Neutral Citation Number: [2016] EWHC 2276 (Ch)

Case No: HC-2014-001212

# IN THE HIGH COURT OF JUSTICE

# CHANCERY DIVISION

Royal Courts of Justice, Rolls Building

Fetter Lane, London, EC4A 1NL

Date: 30 September 2016

# Before :

**Mr Robin Dicker QC**

**(sitting as a Deputy High Court Judge)**

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# Between :

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| --- | --- | --- |
|  | **P&P Property Limited** | **Claimant** |
|  | **- and -** |  |
|  | **(1) Owen White & Catlin LLP**  **(2) Crownvent Limited t/a Winkworth** | **Defendants** |

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**Gary Blaker QC** (instructed by **JPC Law**) for the **Claimant**

**Ben Patten QC** (instructed by **BLM LLP**) for the **First Defendant**

# Ivor Collett (instructed by Mills & Reeve LLP) for the Second Defendant

Hearing dates: 14, 15, 16, 17 and 20 June 2016

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# Judgment Approved

# Robin Dicker QC:

# Introduction

1. The Claimant, P&P Property Limited (“P&P Property”), is a property investment company owned and run by Mr Theophanos Polycarpou (“Mr Polycarpou”) and his father Paul Polycarpou. In December 2013, as it believed, it exchanged contracts for and subsequently completed on the purchase of a residential property at 52 Brackenbury Road, London W6 (“the Property”).
2. Unfortunately, as became apparent almost immediately afterwards, the vendor was a fraudster who had impersonated the true owner.
3. Having failed, as a result, to acquire title to the Property and the fraudster having disappeared with the completion monies, P&P Property now claims against two of the parties who were instructed in relation to the sale, namely the First Defendant, Owen White & Catlin LLP (“Owen White”), which acted as the vendor’s solicitors, and the Second Defendant, Crownvent Limited trading as Winkworth (“Winkworth”), the estate agents who marketed the Property.
4. P&P Property claims that Owen White are liable for breach of warranty of authority, negligence, breach of trust and breach of undertaking and that Winkworth is liable for breach of warranty of authority and negligence.

# Witnesses

1. I heard oral evidence from eight witnesses. Mr Polycarpou, Paul Polycarpou, Robert Robinson (“Mr Robinson”) of Peter Brown & Co., the solicitors instructed by P&P Property, and Clifford Harper, the true owner of the Property, gave evidence for P&P Property. Joyce Lim (“Ms Lim”), the solicitor acting on the transaction at Owen White, gave evidence for Owen White. Benjamin Hunt (“Mr Hunt”), George Jackson-Stops (“Mr Jackson-Stops”) and Elizabeth Nascimento (“Ms Nascimento”) gave evidence for Winkworth.
2. Before dealing with the chronology of events, it is helpful to make certain general comments about some of the witnesses:
   1. Mr Polycarpou gave evidence in a straightforward and fair manner. I am satisfied that he was an honest witness who sought to assist the court.
   2. Mr Robinson did not have a specific recollection of a number of events. Given that, for much of the time, the transaction would have appeared to have been proceeding normally, this is not surprising. Although his file was produced and its contents formed part of the documents available at trial, his recording of various communications also appears to have been patchy. Mr Patten QC, for Owen White, referred to the fact that, although the lenders to P&P Property appear to have threatened to recover any loss from Peter Brown & Co., Mr Robinson asserted that he has no personal interest in the outcome of these proceedings. In the absence of any further evidence on this issue, I am not in a position to know the reason for Mr Robinson’s response and have not taken it into account.
   3. Mr Harper was a confident and forthright witness. I did, however, conclude that, on occasions, he was prone to making general assertions which, on closer examination, were not fully supported by the detailed facts. In addition, whilst he said that he had no axe to grind in this matter, it turned out that he has so far only recovered £10,000 out of the £34,000 loss that he has claimed in respect of the damage done to his property after P&P Property started working on it.
   4. Ms Lim was an honest witness and was fairly accepted as such by Mr Blaker QC, for P&P Property. She kept attendance notes of certain of the events and, where she did not, this appears to have been because she regarded her e-mail communications as sufficient. She was, in my view, also a conscientious solicitor.
   5. Mr Hunt was, in my view, an honest witness. However his actions in relation to client due diligence and anti-money laundering were, on any basis, wholly inadequate and, as I have concluded, his recollection of his communications with Ms Lim appears to have been affected by this.
3. There were also witness statements from Robert Miller, on behalf of P&P Property, Elonora Terakopian, on behalf of Owen White, and Ian Dickson and Gary Hardy, on behalf of Winkworth, which were not the subject of cross-examination.

# The relevant events

1. The relevant events occurred over a relatively short period primarily in late 2013, with exchange of contracts on 6 December 2013 and completion eventually occurring on 12 December 2013.
2. When discussing such events I will, for convenience, refer to the fraudulent vendor as Clifford Harper or Mr Harper, as that is how the parties knew him at the time, although that is, of course, the name of the true owner and one of the victims of the transaction.
3. I will need to return to certain specific aspects of the facts in more detail later in my judgment.

*Wednesday 20 November 2013*

1. On Wednesday 20 November 2013, a man, who introduced himself as Clifford Harper, contacted Owen White by telephone and spoke to Ms Lim, a consultant solicitor at the firm. Mr Harper said that he was arranging a bridging loan on a property in Hammersmith, which was unencumbered, to enable him to complete on the purchase of a property in Dubai within the next 10 days, and that he needed a solicitor to assist him. He told Ms Lim that he was in Dubai. He provided her with an e-mail address and said that the matter was urgent.
2. Later the same day, Ms Lim sent an e-mail to Mr Harper attaching various documents, including a copy of a leaflet from the Law Society on anti-money laundering, an identification verification form and, given that she understood that he would not be able to attend Owen White’s offices, a letter containing instructions to a foreign lawyer carrying out identity checks. Ms Lim told Mr Harper that, to comply with anti-money laundering legislation, she would need to verify his identity and address, and asked him to pass the letter and the form to a local solicitor for completion.

*Tuesday 26 November 2013*

1. Mr Harper contacted Ms Lim again on Tuesday 26 November 2013 by e-mail. He said that the developer in Dubai had agreed to extend the deadline for completion to 18 December 2013 and that he planned to fly back to England at the end of the week. The e-mail address, which was different from the one he had previously given Ms Lim, had the domain name bae-electrical, described him as a project manager and provided two telephone numbers in Dubai.
2. Ms Lim sent Mr Harper further copies of the documents to his new e-mail address. Mr Harper replied later that day. His reply attached a copy of the identification verification form, which he had completed but which had not been certified. It gave his name as Clifford Michael Phillip Harper, identified his date of birth as 25 May 1966, and stated that his current address was 52 Brackenbury Road and that he had lived there for ten years. It provided a home telephone number and two mobile telephone numbers. He also attached a signed copy of the client care information form and a completed client questionnaire.
3. In his covering e-mail, Mr Harper stated that he would be back in England on Thursday 28 November 2013 for two days and asked whether it would be possible for him to see Ms Lim then. Ms Lim responded the following day by saying that, if he was coming over, he should bring his passport and two recent utility bills and she would verify his identity when they met. She opened a file in a name of Mr Harper.

*Friday 29 November 2013*

1. Mr Harper and Ms Lim met on Friday 29 November 2013. Ms Lim obtained an official copy of the register of title for the Property, which identified the owner as Clifford Michael Phillip Harper, provided an address for service of 60 Sedgeford Road London W12 and stated that he had acquired the Property on 23 November 1989. Ms Lim also received a call from a Matthew Neiland (“Mr Neiland”) of Bradley & Jeffries who told her that he was acting for the proposed mortgagee, Funding 365 Limited. Ms Lim said that she would revert to him after she had seen her client.
2. The meeting with Mr Harper began at about 10.40am. Ms Lim’s attendance note records that she took a copy of his passport and a utility bill, and that Mr Harper said that he would send a second proof of address in the form of a bank statement by DHL. Mr Harper also provided her with a business card. The attendance note also records that Mr Harper said that he would like to complete by 10 December 2013, that he was flying back to Dubai that evening and that any further correspondence should be sent to him by e-mail. Ms Lim’s evidence, which I accept, was that, at some stage after the meeting, she examined the documents that she had been given and checked that the photograph was a good likeness. The passport was in the name of Clifford Michael Phillip Harper and gave his date of birth as 25 May 1966. The utility bill was an electricity bill from Eon addressed to Clifford MP Harper at 52 Brackenbury Road dated 28 August 2013.
3. Following the meeting, Ms Lim sent Mr Harper an e-mail reminding him that she needed copies of his latest bank statements as proof of address. She also e-mailed Mr Neiland to tell him that she was now instructed and that Mr Harper would like to complete the mortgage by 10 December 2013. Mr Neiland replied describing the title as one of the cleanest that he had seen recently. He sent her a copy of a draft loan agreement, legal charge and borrower’s declaration, as well as an independent legal advice certificate to be completed by Owen White. He also asked Ms Lim to let him have scanned certified anti-money laundering identification details for Mr Harper. Ms Lim said that she would forward copies of an anti-money laundering search when she received it. On the same day and in accordance with her usual practice, Ms Lim carried out a check on the Law Society’s web site to confirm that Bradley & Jefferies were a SRA regulated firm of solicitors.

*Monday 2 December 2013*

1. The following Monday 2 December 2013, Mr Harper, now supposedly back in Dubai, e-mailed Ms Lim saying that he was sending his bank statements to her by DHL and that the valuation took place yesterday so he was hoping to complete by the end of that week.
2. Early that afternoon, Ms Lim obtained an anti-money laundering search for Clifford Harper of 52 Brackenbury Road. This is something which, she says, Owen White carries out as a matter of course for all property transactions. The results were headed, in large letters, “Referred” and identified certain warnings. These were, in short, that Mr Harper’s identity had not been independently verified, that his date of birth could not be checked as no available sources held this data, and that he was not found on the electoral roll (or, indeed, on previous rolls). It stated that further checks might be required. Ms Lim says in her witness statement that, when a search comes back marked ‘Referred’, this means that she needs to make further enquiries with the client. Ms Lim’s evidence was that, given that Mr Harper had said that he had been working in Dubai for some time, she concluded that he had de-registered himself for Council Tax purposes and that this accounted for the fact that he was not on the electoral roll.
3. Later that day, Ms Lim replied to Mr Neiland and said that, whilst she would confirm that she had met Mr Harper and that he had produced his original ID with the result that she would be able to confirm that he had produced evidence of identity, she would not be able to confirm that he was previously known to Owen White. Ms Lim subsequently forwarded the e-mail from Mr Neiland to Mr Harper, reminded him that she needed a second proof of his address and asked him to confirm who was currently in occupation of the property. At some stage on 2 December 2013, Ms Lim also completed her firm’s client acceptance and risk assessment checklist. She indicated that Mr Harper’s identity had been checked, assessed the risk in relation to the client as medium, and referred to his passport as evidence of his identity. Although she had not yet received a second proof of address, she signed the form, accepting Mr Harper as a client in respect of the proposed mortgage transaction.
4. At about this time, Mr Harper’s focus changed from obtaining bridging finance to selling the Property.
5. At some point that day, Mr Harper contacted Winkworth. Having initially spoken to Mr George Jackson-Stops, a sales negotiator, he was transferred to Mr Hunt, the sales manager. Mr Harper told Mr Hunt that he was the owner of the Property and needed to sell it quickly to be able to complete on a property in Dubai, where he was based. He asked Mr Hunt to contact a handyman, called Andrew Michaelson, who he said could arrange access to the Property. Either during or shortly after the call, Mr Hunt completed a valuation instruction form, which gave the instruction date as 4 December 2013, recorded Mr Harper’s e-mail address and telephone number, identified an asking price of offers in the region of £1 million and noted that no sale details would be produced and that the property would not be advertised. At the top of the form was written in manuscript “*Who can complete in 5 days*”. Mr Harper e-mailed Mr Hunt later that day, saying that he had to complete on the property in Dubai by the 15 December 2013. There is an issue as to the extent to which Winkworth had previously had dealings with the true Clifford Harper which I will come back to later in my judgment.

*Tuesday 3 December 2013*

1. Mr Hunt and his colleague, Ms Nascimento, the Assistant Sales Manager at Winkworth, inspected the Property on Tuesday 3 December 2013. They noted that it was unoccupied and in need of some improvement. Mr Hunt called Mr Harper and explained that, whilst in his view it might be worth between £1.2 million and £1.3 million, in order to achieve a quick sale he proposed that Winkworth should market it at £1 million. Mr Harper agreed. Mr Hunt confirmed that Winkworth would act for a fee of 1.25% and that he was fully aware that any buyer needed to be a genuine cash buyer who could proceed to exchange and completion within ten days. Mr Harper agreed the proposed fee, whilst emphasising the need for a speedy sale.
2. Mr Hunt, having got back to the office, says that he called Mr Harper again to ask for copies of the documents he needed to complete his anti-money laundering checks, but said that, as he would not be able to meet him, he would be able to get certified copies from his solicitors. Mr Hunt, together with others at his office, also immediately started to draw up a list of potential buyers that they considered might be interested in purchasing the Property. They secured three viewings for that afternoon. By the end of 3 December 2013, Winkworth had obtained two offers of £995,000 and £1 million.
3. Mr Hunt also mentioned the Property to Mr Polycarpou and his father. Mr Polycarpou was registered with Winkworth as a property developer and as someone who would be interested in any properties that came up for sale in the area. He had dealt with Mr Hunt previously, particularly since the purchase and subsequent sale of a property in 2012 and 2013. As a result, from time to time Winkworth would contact Mr Polycarpou in relation to properties with development potential.
4. Mr Harper sent an e-mail to Ms Lim on Tuesday 3 December 2013 notifying her of his change of approach. He said that he had spoken to a few estate agents who had convinced him that they could find a cash buyer for the right price, and that he would rather sell the Property, if he could, than commit to bridging finance. He asked Ms Lim to hold back on progressing the bridging finance for the moment. In the same e-mail he confirmed that the Property was not occupied and said that he had sent copies of bank statements to her by courier. Shortly afterwards, Mr Neiland sent Ms Lim a further e-mail, which attached an amended independent legal advice certificate, adding that he understood that his client had been asking Mr Harper for various documentary evidence for his residence in Dubai, including evidence of his contract of employment and bank statements, explaining that all of this was important as it would establish Mr Harper’s principal residence being other than at the Property. Later that day, Mr Harper e-mailed Ms Lim to say that he had received a written offer of £1 million for the Property and that the buyer was willing to exchange and complete by 10 December 2013 and provided her with Mr Hunt’s contact details. Ms Lim, who was out on a course for much of that day, received these various e-mails when she returned to the office on Wednesday 4 December 2013.

