona would become the beneficial and legal owner."** [59]; and
>
> "Mr Mitchell remained the de facto owner of 73b Beulah Road, although Mr Mitchell executed a TR1 which purported to transfer legal title to Ms **Grondona.** Had **Stoffel** & Co registered the transfer then Ms **Grondona** would have had the benefit of having the property as security for the mortgage advance."

18. The judge then went on to hold that the correct test to apply in order to determine whether the claimant's claim was defeated by the principle of *ex turpi causa* was not whether the illegality was closely connected, or inextricably linked, with the claim against the defendant, but whether she relied upon that illegality to found her claim: *Tinsley* ***v*** *Mulligan* [1994] AC 240 [76]. The judge concluded that the claimant had lost the benefit of the property as providing security for the mortgage advance from Birmingham Midshires as a result of the defendant's failures. The fact that, as she had found, the mortgage advance had been obtained dishonestly and for the benefit of Mr Mitchell, did not prevent the claim being brought. Applying *Tinsley* ***v*** *Mulligan,* she held that the claimant did not have to rely upon the illegality to bring her claim. It was only as a result of the breach of contract and/or negligence that her title had not been registered and accordingly the claimant was not relying upon the illegal mortgage agreement to support her claim [77] – [82] Additionally, the judge held that, while entering into the transaction for the purchase of the property and the mortgage were "but for" causes of her loss, the claim against the defendant for negligence and/or breach of retainer was conceptually entirely separate from the fraud: *Sweetman* ***v*** *Nathan* [2003] EWCA Civ 1115 at [58]; see [83] – [84] of the judgment. Accordingly, she held that the defence of *ex turpi causa* did not apply [86].

19. The quantum issue was dealt with by the judge in a second judgment. The judge rejected the claimant's submission that the totality of her ongoing indebtedness and increasing indebtedness to the Bank of Scotland was a natural and direct consequence of the failure to fulfil the terms of the retainer and the breach of duty to the claimant. She held that the claimant's loss was to be calculated by reference to the

fact that the claimant did not have an unencumbered property which was available to her as security for the monies advanced by Birmingham Midshires and that, had the defendant fulfilled its obligations to her, both in contract and in tort, then she would have had an unencumbered property in or about November 2009, when the judge held that the breach occurred and the loss crystallised. Accordingly, the judge held that the monetary equivalent of the benefit to which the claimant had been deprived was the **value** of the unencumbered property as at November 2009, namely £78,000, together with interest thereon to the date of judgment.

The defendant's submissions on the appeal

20. The arguments advanced on the appeal by Mr Stacey, on behalf of the defendant (appellant), may be summarised as follows:

i) Since the Supreme Court in *Patel* ***v*** *Mirza* [2016] UKSC 42 had overruled the reliance test in *Tinsley* ***v*** *Milligan,* the basis upon which the judge had based her decision was no longer the applicable law. Accordingly, the judgment could not stand and ought to be set aside, with the Court of Appeal applying the correct test as articulated in *Patel* ***v*** *Mirza* to the facts as found.

ii) If the correct test were to be applied by reference to the criteria set out at [101] of Lord Toulson's judgment in *Patel* ***v*** *Mirza,* the claimant should not be entitled to recover.

iii) So far as illegality was concerned, the illegal behaviour was active involvement in a mortgage fraud; alternatively, such behaviour was at the **very** least "quasi-criminal" and/or dishonest and/or corrupt.

iv) So far as the underlying purpose of the transgressed prohibition was concerned, the purpose of the criminalisation of this kind of behaviour was (amongst other things) to deter mortgage fraud. Mortgage fraud was a widespread and prevalent abuse, costing building societies and other lending institutions billions of pounds every year. Were the court to order compensation for the defendant's failure to register documents, which formed a part of the criminal enterprise, it would be inconsistent with, and defeat the purpose of, the criminal sanction.

v) Lord Jauncey in *Tinsley* ***v*** *Milligan* stated that it was established law that the court would not give assistance to the enforcement of executory provisions of an unlawful contract. It therefore followed that:

> a) the court should not assist in a claim for the losses from a failure to implement executory provisions of an unlawful contract;
>
> b) it should not award damages for the failure of the defendant to complete the execution (or registration) of an unlawful contract.

vi) Further it would be inconsistent if the court refused (on those well-established grounds mentioned by Lord Jauncey) to order that the register be rectified to record the transfer from Mr Mitchell to the claimant, but nonetheless awarded the claimant damages for the defendant's failure to do so.