*Wednesday 4 December 2013*

1. There were a number of developments during the course of Wednesday 4 December 2013, with the result that, by the end of the day, an offer from P&P Property of£1,030,000 for the Property had been accepted, Winkworth had issued a Memorandum of Proposed Sale providing for exchange to occur by close of business on Friday 6 December 2013 and Mr Robinson of Peter Brown & Co. had accepted instructions to act as P&P Property’s solicitors on the purchase.
2. Ms Lim, having arrived back in the office, responded to Mr Harper’s e-mail notifying her of his change of approach, saying that she thought that the sale of his property would be a more cost effective option for him, confirming that she would be able to act for him, and sending him the various documents that he would now need to complete, as well as a further client questionnaire and a client care letter.
3. There were a number of communications between Mr Hunt and Ms Lim during the course of Wednesday morning. Having spoken briefly to Ms Lim, Mr Hunt sent her an e-mail timed at 10:07 which contained his contact details and asked if there was a draft contract he could see, which Ms Lim duly provided in an e-mail timed at 10:58. Mr Hunt’s evidence is that, although he cannot recall the position with certainty, at some stage that morning Ms Lim told him that she had met Mr Harper and had taken copies of his passport and utility bill and agreed that Winkworth could use this to satisfy their own anti-money laundering obligations and that Mr Hunt asked her to e-mail certified copies of the documents to him. Winkworth’s telephone records indicate that there were two calls to Owen White that morning. The first was at 09:26 and the second was at 10:56. Both lasted around two minutes. Mr Hunt says that the purpose of the first call was to check that Ms Lim was instructed and that he cannot now remember what the purpose of the second call was. Ms Lim says that she has no recollection of Mr Hunt having made any request in relation to anti-money laundering obligations and that, if he had, she is certain that she would have recorded it. She also says that, if such a request had been made, Owen White would have declined it. Neither Mr Hunt nor anyone else at Winkworth made any effort to conduct their own anti-money laundering enquiries or to chase Ms Lim for the identity documents. I will return to the discussions between Mr Hunt and Ms Lim later in this judgment.
4. Later that morning, in an e-mail timed at 11:29, Mr Hunt asked Mr Harper for his correspondence address, and said that he also needed proof of his identity for money laundering purposes but that Ms Lim would be able to provide this, and Mr Harper replied saying that his current address was Villa 87, Frond M, Palm Jumeirah in the United Arab Emirates.
5. At some stage during the day, Ms Lim received a courier package from Mr Harper. The package, which had been signed by Mr Harper, had a printed address label which referred to him as Clifford Harpen and gave his address as Villa 84, Frond M, Palm Jumeirah, UAE. It contained an envelope from the St Regis in Abu Dhabi and three pages of bank statements. The bank statements were addressed to Mr CMP Harper at 52 Brackenbury Road and were for an account with HSBC at 21 King Street, London. They consisted of the first page of each of the statements for July/August, August/September and September/October 2013 and provided details of transactions for a total of fourteen days. Most of the payments were for a variety of purchases in and around London. However, they also referred to two transactions in Dubai on 15 August 2013, and a transaction at Heathrow Airport on the 14 August which suggested that Mr Harper may have flown out the day before. Ms Lim considered that she had now received the second proof of address that she had asked for.
6. During the course of the morning Mr Polycarpou contacted Winkworth and spoke to Ms Nascimento to try and arrange a viewing of the Property, but was told that the vendor had decided to proceed with a previous offer. He then contacted Mr Hunt and offered £1,030,000 for the Property, subject to viewing it the following day. Although a number of other offers had by then been received for the Property, including at least one which was higher than P&P Property’s offer, Mr Hunt advised Mr Harper to accept P&P Property’s offer because he considered them to be a reliable purchaser, which Mr Harper did. Mr Hunt told Mr Polycarpou that his offer had been accepted and that the seller wanted to exchange contracts by 6 December and to complete by 12 December 2013.
7. Early that afternoon, Mr Hunt e-mailed Ms Lim to say that it looked like agreement had been reached with the buyer and that there was talk of an exchange of contracts either the next day or Friday. Ms Lim replied saying that she had not yet issued draft documentation as she had not heard from the purchaser’s solicitor. Mr Hunt contacted Mr Robinson to ask whether he would be able to act for the purchaser in relation to the transaction.
8. Shortly afterwards, Mr Harper e-mailed Ms Lim attaching completed versions of the documents she had sent him earlier that day. They included signed copies of the client questionnaire, which gave his address as 52 Brackenbury Road and gave a target date of completion of 10 December 2013, and the client care letter. They also included a copy of the Law Society’s Fittings and Contents Form (TA10) and an incomplete copy of its Property Information Form (TA6). Mr Harper said that he was a little concerned about completing on time in Dubai on Sunday 15 December 2013, because of banking times, and had been told that realistically he needed to complete by the following Wednesday, which was 11 December 2013.
9. Having been provided with Mr Robinson’s contact details, Ms Lim spoke to him. After initially saying that he was not sure that he wanted to accept instructions given the urgency, Mr Robinson subsequently spoke to Mr Polycarpou and confirmed to Ms Lim that he had accepted instructions.
10. Later that afternoon Winkworth issued a Memorandum of Proposed Sale. It identified the vendor as Clifford Harper and gave his address as Villa 87, Frond M, Palm Jumeirah, UAE. It also provided that contracts were to be exchanged by close of business Friday 6 December 2013. Copies of the memorandum were sent to Mr Harper, P&P Property, Ms Lim and Mr Robinson. In a letter dated 4 December 2013, Winkworth also wrote to Mr Harper saying that, in order to comply with the conditions of the Money Laundering Regulations 2003, they were required by law to check his identity before placing his property on the market, and asked him to provide at least two original documents to confirm his identity and address. The letter was addressed to Mr Harper’s address in Dubai that he had provided to Mr Hunt that day. At some stage, Mr Hunt also wrote in manuscript at the top of Winkworth’s internal identification verification certificate “*to follow from Vendor’s solicitor*”. Mr Hunt’s evidence was that he wrote this on the basis that he had requested the documents from Ms Lim. Again, I will return to this aspect of events in due course.

*Thursday 5 December 2013*

1. On Thursday 5 December 2013, Ms Lim opened a new file for the proposed sale and completed a new client acceptance and risk assessment form. She recorded Mr Harper’s address as 52 Brackenbury Road, referred to his passport as evidence of his identity and indicated that she had seen evidence of his current address. She signed the form accepting Mr Harper as a client. Having asked Mr Harper for a complete copy of Form TA6, he supplied one early that afternoon together with a boiler inspection report for the Property from February 2013. The complete version of the Property Information Form stated that the seller did not live at the property, and gave various details in relation to utilities and services. Ms Lim sent the draft contract, together with Forms TA10 and TA6 and the boiler inspection report, to Mr Robinson. The draft contract and transfer were agreed with Mr Robinson later that day.
2. Mr Polycarpou also signed a loan agreement with City and Western (London) Limited (“City and Western”) who had agreed to provide a secured short term loan to P&P Property for the full amount of the purchase price. City & Western’s solicitors for the transaction were Carlsons Limited (“Carlsons”).
3. Later that afternoon, Mr Harper e-mailed Ms Lim to stress that P&P Property needed to complete by Tuesday 10 December 2013 at the latest, explaining that his bank in Dubai closed on Fridays and Saturdays and that he had to complete on Sunday 15 December 2013.

*Friday 6 December 2013*

1. Contracts for the purchase of the Property were exchanged on Friday 6 December 2013 with completion for Wednesday 11 December 2013.
2. During the course of the morning, Ms Lim sent Mr Harper a copy of the draft contract and transfer. She asked him to confirm that he was happy for her to sign the contract on his behalf and asked him to take a copy of the transfer to a local solicitor to witness his signature. Ms Lim explained that the local solicitor would need to provide written confirmation on his own letterhead confirming that he had personally attended to Mr Harper and that he was satisfied that the person signing the transfer was him, and that she would need the original before completion could occur. Ms Lim also said that she would seek completion for 10 December, but suggested that it would be better to agree 11 December in case the completed Transfer had not reached her by then.
3. Ms Lim spoke to Mr Robinson later that afternoon to discuss completion. She explained that Mr Harper had realised that, given that banks do not open on Friday in Dubai, if completion occurred on Thursday he would not receive the funds until the following Monday or Tuesday, and that he needed the funds by the end of the week. Accordingly, she said, her instructions were to seek completion on 10 December 2013. She also said that she was just waiting for her client’s authority to sign the agreement and, once she had received it, she would revert with an exchange of contracts. Mr Robinson, having taken instructions from Mr Polycarpou, replied saying that the best that could be done would be completion on Wednesday 11 December 2013, as it would not be possible to ensure funds were received before then. Ms Lim took instructions from Mr Harper, who said that he would agree to complete on 11 December 2013 on the basis that, if the money was transferred to him before 13:00, he should receive it the following day. He subsequently sent her the details for a bank account of his at Emirates NBD in Dubai. He also authorised Ms Lim to sign the contract on his behalf. There was also a dispute as to whether the seller would be required to keep buildings insurance in place until completion, which P&P Property eventually conceded.
4. Contracts were exchanged at 16:55 on Wednesday 6 December 2013 using formula B with a completion date of 11 December 2013. The seller was identified as Clifford Michael Harper of 52 Brackenbury Road, London W6 0BB. The contract provided that the deposit of £103,000 would be held by Peter Brown & Co. to the order of Owen White and incorporated the Standard Conditions of Sale (Fifth Edition). It was expressed to be signed by Ms Lim on behalf of the seller and by Mr Robinson as agent for the buyer. Ms Lim asked Mr Robinson if the funds could be transferred first thing on the morning of completion, as there was a cut-off time to transfer them to Dubai of 13:00, and Mr Robinson said that he would try.
5. Ms Lim notified Mr Harper that contracts had been exchanged and asked him whether he would be happy for her to notify Bradley & Jeffries, the solicitors for 365 Funding Limited, that he had decided not to proceed with the mortgage. Mr Harper instructed her to inform them only when the sale had been completed. Mr Hunt also notified Mr Harper and sent an e-mail to the rest of the staff at his office saying “*The first of many for 2014 let’s hope*”.

*7 to 10 December 2013*

1. Following exchange of contracts on Friday 6 December 2013, Mr Robinson and Ms Lim took the necessary steps to prepare for completion the following Wednesday.
2. On Saturday 7 December 2013, Mr Robinson sent Ms Lim a copy of The Law Society’s Completion Information and Requisitions on Title Form (TA13). Ms Lim sent the replies on Monday 9 December 2013. She indicated that completion would take place at the offices of Owen White and, in response to paragraph 4.2, confirmed that, if completion was to occur by post, she undertook to adopt the Law Society’s Code for Completion by Post.
3. On Monday 9 December 2013 Ms Lim e-mailed Mr Harper to check whether the transfer had been signed and was on its way to her. Mr Harper replied saying that the contract and transfer had been witnessed and sent by courier the previous day. Ms Lim received them later that day. The package, which had been signed by Mr Harper, had a printed address label which referred to him as Clifford Hannen and gave his address simply as Dubai. It contained a signed contract and transfer. It also contained a letter dated 7 December 2013 from Peter Lazarus (“Mr Lazarus”) at Winterhill Largo in Dubai. The letter said that Mr Harper had attended at Mr Lazarus’ office that day and had presented his passport as proof of identity and said that Mr Lazarus was satisfied as to his identity and had witnessed his signature on the transfer. The letter bore a stamp for Winterhill Largo and Mr Lazarus signed himself as LLB (Wales) Hons. The signature on the TR1 had been attested by Mr Lazarus and also bore his firm’s stamp. Ms Lim did not make any enquiries about Winterhill Largo or Mr Lazarus. Mr Harper asked Ms Lim to obtain what he said was a form MT 103 from Owen White’s bank to enable the completion monies to be tracked. Ms Lim drew up a draft completion statement and obtained Mr Harper’s agreement that she could hold £1,350 on account of Bradley & Jeffries’ costs in relation to the abortive mortgage transaction.
4. On the same day, Mr Robinson received a draft legal charge from Carlsons, under cover of a letter in which they requested an undertaking from Peter Brown & Co. that, within 21 days of completion, the legal charge would be registered at Companies House and then would be registered with the Land Registry in respect of the Property.
5. On Tuesday 10 December 2013 Ms Lim wrote to Mr Harper confirming receipt of the signed transfer, saying that she was ready to complete the next day and asking for his forwarding address. Mr Harper replied saying that his address for correspondence was Villa 87, Frond M, Palm Jumeirah and emphasised, once again, that he needed the funds sent to him as quickly as possible following completion as he was due to complete in Dubai on Sunday 15 December 2013. Mr Harper also said that the keys would be dropped round to Winkworth immediately completion had occurred.

*Wednesday 11 December 2013*

1. Completion did not, in the event, occur on Wednesday 11 December 2013 as agreed, because of a delay in receipt of the completion monies, although Mr Robinson sent Owen White the £103,000 that he was holding to their order by way of deposit.
2. Early that morning Mr Robinson sent Carlsons an executed and dated legal charge and said that he looked forward to receipt of the balance of the advance of £927,000 as soon as possible. He informed Ms Lim that he was awaiting funds and would confirm despatch as soon as possible. Shortly before midday, the funds not yet having arrived, Mr Robinson contacted Carlsons and asked if they would be willing to send the £927,000 directly to Owen White and Mr Robinson would send the deposit of £103,000 that he was holding to Owen White’s order. City & Western agreed to this suggestion and Mr Robinson informed Ms Lim that he would be sending the £103,000 deposit. There was no express agreement as to the basis on which the £103,000 would be held, pending receipt of the remainder of the purchase price, but Ms Lim says that she understood that she received it to hold as stakeholder. By the middle of the afternoon, having received £103,000 but not the balance of £927,000, Ms Lim sent Mr Robinson Notice to Complete. Mr Robinson replied, saying that he understood her client’s position but said that he had every confidence that the funds would be available first thing the next day.

*Thursday 12 December 2013*

1. Completion finally occurred, as the parties believed, on Thursday 12 December 2013, although not without further developments. In the event, the balance of the completion monies were received by Carlsons, and in turn sent to Owen White, in two tranches of£327,000 and £600,000.
2. The first tranche of £327,000 was transferred from Carlsons directly to Owen White and was received at around 11:15. Mr Robinson told Ms Lim that the remaining£600,000 was, however, not likely to reach her until after 14:00. Ms Lim relayed this information to Mr Harper, who said that the funds would therefore not reach him until the following Tuesday. He asked Ms Lim to send the funds that she had available so that he would at least receive those by Sunday or Monday which would allow him to proceed to complete in Dubai.
3. Ms Lim contacted Mr Robinson and explained Mr Harper’s position. Her attendance note records her saying that, if Mr Robinson agreed to amend the contract so that the£430,000 was to be held as deposit as agent for the seller, she could forward the money to Mr Harper, as otherwise he would suffer loss. Having, he says, obtained further instructions from P&P Property, Mr Robinson sent an e-mail late that morning confirming his client’s agreement to the total of £430,000 that was now held by Owen White being treated as part of the deposit and to the deposit being held by them as agents for the seller and confirming that the contract was varied accordingly. In his evidence, Mr Robinson says that he agreed to release the £430,000 on the basis of a representation by Ms Lim that the monies would be used for a specific purpose, namely the purchase of a property in Dubai and only by the true owner of the Property. Ms Lim says that, following such discussions, she understood that she held the £430,000 as deposit, but as agent for the seller such that she was entitled to deal with it in accordance with her client’s instructions. I return to this later in my judgment. Ms Lim confirmed receipt of Mr Robinson’s e-mail and gave instructions for the deposit monies to be sent to Mr Harper’s account in Dubai immediately.
4. The £430,000 was transferred to Mr Harper’s account at Emirates NBD Bank at about14:53 on Thursday 12 December 2013.
5. Mr Robinson also told Ms Lim that Carlsons had suggested sending the balance of the moneys directly to Mr Harper’s account in Dubai. Ms Lim said that she would have to check with her money laundering officer. Having been unable to do so, she spoke to Mr Harry, a partner at Owen White, who advised that the money should go through Owen White’s account and she conveyed this information to Mr Robinson.
6. Mr Robinson sent a further e-mail shortly afterwards saying that he had been told that the balance of the funds had reached Carlsons and the remaining £600,000 was eventually received by Owen White at about 12:49. According to Mr Robinson, some time shortly before 15:40 he received a call from Ms Lim to confirm receipt of the balance of the purchase monies, and, in turn, they formally completed the sale and purchase of the Property. Mr Robinson confirmed his undertaking that, in consideration of the seller treating the matter as completed forthwith and releasing the keys that afternoon, he would send £342.99 being one day’s interest and costs and Ms Lim indicated that she would instruct Winkworth to release the keys.
7. Ms Lim gave instructions for £581,410, being the balance due on completion, to be transferred to Mr Harper. It was transferred to Mr Harper’s account in Dubai at about 15:37 that afternoon. Ms Lim e-mailed Mr Harper to say that she had just spoken to Mr Hunt who told her that he did not have the keys for the property and asked him to arrange for them to be dropped off. She also asked Mr Harper to confirm that she could now notify Bradley & Jefferies that he would not be taking up the bridging loan. Mr Harper replied saying that she could. Mr Hunt told Mr Harper that he had just spoken to Andrew Michaelson, the handyman, who would be dropping the keys off shortly, and they were released to P&P Property the following day.

*16 December 2013 to 27 January 2014*

1. On 17 December 2013 Ms Lim sent Mr Robinson a copy of transfer which had been signed by Mr Harper.
2. On 7 January 2014 Mr Robinson dealt with the usual post-completion formalities including registration of the legal charge at Companies House, submission of the Stamp Duty Land Tax (SDLT) Return and applied to change the register at Birkenhead Land Registry.
3. In the meantime, P&P Property, believing that it was now the owner of the Property, instructed builders to commence stripping out works and on 13 January 2014, having obtained additional loan facilities elsewhere, made a partial repayment of £500,000 towards the amount owed to City & Western.
4. On 17 January 2014 the true Mr Harper turned up at 52 Brackenbury Road and asked what the builders were doing, saying that they were trespassing on his property. The builders contacted Mr Polycarpou who, together with his father, made their way to the Property, having asked Mr Hunt to meet them there. When they got there, the true Mr Harper was there together with the police. It fairly soon became clear to everyone that a fraud had occurred. The true Mr Harper expressed surprise that Winkworth had not contacted him previously, given that he was, as he thought, well known to them. The parties returned to Winkworth’s offices and subsequently when to Owen White’s offices where Ms Lim was informed of what had happened. P&P Property decided to seek independent legal advice.
5. On 20 January 2014 Mr Polycarpou and his father met Ms Lim and asked if Owen White could contact the bank in Dubai to notify it of the fraud and to ask if the monies in the account could be frozen. The police asked Owen White not to do this as they considered that it might hinder their investigation. On the same day Mr Robinson was notified by Birkenhead Land Registry that an application by the registered proprietor to register a restriction against the Property had been received.
6. On 27 February 2014 Mr Robinson was notified by Birkenhead Land Registry that the application to change the register of title of the Property had been cancelled.

# P&P Property’s claims

1. P&P Property claims that Owen White are liable for breach of warranty of authority; breach of a duty of care in tort; breach of undertakings that it would have the vendor’s authority to receive the purchase money on completion and would complete the purchase on receipt of such money; and breach of trust, on the basis that, in the absence of a genuine completion, they paid away the completion money to Mr Harper in breach of trust.
2. P&P Property claims that Winkworth are liable for breach of warranty of authority and breach of a duty of care in tort.
3. There is a subsidiary issue of whether, if Owen White are otherwise liable for breach of trust, they are entitled to relief under section 61 of the Trustee Act 1925. There are also potential issues of causation and quantum of loss, as well as potential claims for contribution by Winkworth against Owen White and by Owen White against Winkworth in the event that P&P Property’s claims succeed against either or both of them.
4. I was referred by the parties to a number of authorities in relation to the law applicable to the various claims, not all of which are entirely easy to reconcile.

# Breach of warranty of authority

1. P&P Property claims against Owen White and Winkworth that they are liable for breach of warranty of authority, on the basis that, through words and conduct, they represented that they had authority to act for the owner of the Property and in particular that they were properly instructed by the true Clifford Harper, when they were not. It claims that, in reliance on such warranties of authority, it agreed to purchase the Property and arranged funding from City & Western.

*Introduction*

1. Where a person represents, by word or conduct, that he has authority to act on behalf of another, and a third party is induced to act in a way in which he would not otherwise have acted, the representor is deemed to warrant that the representation is true and is liable for any loss caused to the third party by a breach of that warranty. The result of the cause of action being classified as contractual is that liability is strict: the agent is, in effect, a guarantor of his authority. If the representor gives such a warranty he is liable even if he acted in good faith and with reasonable care.
2. The doctrine of warranty of authority, although firmly established ever since the decision in *Collen v Wright* in 1857, has been described as anomalous and fraught with difficulties; see Reynolds, Breach of warranty of authority in modern times [2002] LMCLQ 189 at p.191.
3. One central justification for the doctrine is that, if the agent does not have the authority which he claims, the third party may have no claim against the supposed principal. Treating the agent, in such a situation, as having impliedly warranted his authority, gives the third party a claim against the agent, where otherwise he may have no claim at all. In such circumstances it is appropriate that liability should be strict. Complications arise, however, where the issue is not simply whether the agent had authority to act for a particular individual, but rather concerns the identity of that principal or his attributes. In such circumstances, the critical question is not whether there is a warranty of authority, but the precise terms of the warranty.

*The law*

1. *Penn v Bristol & West Building Society* [1997] 1 WLR 1356 involved a mortgage fraud. The house was owned jointly by a husband and wife, Mr and Mrs Penn. Having incurred business debts, Mr Penn decided to execute a mortgage fraud by selling the house to a purchaser, a party to the fraud, who would obtain the purchase price from a building society, and with the money thus obtained discharge Mr Penn’s business debts. Mr Penn instructed a solicitor who mistakenly believed that he was also instructed by Mr Penn’s wife. Unknown to him, however, Mr Penn had forged his wife’s signature on the contract documents. It appears to have been common ground that the solicitor warranted to the purchaser that he had the authority of Mr and Mrs Penn. Waller LJ said that the solicitor thought he was acting for the wife as well as the husband and, in all the pre-contract correspondence, negotiations and completion, held himself out as duly authorised by the husband and wife jointly. The issue on the appeal was whether the solicitor’s warranty that he was duly authorised on behalf of both the husband and the wife was given not only to the purchaser but also to the building society.
2. Waller LJ held that the building society had to establish that a promise was made to it by the agent, to the effect that the agent had the authority of the principal, and that it had provided consideration by acting in reliance on that promise. He concluded that, in that case, all the necessary ingredients were present for establishing a warranty by the solicitor in favour of the building society that the solicitor had the authority of Mrs Penn. Waite LJ and Staughton LJ agreed.
3. *Bristol & West Building Society v Fancy Jackson* [1997] 4 All ER 582 involved a proposed re-mortgage by a husband and wife of their house to secure an advance from a building society. The wife knew nothing about the transaction and her signature on the mortgage deed had been forged. The defendants were a firm of solicitors who were acting for both the building society and the borrowers. The building society claimed that the solicitors were in breach of their retainer and that they were also liable for breach of warranty of authority. Chadwick J said at p.612-613:

“*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 borrower’s solicitor a mortgage deed which appeared on its face to have been executed by the mortgagors and witnessed. If there was 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 of the Court of Appeal in Penn v Bristol & West …*

*I can see no reason why the position should be different in the circumstances that the same solicitor acts for both the lender and the 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 that he is warranting that the signature on the mortgage deed is authentic; but it has much the same effect.”*

1. *Zwebner v The Mortgage Corporation Ltd* [1998] P.N.L.R. 769 was another case involving a mortgage fraud. The house was jointly owned by a husband and wife, Mr and Mrs Zwebner. The husband applied for a loan from The Mortgage Corporation to be secured on the property. The Mortgage Corporation instructed Brooks & Co., a firm of solicitors. Shortly afterwards the solicitors received, as they thought, instructions to act also for the borrowers. It subsequently transpired that Mr Zwebner had forged his wife’s signature on the mortgage deed. Mrs Zwebner brought proceedings against The Mortgage Corporation claiming that the mortgage was not binding on her which were settled. The Mortgage Corporation brought third party proceedings against Brooks & Co. claiming, amongst other things, that certain statements in the report on title that they produced amounted to a warranty that Mrs Zwebner’s signature was genuine. The report on title contained, amongst other things, an express undertaking by the solicitors that “*all appropriate documents will be properly executed on or before completion*”.
2. Lloyd J, at first instance, held that Brooks & Co. were liable for breach of their undertaking that all appropriate documents would be properly executed on or before completion. The Court of Appeal dismissed the solicitors’ appeal against that conclusion.
3. On appeal, counsel for the solicitors observed that under The Mortgage Corporation’s standard documentation the same undertaking was to be given for a mortgage on an initial purchase, as well as for a re-mortgage, and that, in that situation, the essential documents would include a transfer or conveyance executed by the vendors, of whom the solicitors for the purchaser and lender might know nothing. Robert Walker LJ commented that, in such a case, the solicitors who knew nothing of the vendors could seek an identical undertaking from the vendors’ solicitor and, if it was refused, would be on inquiry. He also continued by saying “*Moreover even in the absence of an express undertaking the vendors’ solicitor would normally be liable on an implied warranty of authority if on completion they handed over a transfer or conveyance with a forged signature. The finding of such a warranty depends on the facts of a particular case, but that would be the general rule: see Penn v Bristol & West …”.*
4. *Penn v Bristol & West* is, in my view, a straightforward application of the doctrine of warranty of authority. The solicitors had represented that they had authority from Mrs Penn when, as a result of her husband’s fraud, they did not. There was no issue as to who “Mrs Penn” was for these purposes or what attributes she had. It was not a case in which someone was purporting to be Mrs Penn, so as to raise a potential issue as to which of two individuals was the subject matter of the implied warranty of authority. Nor did any issue arise as to her attributes, as she was a joint owner of the property. The lenders, having failed to obtain any rights against Mrs Penn, had a claim against the solicitors for breach of warranty of authority.
5. The decision in *Bristol & West Building Society v Fancy & Jackson* is consistent with this. Although Chadwick J referred to the fact that the lender would have the benefit of an implied warranty of authority that the solicitors had the authority of the borrowers to complete the mortgage, the factual circumstances appear to have been similar to those in *Penn v Bristol & West*. The relevant part of the appeal in *Zwebner v The Mortgage Corporation* was primarily concerned with the construction of an express undertaking which the solicitors had given to the lenders, rather than with the doctrine of warranty of authority, and Robert Walker LJ’s comments were made, in that context. Whilst he referred to what he described as the general rule, the reference to *Penn v Bristol & West* suggests that the particular factual situation he was addressing was the one which existed in both *Zwebner* and in *Penn v Bristol & West*, namely where a husband had forged his wife’s signature.
6. These cases do not, in my view, establish that any solicitor who acts for someone impersonating the true owner is necessarily liable for breach of warranty of authority. As Waller LJ said in *Penn v Bristol & West*, 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.
7. Mr Patten QC relied on authorities which hold that professionals are not normally held to be strictly liable or treated as guaranteeing a favourable outcome. He submitted that, if Owen White were held to have warranted that Mr Harper was the true Mr Harper or that he owned the property, they would, in effect, be providing P&P Property with a guarantee of title.
8. In *Platform Funding v Bank of Scotland* [2008] EWCA Civ 1016 a valuer had been asked to inspect and value a property by a mortgage lender to ensure that it would provide adequate security for the loan. He was given the address and purchase price of the property and told to contact the borrower for access. The borrower showed the valuer around the wrong property. The lender brought an action for damages against the valuer. Having considered various authorities, Rix LJ said at [48]:

“*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 the misfortune caused by the fraud of another*”.

1. Moore-Bick LJ said that, whilst there is a presumption that those who provide professional services normally do no more than 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. He continued by saying at [30] that:

“*In my view it is better to ask whether, having regard to the facts and matters known to both parties when instructions were accepted, the professional person assumed an unqualified obligation in relation to the particular matter in question*”.

1. Authorities such as this indicate that the court should normally be cautious about holding that a professional person has undertaken an unqualified obligation in the absence of special facts or clear words to that effect.
2. Caution is, however, required when applying the reasoning in cases such as *Platform Funding v Bank of Scotland* in a case like the present one. That case was concerned with a claim for breach of duty, not warranty of authority. A person who represents that he has the authority of another to act on his behalf is, as a matter of law, liable if that representation is incorrect. Where such a warranty exists, it operates as an exception to the normal position. The mere fact that the agent is a professional does not exclude the existence of a warranty of authority nor, as a result, strict liability if the warranty is breached. Indeed, as the decisions in *Penn*, *Fancy & Jackson* and *Zwebner* illustrate, this is so, even in the context of a fraud which the solicitors may not reasonably have been able to discover.
3. In *Platform Funding v Bank of Scotland* Moore-Bick LJ referred to the earlier case of *Midland Bank v Cox McQueen* [1999] Lloyd’s Rep PN 223. In that case, solicitors were instructed by a bank to obtain the signature of “Mrs Duke” to a guarantee and to certify that they had explained its terms to her. Mr Duke introduced an imposter to the solicitor who witnessed the imposter’s signature as “Mrs Duke” and explained the document to her. The Court of Appeal held in that case the solicitors were not liable, Lord Woolf MR stating that “*If commercial institutions such as banks wish to impose an absolute liability on members of a profession they should do so in clear terms so that the solicitors can appreciate the extent of the obligations which they are accepting*”. Moore-Bick LJ commented, however, that:

“*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 Duke, as the solicitors in Zwebner v Mortgage Corporation Ltd … in effect did*”.

1. The fact that professionals do not normally undertake an unqualified obligation may, however, be relevant when determining precisely what warranty is to be implied. There is, in my view, a material potential difference, for example, between holding that a solicitor has warranted that he has authority to act on behalf of his client and construing the warranty so as also to extend to some attribute of that person.
2. Mr Patten QC also relied on authorities dealing with the doctrine of warranty of authority in relation to solicitors who issue proceedings in litigation.
3. In general, a solicitor instructed in relation to litigation only warrants that he has been authorised by a client who exists, and does not warrant, for example, the client’s solvency or the validity, or even arguability, of the client’s claim. In *Nelson v Nelson* [1997] 1 WLR 233, for example, the solicitors had been instructed by the plaintiff to take all appropriate steps to protect what he claimed was his interest in 18 Arundel Gardens, Ilford, Essex. The plaintiff was, however, an undischarged bankrupt who, as a result, had no interest in the property, which had vested in his trustee in bankruptcy pursuant to section 306 of the Insolvency Act 1986. Peter Gibson LJ said at p.237E-F that:

“*Prima facie his authority is to bring proceedings in the name of his client and I do not see that he warrants more than that he has a retainer from the client who exists and has authorised the proceedings and against whom a costs order can be made. He does not warrant that the client has a good cause of action or that the client is solvent*”.

1. To similar effect, in *SEB Trygg Liv Holding AB v Manche*s [2005] EWCA Civ 1237 Buxton LJ, delivering the judgment of the court, said at [66] that:

“ … *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 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 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?”*

1. There are, however, differences between a situation in which a solicitor commences litigation for a client and the present one. Most of the cases are concerned with the inherent jurisdiction of the court concerning costs. It might also be said that the general nature of a solicitor’s professional duty when acting for a client in litigation is inherently incompatible with the existence of any more extensive warranty of authority. Accordingly, it has been said that the cases involving litigation represent a specialised application of the doctrine of warranty of authority; see Bowstead on Agency (20th ed.) at 9-067. Nevertheless, a number of the cases use the language of warranty of authority and in the *SEB Trygg* case the Court of Appeal took the opportunity to clarify part of the law on breach of warranty of authority.
2. In *Knight Frank v Aston Du Haney* [2011] EWCA Civ 404, Tomlinson LJ referred to the *SEB Trygg* case at [14]-[15]. He commented that in such circumstances it is axiomatic that a solicitor gives no warranty as to the accuracy of his instructions. He held that similar considerations therefore applied against holding a chartered surveyor strictly liable for the accuracy of the name which it applied to his principal. He referred, in this context, to the statement by Bowstead & Reynolds on Agency that “*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 enquiries*”.
3. Such authorities illustrate, in my view, the fact that the court will not construe an implied warranty of authority as operating more broadly than as representing that the agent has authority to act on behalf of his client unless it is clear that such a warranty is properly to be implied.
4. Mr Patten QC also relies on the fact that the approach in these authorities has recently been applied to solicitors who have been instructed in relation to conveyancing transactions.
5. *Excel Securities plc v Masood* [2010] Lloyd’s Rep PN 165 involved a mortgage fraud. The lender agreed to make a loan to an individual claiming to be a Mr Goulding which was to be secured on a property in his name. In fact he was an imposter. The lender brought proceedings against the borrower’s solicitors alleging that they had given a warranty as to the identity of their client, the borrower, and that, because the borrower was an imposter, they were in breach of that warranty. HHJ Hegarty QC dismissing an application by the lender for summary judgment, concluded that, in the circumstances of that case, the solicitors had warranted no more than that they had authority to act on behalf of a person identifying himself as Mr Goulding and claiming to be the owner of the property. The facts of that case were, however, different from those in the present case, as in that case the lender had itself carried out certain checks in order to satisfy itself as to the imposter’s identity.
6. In *Stevenson v Singh* [2012] EWHC 2880 Mr and Mrs Stevenson agreed to purchase a property. However the vendor turned out to be a fraudster who had impersonated the true owner. Mr and Mrs Stevenson sued Haque & Hausmann, solicitors, who had been acting for the fraudster, claiming breach of warranty of authority. The claim was settled before trial. The trial proceeded, however, against various other defendants who had received part of the completion monies. In the course of deciding those claims, it became necessary to determine whether Mr and Mrs Stevenson would have succeeded in their claim against Haque & Hausmann and if so the quantum of their claim. In this context, HHJ Richard Seymour QC said at [99] “*I incline to the view that in fact it is unarguable that a solicitor could give a warranty of authority which went further than that he had a client who had given the solicitor the name which the solicitor had identified to the opposite party*”.
7. The same approach has been taken in Scotland. In *Frank Houlgate Investment Company Limited v Biggart Baillie LLP* [2011] CSOH 160, a fraudster had persuaded the pursuers to advance money on the basis of security over a farm in Fife, which he pretended to but did not in fact own. The defenders were solicitors who became involved in the transaction when they were instructed to prepare and witness the security on behalf of the imposter. The pursuer’s claims included a claim that, by acting on behalf of the fraudster, the defenders had impliedly warranted that they had authority as agent of the registered title holder of the property to do so. Lord Glennie dismissed the claim, holding that the alleged warranty related to the capacity of the defenders’ client, and that this did not fall within the principle of breach of warranty of authority. In this case the lender had however also met and had discussions with the borrower.
8. A similar issue arose in *Cheshire Mortgage Corporation Limited v Grandison* [2012] CSIH 66. Having said that it had reached the clear conclusion that the decision in *Excel Securities* was correct and was good law for Scotland, the Inner House of the Court of Session said at [30]:

“*We would simply add this. We accept that a warranty may be given by a solicitor or other agent, expressly to a third party as to a particular attribute or attributes of the solicitor’s or agent’s client. We consider it more appropriate in such discussions to talk of attributes of clients rather than the identity of a client. The identity of a person is made up of a bundle of qualities or attributes. In particular there is nothing in principle in the law of contract to prevent an agent from guaranteeing to a third party that he has a principal who is the same person as appears on property registers, for example, as the owner of a specific property. As Judge Hegarty observes at page 103 of his judgment however “It is … almost inconceivable that an agent would agree to this”. But, in any event, where, as here no such express warranty was asked for, or given, matters must rest on the implied warranty of authority to be implied as a matter of law the extent and nature of which was defined correctly in the Excel case*.”