vii) The fact that the criminal law had sanctions for such behaviour did not count against the defendant's argument. It was notorious that mortgage fraud was difficult to prosecute and therefore that such sanctions might not be sufficient.

viii) Other than the obvious principle that Ms **Grondona** was entitled to compensation for negligence, which was of no or limited weight where illegality of the kind in question was at stake, there were no relevant public policies which would be rendered ineffective or less effective by denial of the claim.

ix) The refusal of relief was proportionate and would not amount to "overkill". The claimant's conduct was **very** serious and significant: in particular:

a) It involved the deliberate commission of a mortgage fraud for the purposes of the obtaining of monies for a third party, Mr Mitchell, who could not obtain the monies by direct means.

b) The conduct was central to the retainer contract. It was an obvious inference that the judge rejected Ms **Grondona's** case that there was a "genuine and proper" retainer of the defendant: in fact, the only purpose for the instruction of the defendant and the registration of the agreements was to facilitate the fraud, or to maintain its genuineness to Birmingham Midshires and the wider world.

c) In terms of respective culpability, no criticism was made of the defendant's integrity or honesty by Ms **Grondona.** No adverse inferences were sought to be made when the defendant was not called to give evidence. Even if the defendant had been involved or had assisted in the mortgage fraud, that was to be set against the claimant's actions as set out above. The measurement of the parties' respective culpability could only – at worst for the defendant - lead to a finding that the defendant went along with the claimant's mortgage fraud.

x) There were a number of older authorities that assisted the defendant and had to be read in light of *Patel* ***v*** *Mirza.* In particular, *Saunders* ***v*** *Edwards* [1997] 1 WLR 116 at 1134C demonstrated that Ms **Grondona** had not suffered a genuine wrong to which the illegality was incidental, but was bringing an action which had arisen directly *ex turpi causa*. In awarding damages to the claimant, the court would in effect be lending the authority of the state to the enforcement of an illegal transaction or to the determination of the legal consequences of an illegal act: *Les Laboratoires* ***v*** *Apotex* at 445C – G.

xi) Although the judge placed some reliance on the case of *Sweetman* ***v*** *Nathan* [2003] EWCA Civ 1115, that case could be distinguished because, in that case:

a) the solicitor was a fellow fraudster of the claimant;

b) Sweetman's claim for negligence was to the effect that he would not have purchased the property had the solicitor discovered the true potential purchaser and the fraud in obtaining monies from the bank after the purchase.

In the present case, the negligence in respect of which Ms **Grondona** brought her claim was not conceptually separate from the fraud: the apparent conveyance on which the defendant was instructed was itself a fraud.

xii) In all the circumstances, the decision of the judge that the *ex turpi causa* defence failed was wrong in law and the appeal should be allowed.

The claimant's submissions on the appeal

21. The arguments advanced by Mr Rifat on behalf of the claimant (respondent) in relation to the appeal, may be summarised as follows.

i) The claimant did not seek to overturn or alter the findings of the judge in relation to the fraud as found by her. She also accepted that, in the light of *Patel* ***v*** *Mirza,* the basis upon which the judge had based her decision was no longer the applicable law and that, accordingly, the Court of Appeal should apply the correct test as articulated in *Patel* ***v*** *Mirza* to the facts as found by the judge.

ii) The denial of the claimant's claim for damages against the defendant for failing to effect the transaction would not enhance the purpose of the prohibition. There were criminal sanctions already available against the claimant. The mortgagee made no complaint of fraud against the claimant nor did it seek to reclaim its loan on the basis of fraud.

iii) The claimant's claim was to recover damages which put her back in the position she would have been had the defendant not been negligent or in breach of contract; it was not to enable her to gain or profit from the fraud. Her claim for damages was in order to extricate her from the transaction and to redeem, or partially redeem, the mortgage for which she was liable.

iv) The relevant public policy upon which the claimant relied and which would be rendered ineffective or less effective if her claim were denied, was her entitlement to seek civil remedies for negligence/breach of contract against the defendant arising from a legitimate and lawful retainer that was entered into between them in circumstances where she did not seek to profit or gain from a mortgage fraud.

v) It would be entirely disproportionate to deny her claim if one were to take into account the non-exhaustive list of potentially relevant factors set out by Lord Toulson in *Patel* ***v*** *Mirza* at [107]**:**