1. These decisions are referred to in Bowstead and Reynolds on Agency (20th ed.) at 9- 068, where the authors comment that “*This amounts to an allocation of the risk of such fraud: it can certainly be said to emasculate the strict warranty, and is related to the idea that professionals are liable to their clients for negligence only. On the other hand, it is certainly true that agents will not normally promise that a named principal also has a particular qualification, e.g. owns the property concerned*”.
2. This line of authority would not have assisted the solicitors in *Penn v Bristol & West*. Their problem was that, as it turned out, they did not have a client going by the name of Mrs Penn at all, not that she was not who she said she was.
3. The distinction between, for example, *Penn v Bristol & West*, on the one hand, and *Excel Securities v Masood*, on the other, can be said to lead to potentially fine distinctions. Thus if, for example, the seller had been a company, for whom a fraudster could merely purport to act, the result would appear likely to be the same as that in *Penn v Bristol & West*. The solicitors would have warranted that they had authority to act for the relevant company and, given that they received their instructions from a fraudster who did not himself have such authority, would normally be liable for breach of warranty of authority; see, for example, the decision of the Court of Appeal in Singapore in *Fong Maun Yee v Yoong Weng Ho Robert* [1997] 2 SLR 297 at [49]. Furthermore, why, it can be asked, should it make a difference whether, in *Penn v Bristol & West*, the husband had forged instructions from Mrs Penn or had found someone to impersonate Mrs Penn? In some cases, it may indeed be unclear on the facts what the position is, as may have been the position in *Zwebner v The Mortgage Corporation*, where it appears that the solicitors spoke to someone on the telephone who may or may not have been Mr Zwebner’s wife.
4. There are also potential differences between *Excel Securities v Masood* and subsequent cases and the present case:
   1. It is not clear that, in any of those cases, the contract was signed by the solicitors. However, the same issue will arise whether or not this is the case, given that the solicitor will hand over the contract and thereby impliedly represent that he is authorised to deal with it, even if he does not himself sign it.
   2. The discussion in those cases also appears to have focussed primarily not on how a particular reference to the solicitor’s principal should be construed, but on whether any warranty of authority extended to cover certain attributes or characteristics of the solicitor’s client. However the question of identity and attributes are interconnected and it is not always easy to separate the two.
   3. It is also correct that in both *Excel Securities v Masood* and *Frank Houlgate v Biggart Baillie* there was the additional factor that the lender had itself carried out certain checks in order to satisfy itself as to the imposter’s identity. However, while plainly important, that cannot be determinative.
5. These cases can be contrasted with *LSC Finance Limited v Abensons Law Limited* [2015] EWHC 1163. LSC Finance Limited agreed to make a loan to Mrs Boddice to be secured by a mortgage over a property owned by her and a guarantee from her husband. In the event, the envisaged security was never effected, the lender having been the victim of a mortgage fraud perpetrated, most probably, by Mr Boddice. The lender claimed against the defendant Abensons Law Limited, a firm of solicitors, who had acted for Mr and Mrs Boddice. The solicitors had provided the lender with an undertaking, pursuant to which, amongst other things, they confirmed execution of the charge by “the Borrower” and undertook that, within 7 working days, they would complete the registration of the charge against the Borrower as a first legal charge. The undertaking defined Mrs Boddice as the Borrower.
6. HHJ Hodge QC held that the defendant was in breach of undertaking, on the basis that, on its true construction, the undertaking required the solicitors to confirm the execution of a validly-executed charge by Mrs Boddice over the property, rather than merely involving an undertaking that there was a legal charge by a person purporting to be Mrs Boddice. The Judge said at [101] that:

“*Once the undertaking is construed in that way, it seems to me clear that Abensons should also be taken to have been warranting that they were duly authorised to act, not simply for a person purporting to be Mrs Boddice, but warranting that they were actually acting for Mrs Boddice who was the registered proprietor of the property being offered by way of security*”.

1. An application for permission to appeal to the Court of Appeal was dismissed by Kitchen LJ; see [2016] EWCA Civ 274 who said at [22] that the interpretation arrived at by the judge was the natural meaning of the words used.
2. I was not referred to any authorities dealing specifically with claims for breach of warranty of authority in the context of estate agents. Mr Blaker QC submitted, however, that there is nothing in principle to prevent such a claim being made and referred in this respect to Murdoch, The Law of Estate Agency (4th ed., 2003) at p.78. That is plainly correct. As a general principle, any agent who claims to have authority beyond what in fact exists may be liable to a third party for breach of warranty of authority. Whilst relying on the fact that there is a dearth of reported authority on similar facts in relation to estate agents, Mr Collett, for Winkworth, did not dispute the general principle.

*The terms of any warranty*

1. The question of whether a warranty of authority has been given and, if it has, the terms and effect of that warranty, is, as the authorities emphasise, a question of fact which requires to be decided on the basis of the circumstances of the individual case.
2. In considering the facts, the starting point, in my view, is that the central justification for the doctrine is that, if the agent does not have the authority which he claims, the third party may have no claim against the supposed principal. Treating the agent, in such a situation, as having impliedly warranted his authority, is justified because it gives the third party a claim against the agent, where otherwise he may have no claim at all.
3. In the present case Owen White and Winkworth had the authority of the fraudster. This is not, therefore, a case in which, absent a warranty of authority, the purchaser would have no claim against anyone, although the consequence would, of course, be that its claim would be against someone who cannot be traced and from whom any recovery is in practice impossible.
4. The issue is whether the circumstances are such that a warranty of authority is to be treated as having been given that is more extensive in effect.
5. Particular difficulties arise if the person from whom the agent is taking instructions is a fraudster who is impersonating someone else. It is, as it seems to me, possible to approach the problem in two different ways. The first involves identifying who the agent represented that they had authority to act for and the second concerns what attributes, if any, they represented that such person had. Assuming for example that Owen White represented that they had authority to act for “Clifford Harper” or “Mr Harper”, the first approach involves asking whether that is to be construed as referring to the person with whom they were dealing who called himself Mr Harper or to the person who actually bears that name. The second approach asks whether Owen White represented that an attribute of their client was that he owned the Property.

*Owen White*

1. In relation to the claim against Owen White, Mr Blaker QC relies, in particular, on the fact that, in the present case, Ms Lim signed the contract on behalf of Clifford Harper.
2. The contract was expressed to be between the seller and the buyer. The seller was identified as “*Clifford Michael Phillip Harper of 52 Brackenbury Road, London W6*”. Mr Blaker QC submits that this is to be construed as referring to the registered title holder, the true Clifford Harper.
3. If this is correct, the position would be similar to that in *Penn & Bristol & West*. If an agent represents that he has authority to act for a named identified principal he is liable for breach of warranty of authority if he does not in fact have such authority. This is so regardless of the reason for the want of authority, including that he had been unwittingly duped by a fraudster. In signing the contract on behalf of “*Clifford Michael Phillip Harper*”, Ms Lim would have been warranting that she had authority to act on behalf of the true Mr Harper, in the same way that the solicitors in that case warranted that they had authority to act for Mrs Penn. Ms Lim would not thereby be guaranteeing that Mr Harper was the true owner of the Property, any more than the solicitors in *Bristol & West Building Society v Fancy & Jackson* were warranting that the signature on the mortgage deed was authentic or that they had authority to deliver it, although, as Chadwick J said, “*it has much the same effect*”. It would be the consequence of warranting that she had authority to act for someone who was, in fact, the owner of the property.
4. Mr Patten QC, on the other hand, submits that the contract is to be construed as referring to Ms Lim’s client and the person who was agreeing to sell the property, namely the person who called himself Mr Harper and who claimed to own the property. The natural meaning of “seller”, he submitted, is the party to a transaction who is seeking to sell the land and “the seller” is the person purporting to sell.
5. Mr Blaker QC’s submission does not depend, however, on what is meant by the word “seller” but on identifying the seller on whose behalf Owen White were representing that they had authority to act when signing the contract.
6. There is, in my view, some force in the submission that the reference in the contract should be construed as referring to the person whose name is Clifford Michael Phillip Harper and whose address is 52 Brackenbury Road, London W6 CBB, in other words to the true Mr Harper, rather than merely to someone claiming to be Mr Harper and claiming to have that address.
7. I have, however, come to the conclusion that it would be wrong to construe the reference in this way when determining the scope of any implied warranty of authority made by Ms Lim.
8. The basic representation is only that the agent has authority to act for another, a matter which arises between him and his principal and is something which is usually peculiarly within his own knowledge. An agent does not, simply by acting as agent, represent that his principal will perform the contract or is solvent or make any other representation as to the principal’s attributes or characteristics. The court should not imply a warranty of authority which has an effect going beyond the basic representation, save where it is clear that the necessary promise is properly to be implied. This is particularly so in relation to professionals, including solicitors, who do not normally undertake an unqualified obligation.
9. As far as Ms Lim and Mr Robinson were concerned, “*Clifford Michael Phillip Harper*” was Ms Lim’s client and the person selling the Property who, they both assumed, was also the true owner. It turned out that this was incorrect. The question is whether, in these circumstances, Ms Lim is to be taken as having impliedly promised not merely that she had the authority of her client, which she did, but also that she had the authority of the true Mr Harper and owner of the Property.
10. If the scope of any warranty of authority had been raised expressly, it is difficult to believe that either of the parties would have understood that Ms Lim was promising that she had authority from the true Clifford Harper, or that her client was the true Mr Harper. It would, as HHJ Hegarty QC said in *Excel Securities v Masood*, have been almost inconceivable that someone in Ms Lim’s position would have agreed to provide such an express warranty. Nor, in my view, would someone in Mr Robinson’s position have understood that she had impliedly done so. Although the matter is to be determined objectively, it is worth observing that Mr Robinson’s evidence was not that he understood that such a warranty had been given, but rather that he “*assumed that OWC would have carried out appropriate identity checks and taken whatever steps were necessary to enable them to act for a client based in Dubai as I would have done if the positions were reversed*” and that he had “*no reason to doubt that as a professional firm of solicitors, OWC had not done all of the correct due diligence required by them to establish the identity of their client as being the true owner of the Property*”. This seems to me to reflect the objective position. The checks that solicitors are required to undertake are designed to reduce the risk of fraud and cannot reasonably be thought to eliminate it, and Mr Robinson did not suggest that he understood that Owen White were effectively promising that they did. Mr Robinson accepted that he knew that he could have taken steps to protect P&P Property against the risk which he understood existed, but did not do so.
11. If Mr Blaker QC was correct to submit, in effect, that a solicitor who acts for someone purporting to sell a property thereby warrants that their client is the registered title holder, solicitors engaged in conveyancing transactions would effectively be guaranteeing that their client was the registered title holder, and would be strictly liable if this was not the case. I have not been referred to anything which suggests that this represents the position as generally understood amongst conveyancing solicitors or others involved in such transactions.
12. The implication of such a warranty of authority would also be difficult to reconcile with the detailed rights and obligations set out in the Law Society’s Code for Completion by Post, which I consider further later in this judgment in the context of P&P Property’s claim for breach of trust.
13. If P&P Property cannot establish the necessary warranty of authority on the basis that Owen White identified their principal as the registered title owner, in the manner discussed above, it cannot, in my view, be in a better position by contending that Ms Lim represented that her client, the fraudster, was the true Mr Harper or that he was the owner of the Property. These matters are concerned not with whether Ms Lim had authority to act for her client, which is the usual subject matter of any warranty of authority, but with the attributes or characteristics of that client. I can see no basis on which a warranty of authority can be implied in the present case which would extend to such matters.

*Winkworth*

1. In relation to the claim against Winkworth, Mr Blaker QC submits that, in calling up Mr Polycarpou and his father and informing them that the property was being sold by Clifford Harper, Winkworth were representing that they had authority to act for the true owner. He also relied on the terms of the Memorandum of Sale.
2. I do not consider that Winkworth, merely by informing P&P Property that the name of the person selling the Property was Clifford Harper were warranting that they had authority to act for the true owner. The question of title was primarily a matter for the solicitors instructed in relation to the purchase and sale, not an estate agent. Nor, in my view, did they give such a representation by preparing the Memorandum of Sale, which, although it gave the seller’s name as Mr Harper, gave his address as Villa 87, Frond M, Palm Jumeirah in the UAE, an address which had nothing to do with the true Mr Harper.
3. Mr Blaker QC also relied on the fact that Winkworth were subject to anti-money laundering obligations, submitting that they were in place to ensure that an estate agent could be satisfied as to who they were acting for and that P&P Property was entitled to rely on the checks that it thought Winkworth had carried out.
4. It does not follow, however, from the fact that estate agents are required to carry out anti-money laundering checks, that they are, as a result, to be treated as having impliedly represented that their client is who he says he is or that he is the true owner. Indeed, given that such checks can never be expected to be infallible, reliance on the fact that they have been carried out rather than on any warranty of the sort contended for suggests, if anything, that no such warranty was understood to have been provided.

*Reliance*

1. P&P Property contends that, in reliance on implied representations by Owen White and Winkworth that they had authority to act for the owner of the Property and in particular Mr Harper, it agreed to purchase the Property and arranged for finance to be obtained from City & Western in order to fund the purchase.
2. I do not accept that, assuming such representations to have been made, P&P Property relied on them. Mr Robinson does not appear to have thought such a representation was being made by Owen White. His evidence was to the effect that he relied not on such a representation, but on Owen White having “*done all of the correct due diligence required by them to establish the identity of their client as being the true owner of the Property*”, and Mr Polycarpou’s evidence in relation to Winkworth was to similar effect.

*Conclusion on warranty of authority*

1. It follows that, in my view, P&P Property’s claims against Owen White and Winkworth for breach of warranty of authority fail.

# Negligence

1. P&P Property claims that Owen White and Winkworth owed a duty of care in tort that they would act with the skill, care and diligence of a reasonably competent solicitor and estate agent respectively, and that they acted negligently.