> a) The conduct was not sufficiently serious in that:
>
> > i) the '**victim'** mortgagee itself raised no complaint against her;
> >
> > ii) the solicitor at the defendant did not allege fraud in his own witness statement;
> >
> > iii) the claimant did not seek to evade her obligations under the mortgage;
> >
> > iv) the illegal conduct was not central to the otherwise proper and legitimate contract of retainer between the claimant and the defendant;
> >
> > **v)** the claimant's intention was not to profit from the fraud other than to stand as a nominee purchaser for Mr Mitchell, whilst she remained liable under the mortgage covenant. Her intention in pursuing this claim against the defendant was not to profit from the fraud but rather to extricate herself in part or in whole from her liability under the mortgage.

vi) All of the Supreme Court judges in *Patel* ***v*** *Mirza* acknowledged that cases where the enforcement of a claim would undermine the integrity of the justice system would be **very** rare indeed. The denial of the claimant's claim against the defendant for negligence/breach of contract arising from a legitimate and proper retainer between them, in circumstances where she had misled her mortgage company, would create the potential for many similar claims to be denied and would overly widen the use of the doctrine.

The claimant's submissions on the cross-appeal

22. Mr Rifat, on behalf of the claimant (appellant on the cross-appeal), submitted that the judge was wrong to find that the claimant's loss was limited to the **value** of the property as at November 2009 in circumstances where the judge herself found that the claimant did not intend to be the beneficial owner of the property. In summary, Mr Rifat submitted that:

i) The most appropriate method of assessing damages was by reference to the claimant's continuing indebtedness to Birmingham Midshires rather than by reference to the diminution in, or loss of, the **value** of the property. Her true loss and damage should properly be calculated by reference to the fact that she had been prevented from being able to redeem the mortgage loan account in November 2009 (then standing at circa. £76,000) and thereafter remained liable for the mortgage without any means of offering up the security which the defendant had been retained to transfer to her.

ii) The central principle governing the award of damages at common law was that damages were compensatory. The claimant's losses (i.e. her continuing liability under the mortgage in the absence of

any registered title to the property, no discharge of the existing BM Samuels charge and no registration of Birmingham Midshires charge, which meant that she was unable to redeem the charge by offering up the security for sale) were all caused by the defendant's breach of duty in failing to register title, failing to register Birmingham Midshires' security and failing to effect the discharge from BM Samuels.

iii) Although the date for assessment was normally the time of breach, that was a rule that was applied with a "good deal of flexibility" (Chitty 32nd Ed 26-014). In the Irish High Court, although not authoritative, the failure by a solicitor to register title had been analysed as a continuing breach: *Rosbeg Partners -v- LK Shields (A Firm)* [2013] IEHC 494 per Peart J. The defendant had continuing duties not only to her but also to Birmingham Midshires to advise it of the continuing failure to make good the registration of title and the Birmingham Midshires charge and to discharge the existing BM Samuels charge. That unredeemable and inescapable liability of indebtedness to Birmingham Midshires was a natural and direct consequence of the defendant's breach of duty. Accordingly, the true loss caused by the negligence/breach of contract was that of her continuing indebtedness to the mortgagee, namely the amount of her liability to them under her mortgage account now standing at circa £143,000. Damages in that sum would represent extrication from the transaction and/or would represent recovery of all losses from her inability to sell the property in 2009 and would be the correct and most appropriate method of assessing her loss: see *Patel v Daybells* [2001] PNLR 3.

The defendant's submissions on the cross-appeal

23. The arguments advanced on the cross-appeal by Mr Stacey, on behalf of the defendant (appellant), may be summarised as follows:

i) The judge was correct to assess the loss as being £78,000. The crucial fact was that, at that stage, the claimant was well in arrears and therefore would have been subject to repossession in any event. Therefore, her loss (attributable to the absence of registration of her ownership of the property) was the loss caused by her being unable to put forward the property - as at that date – as security for the loan.

ii) The claimant was entitled to be put into the position that she would have been in had there been no negligence. In practice she would have had a property in her name subject to a mortgage from Birmingham Midshires, securing the sums owed by her to the latter.

iii) There were three primary factors upon which the defendant relied:

> a) it was the claimant's decision to take out the loan with Birmingham Midshires;
>
> b) Birmingham Midshires were taking proceedings in respect of the arrears on the mortgage by November 2009.
>
> c) The **value** of the property would have left a small but substantial debt owed by the claimant to Bank of Scotland, even if it had been sold for £78,000 in November 2009.

iv) The arrears as at 8 October 2009 were £84,597.21. Consequently, the claimant's analysis was incorrect. She could not have satisfied the arrears in full even were she to have offered up the property as at that date. The "unredeemable and inescapable liability of indebtedness to [Birmingham Midshires]" (as per the claimant's skeleton) was merely the consequence of her decision to take out a loan and not of any negligence or breach of contract on the defendant's part.

v) It was incorrect to allege that the entirety of the sums owed to Birmingham Midshires were attributable to the defendant's negligence. The claimant accepts that the approach of the court should be to compensate her for the "wholesale failure of the claimant to obtain the property at all". But the only realistic formula must be to put her in the position she would have been in had she indeed "obtained the property". Applying that formula leads to the answer that in November 2009 the claimant would have "lost" the property (with its then **value** of £78,000), because Birmingham

Midshires would have enforced its security over the property as at that date. That figure represents the true **value** of her loss

The appeal – discussion and determination

24. As I have said, it was common ground between the parties that, in light of the Supreme Court's decision in *Patel* ***v*** *Mirza,* the basis upon which the judge had based her decision (namely reliance in accordance with the decision) was no longer the applicable law and that, accordingly, the judgment could not stand and this court was required to apply the correct test as articulated in *Patel* ***v*** *Mirza* to the facts as found by the judge.

25. Before doing so however it is necessary to address two so-called findings of fact by the judge, namely her conclusions that:

    i) "…..the mortgage application and agreement was a sham"; see for example [59] and [6]; and

    ii) that "there was no intention that Ms **Grondona** would become the ……legal owner" of the property; see for example [59].

26. The fact that, so far as the claimant and Mr Mitchell were concerned, the mortgage application was fraudulent in that it contained misrepresentations, as the judge found (see [36] and [50]), as to e.g. the non-private nature of the sale, the source of the deposit monies, the properties she was managing and the purpose of the loan, does not as a matter of law result in it being a *sham transaction* as between her and Birmingham Midshires. She intended to borrow the money secured by way of a legal charge on her registered legal title to the property and Birmingham Midshires likewise intended to lend the money secured in such a way. Moreover, Birmingham Midshires had no knowledge of the misrepresentations or the intentions of Ms **Grondona** and Mr Mitchell. Accordingly, as between Birmingham Midshires and the claimant the transaction of legal charge was not a sham and was clearly intended to take effect and, if and to the extent that the judge decided otherwise on the facts as found by her, she was wrong in her analysis as a matter of law.

27. Moreover, nor does the fact that the sale agreement between Mr Mitchell and Ms **Grondona** was tainted with illegality, because it was entered into with the object of deceiving institutional High Street lenders into thinking that Ms **Grondona** was the owner of the property and required mortgage finance for her own business purposes, in circumstances where apparently Mr Mitchell was unable to obtain such finance himself, result in the conclusion that Mr Mitchell and Ms **Grondona** did not intend legal title to the property to pass to her, as the judge held. On the contrary, the transfer of legal title from Mr Mitchell to Ms **Grondona** was the **very** essence of the transaction as between them, whatever their intentions may have been in relation to retention of beneficial ownership by Mr Mitchell (as to which there was no appeal by the claimant and which it is not necessary to consider further). What is critical in determining whether such an agreement, even if tainted by illegality of purpose, is a sham is an analysis of the intentions of the parties. Legal title may pass under such a contract to a transferee so long as the title was intended under the contract to pass to that person; see for a useful discussion as to what is meant by a sham per Diplock LJ in *Snook* ***v*** *London and West Riding Investments Ltd* [1967] 2 QB 786 at page 802, where he said:

> "As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a "sham," it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co.* ***v.*** *Maclure* and *Stoneleigh Finance Ltd.* ***v.*** *Phillips),* that for acts or documents to be a "sham," with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived.

> There is an express finding in this case that the defendants were not parties to the alleged "sham." So this contention fails."