*Owen White*

1. Mr Blaker QC submits that P&P Property relied on the representations and actions of Owen White and that, in these circumstances, a duty of care should be imposed.
2. Mr Patten QC submits that the claim is misconceived on the basis that the law is that a conveyancing solicitor who makes representations on behalf of his client does not owe a duty of care absent some special facts or circumstances indicating that he assumed such a duty and that no special facts existed.
3. The starting point is the decision in *Gran Gelato v Richcliff* [1992] Ch 560. The plaintiff entered into negotiations to acquire an underlease of a property. Its solicitors sent inquiries before lease to the solicitors for the vendor asking whether there were any rights affecting the superior lease which would in any way inhibit the enjoyment of the underlease. The solicitors replied that there were not to their knowledge. That was incorrect. The plaintiff claimed damages for misrepresentation.
4. Sir Donald Nicholls V-C held at p.570D that “*In my view, in normal conveyancing transactions solicitors who are acting for a seller do not in general owe to the would- be buyer a duty of care when answering inquiries before contract or the like*.”
5. He said three factors had weighed with him. First, the answers given by the solicitor are given by the solicitor on behalf of the seller. Secondly, the law provides the buyer with a remedy against the seller in respect of any misrepresentation in the answers given on his behalf. Thirdly, caution should be exercised before the law takes the step of concluding, in any particular context, that an agent acting within the scope of his authority on behalf of a known principal, himself owes to third parties a duty of care independent of the duty of care he owes his principal. In general, he said, in a case where the principal himself owes a duty of care to the third party, the existence of a further duty of care, owed by the agent to the third party, is not necessary for the reasonable protection of the latter. However, he also emphasised, there will be special cases where the general rule does not apply and a duty of care will be owed by the solicitors to the buyer. This will be the case where the solicitors stepped outside their role as solicitors for their client and accepted a direct responsibility to the lender.
6. Mr Blaker QC submitted that *Gran Gelato Ltd v Richcliff* was wrongly decided, referring to the discussion of that case in Flenley & Leech, Solicitors’ Negligence and Liability (3rd ed.) at 1.25 and 9.26 and in Jackson & Powell on Professional Liability (7th ed.) at 11.061 and 11-062.
7. The decision of the Vice-Chancellor was referred to with approval by Lord Goff in *White v Jones* [1995] 1 AC 207 at p.256D.
8. In *McCullagh v Lane Fox & Partners* [1996] 1 EGLR 35, Hobhouse LJ commented, however, at p.43B-C that “*The reasoning of the Vice-Chancellor, unless it is confined to stating a special rule applicable to solicitors in conveyancing transactions is, in my judgment, inconsistent with the ratio decidendi of Punjab National Bank and with the general principle of tortious liability where the person doing the relevant act is the agent of the other, which the Vice-Chancellor himself recognised in his citation of Smith v Bush and Resolute Maritime*.” The other two members of the Court of Appeal were Sir Christopher Slade, who did not address this issue, and Nourse LJ, who referred to *Gran Gelato Ltd v Richcliff* at p.48B-D without apparent criticism.
9. *Gran Gelato Ltd v Richcliff* has been followed in various cases including, in the context of conveyancing transactions, *Frank Houlgate Investment Company Ltd v Biggart Baillie LLP* [2011] CSOH 160 at [23], *LSC Finance Ltd v Absensons Law Limited* [2015] EWHC 1163 at [106] and *NRAM Plc v Jane Steel* [2016] CSIH 11 at [39] and [67].
10. It is not open to me to hold that *Gran Gelato Ltd v Richcliff* was wrongly decided. Hobhouse LJ himself appears to have considered at p.43M and p.44G that the decision appeared to reflect a special rule applicable to solicitors in conveyancing transactions. In my view, the decision can be explained on the basis of that, absent special circumstances, solicitors in conveyancing transactions are to be understood as acting on the instructions of their clients when making representations.
11. Mr Blaker QC contends, in the alternative, that this case is one of those special cases where the general rule does not apply and a duty of care will be imposed, because Owen White accepted a direct responsibility to the purchaser. I do not accept this submission.
12. To the extent that the claim is based on an allegation that Owen White represented that they had authority to act for the true owner of the Property and in particular the true Clifford Harper, in my view the claim stands or falls with the claim for breach of warranty of authority. No such express representation was made and, in my view, none can be implied.
13. Mr Blaker QC submits, however, that, regardless of any such representations, a duty of care was owed because Owen White should have been aware that P&P Property was being sought out by Winkworth and that contracts would have to be exchanged within a matter of days with the result that Ms Lim would have been aware that she needed to be sure she was acting for the true owner, such that Owen White thereby accepted a direct responsibility to P&P Property.
14. The particulars of negligence pleaded in paragraph 39 of the Particulars of Claim indicate that the scope of the alleged duty of care is primarily to take reasonable care to ascertain the identity of Mr Harper.
15. Absent special circumstances, the firm which owed P&P Property a duty to take reasonable care and skill was Peter Brown & Co., not Owen White. Mr Polycarpou understood that Peter Brown & Co. had a duty to help protect them in the transaction and that part of this would involve carrying out some enquiries about the right of the seller to sell the property and dealing with the vendor’s solicitors. Mr Robinson accepted that he could have asked Owen White for an undertaking that the money would only be released to them on confirmation that they had carried out proper client due diligence, but that he did not do so.
16. In the present case there were, in my view, no special circumstances such as resulted in Owen White accepting a direct responsibility to P&P Property to take reasonable care to ascertain the identity of Mr Harper or to ensure that he was the true owner.
17. There was no communication between Mr Robinson and Ms Lim on this topic and certainly none as a result of which Ms Lim can be held objectively to have assumed a responsibility to P&P Property in this respect. Mr Robinson’s evidence went no further than saying that he was satisfied at all times that he was dealing with a reputable firm of solicitors who would have carried out appropriate due diligence on their client and who would have been satisfied they knew who their client was.
18. Nor, indeed, was it put to Ms Lim that she knew or ought to have known that P&P Property was relying on her in this respect.
19. This case is not analogous to *Allied Finance Investment Co v Haddow Co* [1983] NZLR 22, where the solicitor provided a certificate, and where Richardson J said at p.30 lines 28-34 “*This is not the ordinary case of two solicitors simply acting for different parties in a commercial transaction. The special feature attracting the prima facie duty of care is the giving of a certificate in circumstances where the respondent must have known it was likely to be relied upon by the appellant*”. Nor was it submitted that the anti-money laundering legislation itself gave rise to a statutory duty in favour of P&P Property.
20. The imposition of such a duty of care on the part of Owen White to take reasonable care to ensure that Mr Harper was the true owner of the Property, would also, in my view, be inconsistent with the detailed rights and obligations set out in the Law Society’s Code for Completion by Post, which I consider further later in this judgment.
21. It is convenient to consider the question of whether, if Owen White did owe a duty of care, they were negligent, at the same time as addressing the effect of section 61 of the Trustee Act 1925 which I deal with later in this judgment.

*Winkworth*

1. Mr Blaker QC submitted that Winkworth owed P&P Property a duty to act with the skill, care and diligence of a reasonably competent estate agent.
2. The particulars of negligence in paragraph 39 of the Particulars of Claim indicate that the scope of Winkworth’s duty which is contended for is, in essence, to take reasonable care to verify the identity of Mr Harper and to ensure that he was the true owner of the Property.
3. In support of the existence of a duty of care, Mr Blaker QC relied on *Williams v Natural Life Health Foods Ltd* [1988] 1 WLR 830 and *McCullagh v Lane Fox & Partners Ltd* [1996] 1 EGLR 35.
4. *Williams v Natural Life Health Foods Ltd* concerned a plaintiff who was interested in purchasing a franchise from a company. The company sent the plaintiff financial projections in the preparation of which the second defendant, the managing director and principal shareholder of the company, had played a prominent part. The plaintiff acquired a franchise but the turnover proved to be substantially less than that predicted by the company. The plaintiff claimed against the second defendant.
5. The House of Lords held that to establish the personal liability of a director or employee there had to have been such an assumption of personal responsibility by him as to create a special relationship between him and the plaintiff. Lord Styen said at p.834F-H that:

“*In this case the identification of the applicable principles is straightforward. It is clear, and accepted by counsel on both sides, that the governing principles are stated in the leading speech of Lord Goff of Chieveley in Henderson v Merrett Syndicates Ltd [1995] 2 A.C. 145. First, in Henderson’s case it was settled that the assumption of responsibility principle enunciated in Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] A.C. 465 is not confined to statements but may apply to any assumption of responsibility for the provision of services. The extended Hedley Byrne principle is the rationalisation or technique adopted by English law to provide a remedy for the recovery of damages in respect of economic loss caused by the negligent provision of services. Secondly, it was established that once a case is identified as falling within the extended Hedley Byrne principle, there is no need to embark on any further inquiry whether it is “fair, just and reasonable” to impose liability for economic loss: p. 181. Thirdly, and applying Hedley Byrne, it was made clear that*

*“reliance upon [the assumption of responsibility] by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect) …” (p.180).*

*Fourthly, it was held that the existence of a contractual duty of care between the parties does not preclude the concurrence of a tort duty in the same respect*”.

1. Lord Steyn said at p.835C that it is not sufficient that there should have been a special relationship with the principal. There must have been an assumption of responsibility such as to create a special relationship with the director or employee himself. He also said at p.835F-G that the test was objective:

“*The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contractual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff*”.

1. *McCullagh v Lane Fox & Partners Ltd* involved a claim against an estate agent. During a visit to the property, an assistant director of the estate agent confirmed the area of the gardens and provided the plaintiff, a prospective purchaser, with a copy of the sale particulars prepared by the estate agent which also contained a disclaimer of responsibility for statements in the particulars. The plaintiff exchanged contracts to purchase the property. The figure given for the area of the gardens was incorrect. The plaintiff sued the estate agents.
2. Hobhouse LJ referred to *Hedley Byrne*, *Henderson v Merrett Syndicates Ltd* and *White v Jones* at p.40-41, concluding that *Hedley Byrne* was still the governing authority in cases such as the one he was considering and that the elements of reasonable foreseeability and reliance are fundamental, as is the element of assumption of responsibility. He considered the issue raised by the fact that the defendant was acting as agent for a third party at p.41M-44K. He commented that, in performing his agency, the agent may put himself in a position where he owes a duty of care to the person with whom he is dealing on behalf of his principal and be liable to him as well if he makes a careless statement or does a careless act which causes loss, damage or injury to the third party. At p.42G-44G he considered the *Gran Gelato* case, saying that, in certain special situations, rules which restrict the liability of the agent may be superimposed and that one such situation is, on the basis of *Gran Gelato*, a solicitor in a conveyancing transaction. He concluded, however, at p.44J-K that “*What is clear is that these reasons cannot apply to an estate agent or an agent who will not be liable save on a Hedley Byrne basis*”.
3. Mr Collett contended that, if Owen White did not owe a duty of care to P&P Property, it must follow that Winkworth did not owe a duty of care either. He asked the Court to bear in mind what he described as the *a fortiori* aspect of Winkworth’s defence in this respect. I do not accept this submission. The question whether Winkworth owed a duty of care depends on the detailed circumstances of the individual case and the particular relationship between the parties in the context of the legal and factual situation. Furthermore, the special rationale which it appears applies to solicitors does not extend to estate agents.
4. So far as the relevant test for the existence of a duty of care is concerned, Mr Blaker QC relied on both the assumption of responsibility test derived from *Hedley Byrne* and also the three fold test of foreseeability, proximity and “*whether it is fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of the other*” spelled out by Lord Bridge in *Caparo Industries v Dickman* [1990] 2 AC 605.
5. Mr Blaker QC did not contend that estate agents generally owe a duty to any prospective purchaser to verify the identity of their client with due skill, care and diligence. Nor did he contend that anti-money laundering legislation gives rise to a claim for breach of statutory duty.
6. He submitted, however, that, depending on the facts, an estate agent could owe a duty of care to a purchaser in relation to information provided by the estate agent which was information, such as the identity of its client, that the purchaser would not be expected to investigate.
7. Mr Blaker QC said that there was a close relationship between P&P Property and Winkworth. Mr Polycarpou had previously purchased properties from and sold properties through Winkworth. It had been approached directly in this case by Mr Hunt. Mr Hunt described himself as providing advice to Mr Polycarpou. Mr Blaker QC also said that Mr Polycarpou had expected that Winkworth would have carried out their anti- money laundering obligations and that Mr Hunt accepted that Mr Polycarpou would have expected him to have carried out anti-money laundering checks and client due diligence before offering the property for sale and knew that he would have relied on him having doing so.
8. In my view, Winkworth is not liable to P&P Property for negligent misrepresentation as a result of having failed to take reasonable care to ensure that Mr Harper was the true owner of the property.
9. The difficulty with this formulation of P&P Property’s claim concerns the nature of the information which was provided to it. Mr Hunt did, during the course of his evidence, say that his relationship with Mr Polycarpou was such that Mr Polycarpou trusted his judgment that the house was one that they would be interested in. However, that was, in my view, indicative of no more than the ‘advice’ that all estate agents provide, and cannot be construed as involving the provision of advice in a sense indicative of an objective assumption of responsibility. In any event, it was not concerned with the identity or reliability of the owner, but with whether P&P Property was likely to regard the type of property as a good investment. What little Mr Hunt appears to have said about Mr Harper was in the context of making it clear that, if P&P Property was interested, it would need to move quickly. Mr Polycarpou did not ask Mr Hunt for any information about the vendor.
10. Nor, in my view, in the absence of any such information being provided, did Winkworth owe a duty to P&P Property nevertheless to exercise reasonable care and skill when conducting their client due diligence and complying with their anti-money laundering obligations, to the extent that Mr Blaker QC also put P&P Property’s case in this way.
11. I was not referred to any authority which could be said to have facts which were close to those in the present case, in which such a duty of care has been held to exist. Such a claim would therefore, it appears, be a novel one, in respect of which the court should proceed with caution.
12. I accept Mr Polycarpou’s evidence that he expected Winkworth to have carried out their client due diligence and anti-money laundering checks and relied on them to have done so. However, reliance on its own is not sufficient to establish a duty of care on the part of Winkworth.
13. On the basis of the test derived from *Hedley Byrne v Heller*, it is also necessary to establish, amongst other things, the necessary objective assumption of responsibility by Winkworth and, in this respect, the primary focus is on statements or conduct which crossed the line between them.
14. Nothing was said by Winkworth about the steps taken in relation to its client due diligence and anti-money laundering obligations. Mr Polycarpou did not ask and Mr Hunt did not volunteer anything in this respect. The furthest that the evidence went was that Mr Hunt appreciated that Mr Polycarpou would have expected both Winkworth and Owen White to have carried out their respective money laundering checks before marketing the property.
15. Assessing the relevant evidence as a whole, there was, in my view, no communication or conduct which crossed the line such that, in this particular case, objectively Winkworth are to be taken also to have assumed responsibility to P&P Property for taking reasonable care when carrying out their client due diligence to ensure that their client was the true owner.
16. Given the absence of any relevant representation, it seems to me that, in the present case, it is also appropriate to consider the three fold test identified by Lord Bridge in *Caparo Industries v Dickman* of foreseeability, proximity and “*whether it is fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of the other*”.
17. In my view the requirements of foreseeability and proximity are satisfied. However, I have come to the conclusion that it would not be fair, just and reasonable to hold that Winkworth owed a duty in favour of P&P Property to take reasonable care when conducting their client due diligence and anti-money laundering obligations to identify Mr Harper and to establish that he was the true owner of the Property.
18. The general contractual context is that Winkworth was acting for the vendor, the other party to the transaction, and not for P&P Property. The purchaser would normally be expected to have instructed a solicitor to act for them in relation to the purchase. The task of ensuring that P&P Property acquired good title to the property was primarily a legal matter.
19. There is, in my view, nothing that would distinguish this case from the vast majority of cases in which an estate agent is instructed to sell a property. If Winkworth owed such a duty then, in practice, it seems to me likely that all estate agents, absent some form of express disclaimer, would be likely to owe a similar duty. However, Mr Blaker QC did not seek to contend that the anti-money laundering legislation gives rise to a claim for breach of statutory duty or that estate agents generally owe such a duty of care in tort. Nor, as a result, were the potential implications of such a duty explored by the parties in their submissions.
20. In case, however, this is incorrect, it is necessary to consider whether Winkworth were negligent and in breach of duty of care. The particulars of negligence relied upon by P&P Property are pleaded in paragraph 39(i) to (ix) of the Particulars of Claim.
21. If Winkworth did owe a duty of care, I would have concluded that they were negligent in respect of the matters pleaded in sub-paragraphs (v) to (vii) of the Particulars of Claim, which relate to the conduct of its client due diligence and anti-money laundering checks. Indeed, in my view Winkworth’s approach to its client due diligence and anti- money laundering obligations was wholly inadequate.
22. Mr Blaker QC referred to the National Federation of Property Professional’s Money Laundering Guidance issued in July 2011. This guidance contained a non-exhaustive list of warning signs, which included funds being sent to a high risk jurisdiction, sales at prices significantly above or below market prices, where the pattern of the transaction inexplicably changes and where the transaction progresses at an unusual speed. It commented that “*The best approach is to combine all that is known about an individual or entity when making a judgment as to the level of risk they pose*”.
    1. Paragraph 2.4.2 states that “*Identification is part of CDD, but CDD is a broader concept implying a wider knowledge of customers and the reasons behind their transactions*”.
    2. Paragraph 2.4.3 comments that the OFT’s guidance outlines two stages of the identification process, namely identifying the customer by obtaining a range of information such as her or her full name, residential address, date of birth; and verifying this information through the use of reliable independent source documents, data, or information.
    3. Paragraph 2.4.4 states that a reasonable approach is whether the information provided appears, on the face of it, to prove that the person is who they say they are.
    4. Paragraph 2.4.6 states that if documents are used and no risk factors are evident, then for most transactions and customers one of a specified list of government issued documents could suffice, however checking a single document may not be automatically sufficient in all circumstances.
    5. Paragraph 2.4.9 states that “*Sufficient checks should be made of the documentary evidence to satisfy the business of the customer’s identity [sic]. This may include checking the spelling of names, validity, photo likeness, whether address match etc*”.
    6. Paragraph 2.4.21 comments that as estate agents are usually the first party to be instructed in a transaction they are usually unable to rely on a third party. Paragraph 2.4.22 continues “*However, if an … independent legal professional… has already conducted CDD, and provided they consent to being relied upon, an estate agent may rely upon them*”.
    7. Paragraph 2.4.25 states “*However, property professionals ultimately remain responsible for CDD*” and paragraph 2.4.26 adds “*It would be sensible to confirm in writing with the third party that they consent to being relied upon, and that they will provide the relevant documents on request and comply with the record keeping requirement* …”
    8. Part 3 contains Sector Specific Guidance. Paragraph 2 states, in response to the question of whether everything can be left to the solicitors who are going to process the transaction “*No. You must comply with the MLR and the legislation* …”.
23. Winkworth’s letter dated 4 December 2013 stated that “*we are required by law to check your identity before placing your property on the market*”. But it did not do so either at that stage or subsequently. Mr Hunt said that he was not fully aware of this requirement at the time. Although he said that there was a copy of the relevant guidance in the office, he could not recall when he had last looked at it and did not know whether he had ever read it all the way through. Mr Hunt, it soon became clear, had little or no knowledge of such guidance, beyond the fact that it required him to take proof of identity of every client.
24. Mr Hunt accepted that, looking back, there were a number of aspects of the transaction that might have alerted him, had he been aware of such guidance at the time.
25. I do not accept Mr Hunt’s evidence that Ms Lim told him that she had met Mr Harper and had taken copies of his passport and utility bill and agreed that Winkworth could use this to satisfy their own anti-money laundering obligations and that Mr Hunt had asked her to e-mail certified copies of the documents to him. I accept Ms Lim’s evidence that if such a request had been made she would have recalled it and would almost certainly have recorded it. She says that she had not previously experienced such a request from an estate agent. She says that she would not provide information about a client to a third party and would have asked Mr Hunt to contact Mr Harper directly. She also says that, if Mr Hunt had asked if he could rely on her due diligence, it was likely that she would have said that he needed to conduct his own. Her carefully worded exchanges with Mr Neiland are evidence of her general approach in such matters, and I also accept her evidence in this respect. When asked whether Ms Lim had provided her consent to rely on Owen White’s due diligence, Mr Hunt admitted that he could not remember what she said. Mr Hunt’s e-mail of 4 December 2013 timed at 11:29, which he says was probably sent after the relevant conversations and which says that “*We also need proof of ID for money laundering regulations, but Joyce will be able to provide*”, is equally consistent with an intention to ask Ms Lim as with her having already agreed to do so. In any event, even if such a request was made, it was not made in sufficiently clear terms to ensure that Ms Lim remembered it. Furthermore, it was not confirmed in writing and no steps were taken by Mr Hunt or anyone else at Winkworth to pursue the matter subsequently. He was unable to explain this failure. Mr Hunt accepted that he was not entitled simply to leave everything to Owen White and that he remained ultimately responsible for client due diligence.
26. Mr Collett conceded, in his closing submissions, that Winkworth had failed to comply with its duty to carry out the anti-money laundering checks required of it.
27. I am not satisfied that Winkworth were negligent in relation to any of the other particulars alleged by P&P Property.
28. There is a dispute as to the extent to which Winkworth, and Mr Hunt in particular, knew the true Mr Harper and should have realised that he was being impersonated.
29. Mr Harper’s evidence was that he is well known as a property buyer and developer in West London who has had a long relationship with various Winkworth offices, conducting dealings with them and frequently attending their offices in person. He said that, in this way, he came into contact with Mr Hunt, who he used to see professionally and also outside of work at a wine bar and pub near Winkworth’s offices. He identified two specific occasions when he had dealings with the relevant Winkworth office over the last 10 years. The first was when he was sent a property alert in September 2011 and the second was when he was shown round a property in or around September 2013.
30. Mr Hunt’s evidence was that he had no recollection of ever have met Mr Harper and had certainly never had any dealings with him, although he vaguely knew the name and vaguely knew that he was involved in property. Mr Hunt said that he would not have recognised him if he saw him. Winkworth’s records do not suggest that they had ever dealt with the Property.
31. Mr Blaker QC during the course of his closing submissions submitted that Mr Hunt did know Mr Harper albeit not particularly well.
32. Although Mr Harper came across as a memorable individual, his specific dealings with Winkworth were relatively sparse and occurred some time ago. Given this, it would not be surprising if Mr Hunt did have only a vague recollection of Mr Harper’s name or did not immediately recall him from amongst the various clients passing through Winkworth’s offices. Although I formed the impression that to some extent Mr Hunt may have sought to downplay the extent to which he had heard of Mr Harper, I am not satisfied that the extent of his knowledge was such that, at the time, he should reasonably have drawn a connection between his client and the true Mr Harper or suspected that the former was impersonating the latter.
33. I am not satisfied that Winkworth were negligent for having failed to suspect that that their client was impersonating the true Mr Harper.