28. In the present case, the whole purpose of the arrangement between the claimant and Mr Mitchell (whatever the position in relation to retention of the beneficial ownership) was that she should be clothed with the legal title so as to be able to obtain finance from Birmingham Midshires and grant a charge in the latter's favour to secure such finance. Given the external evidence and the subsequent conduct of the parties, there can be no doubt that Mr Mitchell and the claimant intended that there would be an actual transfer of legal title in the property from Mr Mitchell to the claimant. Without Mr Mitchell's agreement to transfer title, the claimant could not have agreed to charge the property in favour of Birmingham Midshires and the finance would not have been forthcoming from the latter. Consequently, in my judgment the judge was wrong in law to conclude that there was no genuine intention to transfer legal title to the property from Mr Mitchell to the claimant.

29. Indeed, once Mr Mitchell had executed the TR1 on 31 October 2002 unconditionally transferring his interest in the property to the claimant and had sent it to the defendant, the claimant had signed the charge and Mr Mitchell had taken the Birmingham Midshires funding, or agreed to its application for his benefit (i.e. payment to BM Samuel in reduction of his indebtedness), there would, in my **view,** have been no grounds upon which Mr Mitchell himself could have resisted a claim by the claimant for specific performance of the agreement for sale of the property on grounds of alleged illegality, if he had subsequently, for example, attempted to interfere with the registration of the transfer of title into the claimant's name, relying on the illegality – although this would have been subject to the intervening position of BM Samuel, which might have meant that the claimant would not have succeeded in obtaining any relief in priority to the latter.

30. The fact that, as counsel for the appellant sought to emphasise, the claimant did not appeal against the judge's so-called finding of fact that there was no intention to transfer legal title in the property is irrelevant. The judge's conclusion was in reality not one of fact, but rather of legal analysis, based on her flawed legal conclusion that the transaction was a sham transaction. It was certainly not based on any analysis of the evidence. It is not sustainable.

31. Issues frequently arise where property has been transferred in pursuance of an illegal agreement as to whether the court should give effect to the transferee's interest, whether against the transferor or against a third party or disregard it and enforce the transferor's original rights; see *Chitty on Contracts* 32nd Ed. Paragraph 16-195-196. The authorities show that the fact that, by reason of illegality, the transferee could not have enforced the agreement under which the transfer was made does not necessarily mean that delivery to him of property thereunder will not pass to him the property or the interest in question. So, for example, in many situations, where goods are delivered in pursuance of an illegal contract of sale, the property in them passes to the purchaser who will be entitled to damages against anyone, including the **vendor,** who thereafter wrongfully deprives him of those goods or otherwise interferes with his proprietary rights or interests; see e.g. *Singh* ***v*** *Ali* [1960] AC 167; *Taylor* ***v*** *Chester* (1869) L.R. 4 Q.B. 309; *Tinsley* ***v*** *Milligan* [1994] 1 AC 340, 374, per Lord Browne-Wilkinson. Likewise, where a person takes a lease of property intending to use it for an immoral purpose, he acquires an interest under the executed lease despite the intention to use the property for an immoral purpose; *Feret* ***v*** *Hill* (1854) 15 C.B. 207. In *Singh* ***v*** *Ali*, a lorry had been sold by the appellant to the respondent in a transaction which was illegal because it involved a fraud on the transport licensing authorities. The appellant retook possession of the lorry without the respondent's consent and claimed to be entitled to retain it. The Privy Council held that, notwithstanding the illegality of the contract, the fact that it had been fully executed and carried out meant that the property in the lorry had passed to the buyer. The principle was explained by Lord Denning in the following passage, at pp. 176-177:

> "There are many cases which show that when two persons agree together in a conspiracy to effect a fraudulent or illegal purpose - and one of them transfers property to the other in pursuance of the conspiracy - then, so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property (be it absolute or special) which has been transferred by the one to the other remains **vested** in the transferee, notwithstanding its illegal origin . . . The reason is because the transferor, having fully achieved his unworthy

> end, cannot be allowed to turn round and repudiate the means by which he did it - he cannot throw over the transfer and the transferee, having obtained the property, can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it. The court does not confiscate the property because of the illegality - it has no power to do so - so it says, in the words of Lord Eldon: 'Let the estate lie where it falls."

32. Moreover, the principle has been held to apply in sale of goods cases under an illegal sale even where the transferee has not taken possession of the property, so long as the title to it was intended under the contract to pass to that person, and had so passed, so that the buyer may obtain rights against a third person. But the cases show that it is unlikely that a buyer, to whom property in goods has passed under an illegal contract, could claim them, or damages for their conversion, from a seller who has never delivered them at all. As the editors of *Chitty* point out, such a claim would not differ in substance from a claim for the delivery, or for damages for the non-delivery, of the goods under the illegal contract and its success would defeat the policy of the rule against the enforcement of such a contract.

33. In my judgment, it is clear from the analysis above, that, in general (and no doubt there are exceptions), once property, or an interest in the relevant property, has passed to the illegal transferee, he has all of the remedies available to him as the **valid** holder of that property or interest. This applies both in relation to the illegal transferor and to third parties; it is because the transferee is entitled to all the benefits of a holder of the relevant property or interest, as against all the world, save those who could prove a better title.

34. In the present case there can be no doubt that, had the defendant registered the TR1 at the Land Registry following the execution and delivery of the TR1, the legal title in the property would have passed to the claimant under s27(1) of the Land Registration Act 2002, despite the illegal agreement. However, the absence of registration meant that all the claimant was entitled to was an equitable interest in the property – namely the right to be registered as proprietor of the registered legal title: see Section 24(b) of the Land Registration Act 2002 and *Mortgage Business plc v O'Shaughnessy* [2012] 1 WLR 1521 per Etherton LJ (with whom Lord Neuberger of Abbotsbury MR and Rix LJ agreed) at [58]. Although this decision was the subject of an appeal (see *Mortgage Business plc v O'Shaughnessy* [2015] AC 385), the argument based on section 24(b) of the Land Registration Act 2002 was not pursued and, therefore, was not addressed by the Supreme Court.

35. But the fact that the claimant merely obtained an equitable interest in the property under what the judge held to be her illegal contract with Mr Mitchell does not, in my judgment, mean that she fell outside the parameters of the principle described above. On the contrary, Mr Mitchell had done all within his power to transfer legal title to the claimant and certainly could not have reneged on his obligation to do so, so as to prevent her from protecting her position under the proposed Birmingham Midshires first legal charge. In those circumstances, what the defendant firm was obliged to do, and failed to do, so far as the claimant was concerned, was to protect the claimant's equitable interest in the property and her liability under the Birmingham Midshires charge by registering the TR1, the discharge of the BM Samuel charge and the Birmingham Midshires charge, as a first legal charge, so that she became entitled to a legal interest in the property and her position as chargee and her liability under her personal covenant was protected. The illegal features of the agreement between the claimant and Mr Mitchell were irrelevant to that obligation.

36. In my judgment, it then becomes necessary to consider whether, applying the criteria articulated by Lord Toulson in *Patel v Mirza* at [101], there is any reason why the claimant should not be entitled to recover damages in respect of the defendant's (admittedly negligent) failure to register her equitable title to the property at HM Land Registry because of the illegal purpose of the transaction as between her and Mr Mitchell, as found by the judge. Although this court is required to apply different criteria from that applied by the judge, I see no reason to depart from her conclusion that the claimant was entitled to sue the defendant for its negligence in failing to protect her equitable interest and register it, so as to convert it into a legal title. At [101] of his judgment in *Patel v Mirza*, Lord Toulson said:

> "So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which

> is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law."

Then at [107] he said:

> "In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, **various** factors may be relevant. Professor Burrows' list is helpful but I would not attempt to lay down a prescriptive or definitive list because of the infinite possible **variety** of cases. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability."

37. I turn to consider Lord Toulson's relevant criteria as set out in [101] and [107] of his judgment. So far as the first consideration is concerned ("the underlying purpose of the prohibition which has been transgressed"), mortgage fraud is, of course, a canker on society and it is extremely important that dishonest applicants for mortgages should not be empowered by the law to abuse the system. However, I see no public interest in allowing negligent conveyancing solicitors (or, in financial terms, their insurers), who are not party to, and know nothing about, the illegality, to avoid their professional obligations simply because of the happenstance that two of the clients for whom they act are involved in making misrepresentations to the mortgagee financier. On the contrary, it seems to me that there is more likelihood that mortgage fraud would be avoided if solicitors appreciate that they should be alive to, and question, potential irregularities in any particular transaction. Moreover, the premise that it would assist the fight against mortgage fraud if mortgagors involved in making false representations to mortgagees were unable to recover if their solicitors were negligent in failing to register the mortgagee's security seems, to say the least, questionable. Further, this was a case where Birmingham Midshires, the mortgagee, made no complaint of fraud against the claimant nor did it seek to reclaim its loan on the basis of fraud.