*Conclusion on negligence*

1. It follows that P&P Property’s claims against Owen White and Winkworth for breach of a duty of care fail.

# Breach of trust

1. The two further claims by P&P Property, which are solely against Owen White, are for breach of trust and breach of undertaking.
2. P&P Property claims that Owen White held the funds that it received from the purchaser on trust, that no valid completion took place and that the completion monies were therefore paid away in breach of trust. It also claims that, pursuant to the Law Society’s Code for Completion by Post, Owen White undertook to have the vendor’s authority to receive the purchase monies on completion and to complete the purchase on receipt of the same and breached those undertakings.
3. Owen White contends that the funds that it received were not held on trust for the purchaser or, if they were, that the terms of that trust were not breached. Alternatively it claims relief under section 61 of the Trustee Act 1925. It also denies that it was in breach of undertaking.
4. The two claims are interrelated. The question of whether Owen White are liable for breach of trust depends, in part, on the basis upon which they received the monies and whether and in what circumstances they were permitted to release them to Mr Harper which involves, amongst other things, consideration of the terms of the Law Society’s Code for Completion by Post.

*The law*

1. Trust concepts were initially relied on in litigation by mortgage lenders against their solicitors. In that context, many lenders have adopted measures to try and ensure that the risk of loss in a situation like the present one falls on the firm of solicitors acting in the transaction.
2. Mr Patten QC referred to *Bristol and West Building Society v Mothew* [1998] Ch 1. In that case solicitors acted for a husband and wife in the purchase of a house and also for the building society who had agreed to provide a loan to enable them to do so. The money was advanced on the express condition that the balance of the purchase price was provided by the purchasers without resort to further borrowing and the building society instructed the solicitors to report, prior to completion, any proposal that the purchasers might create a second mortgage or otherwise borrow in order to finance part of the purchase price. The solicitors knew that the purchasers were arranging for an existing bank debt of £3,350 to be secured on the property but, due to an oversight, stated in their report that the balance of the purchase price was being provided by the purchasers without resort to further borrowing. The Court of Appeal held that the solicitors’ conduct and subsequent application of the money advanced by the building society to complete the purchase was not a breach of trust.
3. Millett LJ said that the solicitor held the money in trust for the society but with the society’s authority (and instructions) to apply it in the completion of the transaction or purchase and mortgage of the property. The society contended that the effect of the instruction to report the arrangements prior to completion made it a condition of the solicitor’s obligation to complete that he had complied with his obligation. Millett LJ rejected that contention. At p.24B-C he said:

“*I do not accept this. The society’s standing instructions did not clearly make the defendant’s authority to complete conditional on having complied with his instructions. Whether they did so or not is, of course, a question of construction, and it is possible that the society could adopt instructions which would have this effect. But it would in my judgment require very clear wording to produce so inconvenient and impractical a result. No solicitor could safely accept such instructions, for he could never be certain that he was entitled to complete*”.

1. Mr Blaker QC referred, in contrast, to *Lloyds TSB plc v Markandan & Uddin* [2012] EWCA Civ 65. C&G retained M&U, solicitors, to act for it on a proposed mortgage loan to someone calling himself Victor Davies. M&U remitted the loan money to, as they believed, a firm of solicitors acting for the vendors. In the event, it turned out that C&G and M&U were the victims of a fraud by individuals who pretended to be carrying on practice as solicitors. C&G contended that M&U had parted with the money in breach of trust and in breach of the undertakings it had given. The bank had adopted the Council of Mortgage Lenders’ Handbook and required the solicitors to act in accordance with the instructions in it. Those instructions included clause 10.3.4 which provided “*You must hold the loan on trust for us until completion. If completion is delayed, you must return it to us when and how we tell you*”.
2. There was no dispute that, following the bank’s payment of the loan money to M&U, the solicitors held it on trust for the bank until ‘completion’. Rimer LJ commented that clause 10.3.4 of the Handbook so provided expressly but that, even if it had not, the money would anyway have been held on such a trust. At [37] he said:

“*It was, however, a term of the instructions upon which C&G retained M&U that M&U were authorised to release the money for the purpose of completing the purchase (see clause 10.3.1 of the Handbook); and upon such release, the trust would come to an end and C&G’s right to recall the money would cease. If what happened on 4 September was ‘completion’ of the purchase, then, whether or not C&G might have any claims against M&U on other grounds, it would have no claim against them for breach of trust in paying away the loan money*”.

1. Rimer LJ held at [50] that ‘completion” for the purposes of the relevant provisions of the Handbook had not occurred and that this would have been the case even if M&U had received in return forged versions of the documents that they were expecting to receive, commenting that “*An exchange of real money for worthless forgeries in purported performance of a contract that was a nullity is not completion at all. Had that happened in this case, the parting with the loan money would have been a breach of trust*”.
2. These cases concerned the construction of an express term of the solicitor’s retainer or instructions which was said to operate as a precondition to his authority to disburse the client money under his control. The difficulties which can result from treating as a breach of trust the unauthorised release of monies held in a solicitor’s account as part of a larger transaction, have generally led the courts adopting a conservative approach when construing such provisions. The approach which the court takes was summarised by Lord Woolf MR in *Midland Bank Plc v Cox McQueen* [1999] PNLR 593, where he concluded that “*Unless the language used in a retainer clearly has this consequence, the courts should not be ready to impose obligations on solicitors which even the most careful solicitor may not be able to meet*”.
3. Although those cases provide guidance as to the correct approach to the construction of solicitors’ instructions, neither was concerned with whether or in what circumstances a solicitor who is instructed by the vendor may be liable for breach of trust or undertaking for releasing the completion monies in the absence of a valid completion. The answer depends on the terms on which the vendor’s solicitor received and held the money and was entitled to release it.
4. There are a variety of bases on which solicitors can hold money for a third party. They may, for example, hold it on a bare trust to the order of the other party pending some anticipated event. Alternatively, they may receive it on a purpose trust or give a solicitor’s undertaking to use those funds only for a particular purpose; *Twinsectra Ltd v Yardley* [2002] 2 AC 164 per Lord Millett at [73]-[76].
5. In the present case, Owen White’s obligations need to be construed in the light of the Law Society Code for Completion by Post (2011 edition) (the “Code”) which it was common ground applied in this case. The Code states, at the beginning, “*Warning: Use of this code embodies professional obligations*”. The following provisions are relevant:
   1. Paragraph 3 states that “*In complying with the terms of the code, the seller’s solicitor acts on completion as the buyer’s solicitor’s agent without fee or disbursement but this obligation does not require the seller’s solicitor to investigate or take responsibility for any breach of the seller’s contractual obligations and is expressly limited to completion pursuant to paragraphs 10 to 12*”.
   2. Paragraph 7 states “*the seller’s solicitor undertakes: (i) to have the seller’s authority to receive the purchase money on completion; and (ii) on completion, to have the authority of the proprietor of each mortgage, charge or other financial incumbrance which was specified under paragraph 6 but has not then been redeemed or discharged, to receive the sum intended to repay it* …”
   3. Paragraph 8 states “*The buyer’s solicitor may send the seller’s solicitor instructions as to any other matters required by the buyer’s solicitor which may include (i) documents to be examined or marked; (ii) memoranda to be endorsed; (iii) undertakings to be given; (iv) deeds or other documents, including transfers and any relevant undertakings and authorities relating to rents, deposits, keys, to be sent to the buyer’s solicitor following completion* …”.
   4. Paragraph 9 states “*The buyer’s solicitor will remit to the seller’s solicitor the sum required to complete, as notified in writing on the seller’s completion statement or otherwise in accordance with the contract* …”
   5. Paragraph 10 states “*The seller’s solicitor will complete upon becoming aware of the receipt of the sum specified in paragraph 9, or a lesser sum should the buyer’s and seller’s solicitors so agree, unless (i) the buyer’s solicitor has notified the seller’s solicitor that the funds are to be held to the buyer’s solicitor’s order; or (ii) it has previously been agreed that completion takes place at a later time*.”
   6. Paragraph 11 states “*When completing , the seller’s solicitor undertakes: (i) to comply with any agreed completion arrangements and any reasonable instructions given under paragraph 8; (ii) to redeem or obtain discharges for every mortgage, charge or other financial incumbrance specified under paragraph 6* …”.
   7. Paragraph 12 states “*The seller’s solicitor undertakes: (i) immediately completion has taken place to hold to the buyer’s solicitor’s order every document specified under paragraph 8 and not to exercise a lien over any of them; (ii) as soon as possible after completion, and in any event on the same day: (a) to confirm to the buyer’s solicitor by telephone, fax or e-mail that completion has taken place …; (iii) as soon as possible after completion and in any event by the end of the working day following completion to send written confirmation and, at the risk of the buyer’s solicitor, the items specified under paragraph 8 to the buyer’s solicitor by first class post or document exchange* …”.
   8. Paragraph 13 states that “*The rights and obligations of the parties, under the contract or otherwise, are not affected by this code and in the event of a conflict between the contract and this code, the contract shall prevail*”.
6. Annexed to the Code are various notes. Paragraph 3, which deals with the seller’s solicitor’s undertaking in respect of any mortgages, explains that “*In view of the decision in Edward Wong Finance Company Limited v Johnson, Stokes and Master [1984] AC 296, clause 7(ii) of the code requires the seller’s solicitor to undertake on completion to have the authority of the proprietor of every mortgage or charge to be redeemed to receive the sum needed to repay such charge*”. It says that the course of dealing between the solicitor and mortgagee in relation to the monies required to redeem the mortgage should at least evidence implicit authority from the mortgagee to the solicitor to receive the sum required to repay the charge, and, on the basis of those dealings, the seller’s solicitor should be in a position to give the undertaking to discharge the mortgage.
7. The 2011 edition of the Law Society’s Code for Completion by Post replaced an earlier edition of 1998, which was in different terms. In particular, paragraph 6 of the 1998 edition of the Code stated, at the end of what later became paragraph 9 of the 2011 edition, “*Pending completion, the seller’s solicitor will hold the funds to the buyer’s solicitor’s order*”. Paragraphs 3 and 10 of the 2011 edition were also new.
8. Mr Patten QC submitted that the completion monies were not received and held by Owen White on trust. He submitted that the only obligations which they undertook were those expressly set out in the Code. He submitted that those obligations did not give rise to any trust. The reason for this, he submitted, was that the Code envisaged that receipt of the money and completion would be simultaneous, in the same way as it would have been in an old-style completion, such that there was no period during which the money could be held on trust.
9. In S*antander UK Plc v R.A. Legal Solicitors* [2014] EWCA Civ 183, which involved the 1998 edition of the Code, the Court of Appeal indicated that, if completion monies were received by the vendor’s solicitor prior to completion, it was an inevitable consequence of the circumstances of payment that, absent agreement to the contrary, they would be held by the vendor’s solicitor on trust to the order of the purchaser’s solicitor pending completion whether or not there is an express provision to this effect.
10. Santander agreed to lend £150,000 to Mr Vadika to assist him purchase a property. The bank and Mr Vadika instructed R.A. Legal Solicitors to act for them. R.A. Legal were advised that the owner and vendor of the property was Ms Slater and that her solicitors were Sovereign Chambers LLP. Unfortunately, although Ms Slater was the owner of the property, she had never retained Sovereign for that purpose and had never agreed to sell it to Mr Vadika. Although a firm of solicitors in good standing with the Law Society, Sovereign was in fact a fraudster. Santander brought proceedings against R.A. Legal for breach of trust. The standard form terms upon which Santander instructed R.A. Legal required the firm to hold the bank’s £150,000 on trust until completion.
11. Counsel for R.A. Legal conceded that, in the light of cases such as the *Markandan* case, solicitors who hold a loan advance on trust until completion necessarily commit a breach of trust if they part with the advance otherwise than upon completion. There was also an issue as to whether R.A. Legal had been in breach of trust the previous day when they transferred the money to Sovereign’s client account. Counsel for the bank submitted this had also involved a breach of trust for two reasons. The first reason was because the money had been transferred to the client account of solicitors who were not acting for the owner or intending vendor of the property. The Court of Appeal accepted this submission. The second reason, which is the relevant one for present purposes, was because, it was said, the transfer had been made without R.A. Legal first taking effective steps to ensure that, once transferred, the money would be held by Sovereign to its order. Briggs LJ dealt with this submission in the context of his consideration of whether R.A. Legal were entitled to relief under section 61 of the Trustee Act 1925. He accepted the Judge’s conclusion that, regardless of the absence of a written direction or undertaking, Sovereign did in law hold the completion money to R.A. Legal’s order from the moment of its receipt on 28th July until formally released by R.A. Legal at the moment of pretended completion the following day. Briggs LJ commented at [78] that “… *I consider that to be an inevitable consequence of the fact of the payment, against the background that it was made by a purchaser’s solicitor to Sovereign holding itself out as the vendor’s solicitor in anticipation of completion, which Sovereign had requested by letter on the previous day*”. Although the 1998 edition of the Code expressly provided in paragraph 6 that *pending completion, the seller’s solicitor will hold the funds to the buyer’s solicitor’s order*, it is clear that this was not the basis upon which he reached that conclusion, as the parties in that case had not agreed to the application of the Code.
12. Mr Patten QC submitted that the position is different under the 2011 edition of the Code. He pointed out that the 2011 edition does not contain a provision equivalent to paragraph 6. It also contained new provisions in paragraph 3 and 10. Counsel were not able to identify any discussion of the reason for these changes between the 1998 edition and the 2011 edition of the Code.
13. Mr Patten QC referred to paragraph 10 of the Code. This provides that “*The seller’s solicitor will complete upon becoming aware of the receipt of the sum specified in paragraph 9 … unless (i) the buyer’s solicitor has notified the seller’s solicitor that the funds are to be held to the buyer’s solicitor’s order; or (ii) it has previously been agreed that completion takes place at a later time*”. Mr Patten QC submitted that the effect of this is that completion will occur simultaneously with receipt of the money such that there is no period during which a trust could have existed.
14. Paragraph 10 envisages a number of possibilities. Sub-paragraph (i) deals with a situation in which the buyer’s solicitor has notified the seller that the funds are to be held to the buyer’s solicitor’s order. In that situation the position is the same as under the 1998 edition. Sub-paragraph (ii) deals with a situation in which it has previously been agreed that completion takes place at a later time. In my view, the position is the same in this situation. It would be surprising if, in such a situation, the monies would form part of the vendor’s solicitor’s estate, or the vendor’s estate, in the event that they became insolvent prior to completion. This must be so, despite the absence of any express reference to the monies being held to the order of the buyer’s solicitor in sub- paragraph (ii). Subject to this, paragraph 10 provides that “*the seller’s solicitor will complete upon becoming aware of the receipt of the sum specified in paragraph 9*”. I agree with Mr Patten QC that the effect of this is that, from this moment, the vendor’s solicitor is not required to hold the money on trust to the order of the buyer’s solicitor, but is instead permitted to use them for the purposes of completion in accordance with the rights and obligations set out in the Code.
15. This does not, however, conclude matters. The further issue is whether in these circumstances the vendor’s solicitor, acting as the purchaser’s solicitor’s agent, is permitted to use the monies solely for the purposes of a genuine completion, failing which it will be in breach of trust. In other words, whether the Code is to be construed as having the same effect as the express undertaking in cases such as *Lloyds TSB plc v Markandan & Uddin*.
16. Mr Patten QC, in contending that it should not, relied on paragraph 3 of the Code, which states that, in complying with the terms of the Code, the seller acts on completion as the buyer’s agent but that “*this obligation does not require the seller’s solicitor to investigate or take responsibility for any breach of the seller’s contractual obligations and is expressly limited to completion pursuant to paragraphs 10 and 12*”. He submitted that this is inconsistent with the vendor’s solicitor, as agent for the purchaser’s solicitor, holding the completion monies on trust and being liable for breach of trust in the event that a genuine completion does not occur. The 1998 edition of the Code did not include a paragraph equivalent to paragraph 3.
17. I agree with Mr Patten QC that the fact that paragraph 3 provides that the seller’s solicitor is not required “*to investigate or take responsibility for any breach of the seller’s contractual obligations*” is, in substance, inconsistent with the vendor’s solicitor being liable, as the purchaser’s agent, for breach of trust in releasing the money in the event that completion does not occur because the seller does not have title. One of the seller’s obligations is to provide a genuine transfer of title. If the vendor’s solicitor is liable for breach of trust merely because no genuine transfer is provided it would effectively be taking responsibility for what paragraph 3 says it is not. The extent of the vendor’s solicitor’s obligations on completion are governed by the express undertakings that it provides in accordance with the Code. In my view, in the light of the guidance in cases such as *Mothew*, in these circumstances it would be wrong to construe the Code so as to give rise to a breach of trust or, as a result, as an effective guarantee of title.
18. Mr Blaker QC also relied on the decisions of Deputy Master Jeffries and subsequently His Honour Judge Pelling QC in *Purrunsing v A’Court & Co*. [2016] EWHC 789. The facts of that case were, in broad terms, similar to those in the present case. Mr Purrunsing agreed to purchase a property and instructed House Owners Conveyancers (“HOC”) as his solicitors. The vendor, who called himself Nicholas Dawson, was in fact a fraudster. Mr Dawson instructed A’Court & Co. to act as his solicitors. Mr Purrunsing applied for summary judgment. Deputy Master Jeffries referred to the 1998 edition of the Code, which applied in that case, and to *Target Holdings* and *Santander* and held that the money was held by A’Court & Co. on trust and that there had been a breach of trust, but concluded that there was a triable issue as to whether the solicitors were entitled to relief under section 61 of the Trustee Act 1925. At trial, HHJ Pelling QC recorded at [2] that it was common ground that A’Court & Co.’s payments to Mr Dawson were payments made in breach of trust and concluded that they were not entitled to relief under section 61 of the Trustee Act 1925. That case however concerned the 1998 edition of the Code. I do not consider that it assists in determining the effect of the 2011 edition of the Code or alters my conclusions as to the effect of that Code.
19. There is, in my view, a further potential issue. Assuming, contrary to the above, that the vendor’s solicitor under the 2011 edition of the Code does hold the money on trust to the order of the purchaser’s solicitor until the point of completion, there remains a potential question as to when the vendor’s solicitors are released from that obligation so as to cease to hold the money to the order of the purchaser’s solicitor. One situation is obviously in the event of a genuine completion. However, that is not necessarily the only situation. Money that is held on trust to the order of another will also cease to be held on trust if and when that other party orders otherwise.
20. Mr Patten QC referred to the fact that in the *Santander* case Briggs LJ said at [78] “*Sovereign did in law hold the completion money to R.A. Legal’s order from the moment of its receipt on 28th July until formally released by R.A. Legal at the moment of pretended completion the following day*”. Briggs LJ appears to have considered that the money ceased to be held on trust to the order of R.A. Legal, when it released Sovereign from that trust on purported completion.
21. It is right that Briggs LJ also said at [94]: “*The result, in my judgment, is that R.A. Legal were disabled from seeking by any summary means of enforcement to protect Abbey from the loss of its money, because they had neither an undertaking to discharge the prior charge on or after completion, nor written confirmation that, until completion had properly occurred (which it plainly had not) they could demand the immediate return of the completion money. Those disabilities arose, respectively, from a failure to appreciate the implications of Sovereign’s answer to Requisition 4(B) and from a failure to ask for or obtain Sovereign’s commitment to the adoption of the Completion Code before transferring the completion money*”. However, the point that Briggs LJ was making here, as I understand it, was that, R.A. Legal should have realised that something was wrong on completion and, if it had obtained Sovereign’s agreement to the application of the Code, it would have had a summary means of enforcement which would have been of benefit to it given that the money was not in fact misappropriated from Sovereign’s account until two weeks after pretended completion; see at [80] and [86]. This is not inconsistent with Briggs LJ’s earlier statement. If R.A. Legal had realised that something had gone wrong and had not formally released Sovereign, the completion money would have continued to be held by Sovereign to the order of R.A. Legal and R.A. Legal could have taken summary proceedings to ensure its return before it was eventually misappropriated from Sovereign’s account.
22. In my view, cases such as the *Markandan* case involved a different situation. That case concerned the construction of an express undertaking, as between a lender and either its own or the purchaser’s solicitor, to hold the proceeds of the loan on trust for the lender until completion. The 2011 edition of the Code does not contain an equivalent provision and the implication of such a provision would, in my view, in substance be inconsistent with the specific rights and obligations which are expressly provided for.

*The £103,000 deposit and £327,000*

1. The completion monies were paid to Owen White in three tranches. The first two tranches of £103,000 and £327,000 were received by them on 11 and 12 December 2013. On 12 December 2013 Mr Robinson sent Owen White an e-mail confirming his client’s agreement to the total £430,000 now held by Owen White being treated as part of the deposit and to the deposit being held by them as agents for the seller and confirming that the contract was varied accordingly.
2. This raises a further difficulty for P&P Property’s claim for breach of trust so far as the£430,000 is concerned.
3. There is conflicting evidence as to whether or to what extent Mr Robinson explained the risks of such an agreement to Mr Polycarpou before sending his e-mail. Mr Polycarpou’s evidence was that he was not aware that the money was being transferred on terms that it could be released before completion and would have remembered if he had been told that there was any risk involved. Mr Robinson’s evidence was that he is sure that he would have had such a discussion. It is not necessary for me to resolve this issue and, in case it may later arise in some other context, I do not do so.
4. The effect of agreeing that the £430,000 would be treated as part of the deposit and to the deposit being held by Owen White as agents for the seller was necessarily inconsistent with any obligation on Owen White to continue to hold it on trust to the order of the purchaser’s solicitor pending completion. Owen White were entitled, if they chose, to pay it to Mr Harper and, if they did so, this would not constitute a breach of trust. This is consistent with the default position that, in the absence of any agreement or arrangement to the contrary, where a party to a transaction pays money at the other party’s request to that other party’s solicitor, the payment to the solicitor is equivalent to payment to the solicitor’s client so that the money is held on trust for the client; *Ellis v Goulton* [1893] 1 QB 350 and *Burt v Cousins & Co Ltd* [1971] 2 QB 426. In the event that completion did not occur, it would be Mr Harper who would be liable to repay the deposit, not Owen White.
5. Mr Robinson was well aware that this was the effect of agreeing that the money could be held by Owen White as agent for the vendor.
6. In his evidence, Mr Robinson says, however, that he only agreed to release the £430,000 on the basis of a representation by Ms Lim that the monies would be used for a specific purpose, namely the purchase of a property in Dubai and only by the true owner of the Property.
7. The exchange between Ms Lim and Mr Robinson was not such as to have been capable of giving rise to a purpose trust of the money in Ms Lim’s hands. The effect of the conversation was that Mr Robinson agreed to the money being released to Mr Harper not the creation of a new purpose trust. I am also satisfied that Mr Robinson’s construction of events is not consistent with his intention and understanding at the time.
8. I am also not satisfied that Ms Lim represented that the money would be used by the true owner of the Property and, although she had previously referred to Mr Harper needing the money to purchase a property in Dubai, any resulting misrepresentation would merely have made the agreement voidable and not void and it was not rescinded prior to payment of the money by Owen White to Mr Harper.
9. Mr Blaker QC submitted that, as the £430,000 was not in fact paid to Mr Harper until after the balance of the completion monies were received, it once again fell to be treated in the same way as the rest of those monies. I disagree. At the time that money was paid away, it was held by Owen White as agent for Mr Harper in accordance with the terms of the agreement with Mr Robinson and was not held on trust for Peter Brown & Co.
10. In the circumstances, whatever may be the position in relation to the balance of the completion monies, the claim by P&P Property against Owen White for breach of trust in respect of the £430,000 fails.

*The £600,000*

1. The remaining £600,000 was eventually received by Owen White directly from Carlsons at about 12:49 on 12 December 2013. At about 14:20 Ms Lim drafted instructions for £581,410, being the balance due on completion, to be transferred to Mr Harper. According to Mr Robinson, shortly before 15:40 that afternoon he received a telephone call from Ms Lim to confirm receipt of the balance of the purchase monies and, in turn, they formally completed the sale and purchase of the Property. The balance of the completion money was transferred to Mr Harper’s account in Dubai at about 15:37 that afternoon. At 15:40 Mr Robinson sent an e-mail to Ms Lim to confirm completion had taken place and to confirm his oral undertaking that the sum of £306.99, representing one day’s interest of £126.99 and Owen White’s costs of £180 in respect of late completion, would be paid.
2. In my view, for the reasons set out above, Owen White did not receive the £600,000 money on trust to the order of Peter Brown & Co. pending anticipated completion. They had not been notified that the funds were to be held to the latter’s order nor had it previously been agreed that completion would take place at a later time. To the contrary, P&P Property were already late in completing and the monies were remitted directly by Carlsons to enable completion to occur immediately. Nor, for the reasons set out above, do I consider that the money was held by Owen White, as agent for Peter Brown & Co., so as to give rise to a breach of trust if released otherwise than on a genuine completion.
3. Even if this is incorrect, it does not necessarily follow that the money was paid away by Owen White in breach of trust. On this basis, Owen White would have held the money on trust to the order of Peter Brown & Co., unless and until Peter Brown & Co released them from that obligation. By agreeing that completion was to be treated as having occurred, it seems to me that Mr Robinson may have released Owen White from any obligation to continue to hold the balance of the completion monies to the order of his firm and lost the ability to contend that, in paying the balance of the £600,000 to Mr Harper that afternoon, Owen White were acting in breach of trust, unless that release was for some reason ineffective. However, this issue was not fully addressed by the parties in submission and, given my previous conclusion, I do not need to consider it further.
4. In the circumstances, the claim by P&P Property against Owen White for breach of trust in respect of the £600,000 also fails.