38. On the other side of the coin, and looking at Lord Toulson's second relevant criterion ("any other relevant public policies which may be rendered ineffective or less effective by denial of the claim"), there is a genuine public interest in ensuring that clients who use the services of solicitors are entitled to seek civil remedies for negligence/breach of contract against a defendant arising from a legitimate and lawful retainer which was entered into between them, in circumstances where the client was not seeking to profit or gain from her mortgage fraud, but merely to ensure that that the chargee's security was adequately protected by registration.

39. So far as proportionality is concerned, similar considerations apply. I accept the claimant's submissions that it would be entirely disproportionate to deny her claim if one takes into account the non-exhaustive list of potentially relevant factors set out by Lord Toulson at [107]. These include the fact that, although the misrepresentations to Birmingham Midshires were reprehensible, the reality was that:

    i) the '**victim**' chargee itself raised no complaint against her on the grounds of fraud, but adopted the transaction;

    ii) the solicitor at the defendant's firm did not allege fraud in his witness statement;

    iii) the claimant did not seek to evade her obligations under the Birmingham Midshires charge; indeed, as the judge said at [49], she was legally responsible under the terms of her personal covenant for any sums not paid to Birmingham Midshires as a result of a sale of the property;

    iv) her illegal conduct was not central, or indeed relevant, to the otherwise proper and legitimate contract of retainer between the claimant and the defendant or indeed to the claimant's claim in the

present action; it was simply part of the background story;

v) the claimant's intention in pursuing the claim in negligence against the defendant was not to profit from the fraud, or indirectly to enforce her entitlement under her agreement with Mr Mitchell to 50% of the profits on a sale of the property, but rather to obtain funds to reduce, or to discharge, her liability in part or in whole under the Birmingham Midshires charge;

vi) in the circumstances, there was no risk that the enforcement of her claim would undermine the integrity of the justice system.

40. For the above reasons, I would dismiss the appeal by the defendant and permit the claimant to recover damages in respect of the former's negligence and breach of duty.

The quantum appeal – discussion and determination

41. In my judgment the judge was correct to conclude that the quantum of the claimant's loss was limited to the **value** of the property as at November 2009, **viz.** £78,000 (excluding any liability in respect of the BM Samuels charge), together with interest thereon until the date of payment, rather than a sum calculated by reference to the claimant's ongoing debt obligation to Birmingham Midshires under its charge. Accordingly, I would dismiss the cross-appeal.

42. The fact that, as the judge held, under the agreement between the claimant and Mr Mitchell, the claimant was not intended to be the beneficial owner of the property is irrelevant to issues of quantum. As Mr Stacey, on behalf of the defendant (respondent to the cross-appeal) submitted, the crucial fact was that, as at November 2009, the claimant was well in arrears and therefore would have been subject to repossession in any event. Therefore, her loss (caused by the defendant's failure to register her leasehold title to the property, the discharge of the BM Samuel charge, and the Birmingham Midshires charge as a first charge) was the loss caused by the fact that she was unable to provide Birmingham Midshires as at that date with an unencumbered registered title to the property– as security for the reduction or discharge of its loan to her. Thus, the claimant was entitled to be put into the position that she would have been in had there been no negligence. In practice she would have had a property in her name, subject to a first legal charge in favour of Birmingham Midshires, securing the sums owed by her to it.

43. I see no reason why the damages should be calculated by reference to the totality of the claimant's ongoing liability to Birmingham Midshires. It was the claimant's decision to take out the loan with Birmingham Midshires. By November 2009 Birmingham Midshires was taking proceedings against her in respect of the arrears on the legal charge. As at that date the arrears stood at over £84,597.21 (the figure as at 8 October 2009). Even if Birmingham Midshires had been able to sell the property for £78,000 in November 2009, the realisable **value** of the property would have left a small but substantial debt owed by the claimant to Birmingham Midshires. There was no evidence before the court that she could have paid the full amount of the arrears even if she had been in a position to have offered up the property as at that date. The "unredeemable and inescapable liability of indebtedness to [Birmingham Midshires]" (as per the claimant's skeleton) was merely the consequence of her decision to take out a loan and not of any negligence or breach of contract on the defendant's part.

44. Accordingly, I would dismiss the cross-appeal.

Disposition

45. I would dismiss the appeal and the cross-appeal.

Lord Justice Flaux:

46. I agree.

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