# Breach of undertaking

1. P&P Property claims that, even if Owen White were not in breach of trust, they were in breach of undertaking.
2. Paragraph 40 of the Particulars of Claim relies in effect on paragraph 7(i) of the Code which states that “*The seller’s solicitor undertakes (i) to have the seller’s authority to receive the purchase money on completion*” and on paragraph 10 which states that “*The seller’s solicitor will complete upon becoming aware of the receipt of the sum specified in paragraph 9*”. P&P Property contends that, in breach of those undertakings, Owen White did not have the true vendor’s authority to receive the purchase monies and that no valid completion took place.
3. Mr Patten QC submitted that there was no breach of undertaking. So far as paragraph 7(i) is concerned, he submitted the reference to the “seller” is to the person agreeing to sell the property, not to the true owner. He submitted that the provision was introduced to address the risk that if monies were forwarded to the seller’s solicitor that person might run off with them leaving the buyer with no remedy against the seller. He referred to *Edward Wong Finance Company v Johnson Stokes & Master* [1984] AC 296 where the vendor’s solicitor absconded with the completion monies and in which the Privy Council commented at p.307H that to address this risk “*all that is needed in such a case is that the purchaser’s or lender’s solicitor should take reasonable steps to satisfy himself that the vendor’s or borrower’s solicitor has authority from his client to receive the purchase money*”. I accept Mr Patten QC’s submissions in this respect. In my view, the reference to “seller” in the Code is to the person agreeing to sell the property, not a reference to the registered title holder if different. The passage cited from the *Edward Wong* case is consistent with his submission as to the purpose of the provision.
4. In relation to paragraph 10 Mr Patten QC submitted that this paragraph is not expressed so as to constitute an undertaking at all. I agree. The Code makes it clear when an undertaking is intended by expressly using the word “*undertakes*” and emphasising that word in bold type. Paragraph 10 does not contain such language.
5. More generally, as Mr Patten QC submitted, there is nothing in the Code to indicate that, by adopting it, the vendor’s solicitors are accepting that they will automatically be liable if it subsequently turns out that the vendor was a fraudster such that no genuine completion occurred. Whilst the notes to the Code warn about the effect of the undertaking given by the solicitor to discharge existing mortgages and charges, it contains no comparable warnings dealing with this situation.
6. I should add that it seems to me that there may be circumstances in which the Code may operate to provide a purchaser with the protection which P&P Property seeks. Paragraph 11 provides that when completing the seller’s solicitor undertakes, amongst other things, to comply with any agreed completion arrangements and any reasonable instructions given under paragraph 8, and paragraph 12 contains an undertaking by the seller’s solicitor immediately completion has taken place to hold to the buyer’s solicitor’s order every document specified under paragraph 8. Paragraph 8 states that the buyer’s solicitor may send the seller’s solicitor instructions as to any other matters required by the buyer’s solicitor which may include documents to be examined and marked, memoranda to be endorsed, undertakings to be given, or deeds or other documents, including transfers and any relevant undertakings and authorities relating to rents, deposits, keys, to be sent to the buyer’s solicitor following completion. Seeking and obtaining appropriate instructions in accordance with paragraph 8 may give rise to enforceable undertakings from the vendor’s solicitors which would protect the purchaser. However, Mr Patten QC said that there were no such arrangements or instructions in the present case and Mr Blaker QC did not seek to suggest the contrary or to rely on any matters other than the provisions in paragraphs 7(i) and 10 which are referred to in paragraph 40 of the Particulars of Claim. Obviously, if the purchaser’s solicitor were to seek to protect its client from the risk of a fraudulent vendor in this way, the vendor’s solicitor would be aware that this is what was intended and would be able to decide whether or not to agree to proceed on such a basis or to do so without taking further steps to protect itself.
7. It follows that P&P Property’s claim that Owen White are in breach of undertaking in respect of paragraphs 7(i) and 10 of the Code fails.

# Section 61 of the Trustee Act 1925

1. Given my conclusions in relation to P&P Property’s claim for breach of trust, the question of whether Owen White would be entitled to relief under section 61 of the Trustee Act 1925 does not arise. However, in case my conclusions on that part of the case are incorrect, I should address this issue. The following section therefore proceeds on the assumption that, contrary to the conclusion I have in fact reached, Owen White are liable for breach of trust and are seeking relief for such breach.

*Section 61*

1. Section 61 provides:

“*If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust … but has acted honestly and reasonably and ought fairly to be excused for the breach of trust … then the court may relieve him either wholly or partly from personal liability for the same*.”

1. The principles so far established in relation to section 61 in the context of conveyancing transactions are discussed in *Lloyds TSB plc v Markandan & Uddin* [2012] EWCA Civ 65, *Davisons Solicitors v Nationwide Building Society* [2012] EWCA Civ 1626 and *Santander UK Plc v R.A. Legal Solicitors* [2014] EWCA Civ 183.
2. The section imposes three conditions, honesty, reasonableness and the exercise of the Court’s discretion. No question of dishonesty arises in these proceedings. P&P Property accepts that Ms Lim acted at all times honestly. The issue is whether Ms Lim has established that she acted reasonably and, if she did, whether the Court’s discretion should be exercised to grant her relief.
3. The relevant principles governing the application of section 61, as they appear in particular from the three authorities referred to above, can be summarised for present purposes as follows:
   1. The section requires the solicitor to have acted reasonably. Section 61 must be interpreted consistently with equity’s high expectations of a trustee discharging fiduciary obligations; *Santander* per Sir Terence Etherton C at [108]. It requires the trustee to have acted “ … *with exemplary professional care and efficiency*” and to have been “*careful, conscientious and thorough*”; *Lloyds TSB* per Rimer LJ at [60]-[61]. This does not however predicate that he has necessarily complied with best practice in all respects and the requisite standard is that of reasonableness not perfection; *Davisons* per Sir Andrew Morritt C at [48] and *Santander* per Briggs LJ at [30].
   2. A strict causation test casts the net too narrowly for the purposes of identifying relevant conduct. It would not be appropriate to exclude as irrelevant conduct which consisted of a departure from best or reasonable practice which increased the risk of loss caused by fraud, even if the court concludes that the fraudster would nonetheless have achieved his goal if the solicitor had acted reasonably. On the other hand, the court’s jurisdiction to grant relief is not precluded by conduct of the trustee which, although unreasonable, played absolutely no part in the occasioning of the loss; *Santander* per Briggs LJ at [25] and Sir Terence Etherton C at [109]-[110].
   3. The burden of proving that he acted reasonably lies squarely on the solicitor; *Santander* per Briggs LJ at [54]. The onus is on the trustee to place before the court a full account of his or her conduct leading to the breach of trust; per Sir Terence Etherton C at [111].
   4. Even if the trustee ought fairly to be excused, the court still retains a discretionary power to grant relief from liability, in whole or in part, or to refuse it. Much may depend at this discretionary stage upon the consequences for the beneficiary. An institutional lender may well be insured (or effectively self- insured) for the consequences of third party fraud. But an innocent purchaser may have contributed his life savings to the purchase and have no recourse at all other than against his insured solicitor where, for example, the fraudster is a pure interloper; *Santander* per Briggs LJ at [33].

*Analysis*

1. The relevant conduct concerns Owen White’s actions as solicitors for Clifford Harper in relation to the proposed sale and purchase of the Property. Those actions need to be assessed in the light, amongst other things, of Ms Lim’s obligations in respect of anti- money laundering checks and client due diligence.
2. The Money Laundering Regulations 2007 (the “Regulations”) apply to all persons who are “Relevant Persons” as defined in Regulation 3, which includes all independent legal professionals. Regulation 7(1) imposed on Owen White an obligation to apply “*customer due diligence*” when establishing a business relationship or carrying out an occasional transaction. Customer due diligence is defined by Regulation 5(a) as “… *identifying the customer and verifying the customer’s identity on the basis of documents, data or information obtained from a reliable and independent source*” and by Regulation 5(c) as “*obtaining information on the purpose and intended nature of the business relationship”.*
3. The effect of these requirements is considered in the Law Society’s Anti-Money Laundering Practice Note (9 October 2012). Paragraph 11.2 deals with general warning signs. It that starts by saying that, because money launderers are always developing new techniques, no list of examples can be fully comprehensive. It then identifies some key factors which may heighten a client’s risk profile or give a solicitor cause for concern. These include instructions that change unexpectedly especially if there seems to be no logical reason for the change. Paragraph 11.4 deals with property work. It states that an unusual sale price can be an indicator of money laundering and states that, if the solicitor becomes aware of a significant discrepancy between the sale price and what they would reasonably expect the property to sell for, they should consider asking more questions.
4. Also relevant is the Law Society’s Property and Registration Fraud Practice Note (11

October 2010):

* 1. Paragraph 1.2 states that “*Fraud is on the increase and there is a rising incidence or awareness of fraudsters targeting the properties of both individuals and companies. These attacks often include identity and other types of fraud*”.
  2. Paragraph 2.2 deals with seller and buyer frauds. It states that certain properties and owners are particularly susceptible to fraud and that most fraudulent activity falls into distinct categories, one of which is identified as “*third party frauds where tenants or those who have access to tenants are able to divert post to perpetrate the fraud*”.
  3. Paragraph 2.2.1 deals with contact details. It states that client contact details may suggest an increased risk of fraud, such as “*where the only contact details provided for any party are a telephone number, mobile number and/or an e-mail address*”.
  4. Paragraph 2.2.2 deals with vulnerable registered owners. It states that some clients may be particularly at risk from fraudulent activity because, for example, “*they have let the property or it is empty*”.
  5. Paragraph 2.3 deals with vulnerable properties. It states that the Land Registry has identified that certain types of properties may be particularly vulnerable to registration frauds, such as “*unoccupied properties, whether residential or commercial, tenanted properties, high value properties without a legal charge*…”
  6. Paragraph 3 is concerned with mitigating fraud threats. Paragraph 3.1 deals with client identity. It states that “*You should be aware that exercising reasonable care in viewing documents intended to establish identity may not conclusively prove that the person or company is the person or company they are purporting to be*”.
  7. Paragraph 3.1.1 deals with conveyancing transactions. It states that these are a regulated activity under the Regulations and that the solicitor must therefore identify and verify the client by independent means and obtain information on the purpose and intended nature of the business relationship. It comments “*The last requirement means more than just finding out if they want to sell a property. It also encompasses looking at all the information in the retainer and assessing whether it is consistent with a lawful transaction. This may include considering whether the client is actually the owner of the property they want to sell*”.
  8. Paragraph 3.2 deals with surrounding circumstances. It states that further factors the solicitor may consider include whether they have met the client face to face, whether they have seen the original identity documents and whether the registered proprietor’s date of birth is inconsistent with their being the owner. It comments that “.. *if, in cases where you are seeing the client face to face, the person presenting the identification information appears too young, this may be a case of impersonation*”.
  9. Paragraph 3.5 states that “*Risks of fraud are increased if documents are provided to clients for execution other than in the presence of you or your staff*”.
  10. Paragraph 4.2.1 deals with addresses for service. It states that clients may use more than one address for service in the register, and that this can give additional protection to a legitimate owner as the address of the property the client is selling may not be an effective address for service.

1. Ms Lim plainly had a good understanding of her obligations under the anti-money laundering legislation and in respect of client due diligence. In particular, she was aware that she needed to establish that the client was who he said he was and that he owned the Property, that this required the client to produce certain specific forms of identification, that there were certain features which could heighten risk and that the transaction must be kept under review. She was also aware of the guidance from the Law Society on such matters.
2. Ms Lim’s evidence was that she started from the proposition that her client was genuine but that she needed to look out for circumstances that suggested otherwise. Mr Patten QC submitted that this was the right approach. He referred, in this respect, to the Law Society’s discussion of the risk based approach where it said that “*While you can, and should, start from the premise that most of your clients are not launderers or terrorist financers, you must assess the risk level particular to your firm and implement reasonable and considered controls to minimise those risks*”.
3. I do not consider that Ms Lim’s starting point was inappropriate. Much, however, depends on its application in practice. In this respect I would emphasise the following. The Law Society’s Practice Note states that fraud is on the increase. The regime established by the Regulation is intended to reduce the risk of professionals being used to facilitate criminal activities. It is obviously important that the exercise is not treated as purely mechanical and as capable of being satisfied by the provision of identity documents without appropriate assessment. It is also important that a solicitor is not inhibited from making the necessary investigations and asking the appropriate questions for fear of upsetting his or her client or affecting his relationship with his client.
4. Mr Blaker QC identified a number of specific aspects of the relevant events and Ms Lim’s conduct which he submitted indicated that she did not act reasonably for the purposes of being entitled to relief under section 61. It is helpful to consider the more significant individual aspects while, of course, bearing in mind that the onus would at all times be firmly on Owen White to establish that they acted reasonably. In considering the various matters I have tried to avoid the use of hindsight and have considered the various aspects of Ms Lim’s actions as a whole.
5. The Property was one of those types of properties which the Law Society’s Practice Note states has been identified by the Land Registry as particularly vulnerable to fraud, as it was of relatively high value, without a legal charge and unoccupied. It was also being sold by someone overseas. Ms Lim was aware that these were risk factors.
6. The transaction was presented as urgent and was required to be completed in a short timeframe. Mr Harper first contacted Ms Lim on 20 November 2013. Ms Lim only learnt that the Mr Harper was considering selling the Property rather than mortgaging it on 3 December 2013. Exchange of contracts took place on 6 December 2013 and completion eventually occurred on 12 December 2013.
7. Ms Lim was provided with a copy of Mr Harper’s passport when she first met him on 29 November 2013. Mr Blaker QC submitted that this provided Ms Lim with a number of warning signs:
   1. The passport gave Mr Harper’s date of birth as 25 May 1966. On this basis he must have been 38 years old when the passport was issued in August 2004 and 47 years old when Ms Lim first met him. Mr Blaker QC submitted that the photograph on the passport shows someone who appears to be much younger than 38 years old and that the person who Ms Lim met cannot have looked to be 47 years old. Ms Lim’s evidence is that the person she met could have been of that age. I have only got a photocopy of the passport photograph and have no evidence about what Mr Harper looked like when he met Ms Lim. Nor is always easy to assess a person’s age even where one meets them.
   2. The office copy entries for the Property gave the date of title as 23 November 1989. On this basis Mr Harper must have been 23 years old when he purchased the Property. Mr Blaker QC submits that this is unlikely, although it is obviously not impossible.
   3. The passport contained a signature for Mr Harper. Mr Blaker QC submitted that the signature is different from that on various other documents that Mr Harper signed and provided to Ms Lim. Ms Lim’s evidence is that, while she did not carry out such a comparison at the time, she regarded them as variants on his signature. Although the signatures do look, to my eye, to be different, I do not have the benefit of expert evidence on handwriting. I also bear in mind that an individual’s signature can change over time.
8. I do not consider that following the meeting on 29 November 2013, Ms Lim should have suspected that Mr Harper might not be who he said he was or that he might be impersonating the true owner. I accept her evidence that she reviewed the documents in her office at some stage after the meeting and assessed what they indicated. I am not in a position to second guess her evidence that the person she met appeared to be of an appropriate age or conclude that she should have been alerted because his signature on other documents did not match the signature on his passport. Nor do I think that she should have been altered because of his apparent age when he purchased the property.
9. Ms Lim also received an electricity bill from Eon addressed to Clifford MP Harper at 52 Brackenbury Road dated 28 August 2013. Mr Blaker QC referred to the fact that this was more than three months before the meeting with Ms Lim. This is correct. However, it was only just older than three months and was less than three months before Ms Lim had requested it. Mr Blaker QC also referred to the fact that the bill was for£95.44, although the property was presently unoccupied. I do not regard the fact that the utility bill was dated one day more than three months prior to the meeting or showed a charge as significant.
10. There is one further aspect of the position at this stage. Ms Lim had received a copy of a utility bill linking Mr Harper to the Property. However, as the Law Society’s Practice Note states, one common category of fraud is where tenants or those who have access to tenants are able to divert post. She knew that the Property was unoccupied, so Mr Harper was not living there, although he had provided it as his address. Whilst he had told her that he was living in Dubai, at this stage she had not been provided with any correspondence address or evidence as to where he was in fact living and working or how long he had been there. The only contact details that she had been provided with were two e-mail addresses and telephone numbers together with a business card. The Law Society’s Practice Note states that such circumstances may suggest an increased risk of fraud. The effect of this is that, whilst Ms Lim had evidence of Mr Harper’s identity in the form of his passport and evidence of a link to the Property, she did not have any evidence as to where he was in fact residing or where he could be contacted, although she knew that he was not living at the Property. Ms Lim regarded Mr Harper as a medium risk. She accepted that, with hindsight, she should have asked him where he was actually residing. Her approach appears to have been influenced by, as she put it during her evidence, a concern not to get too intrusive or ask too many questions because the client does not like it and by a view that it was not essential for her to know any more because she was not going to be involved with the Dubai property. The office copy entries did, of course, provide an address for the registered title holder, but Ms Lim does not appear to have considered checking whether Mr Harper could be contacted there.
11. Although Ms Lim had not, at this stage, received the third identification document that she had requested, she accepted Mr Harper as a client. She therefore needed to review the position further when she received the bank statements that she had been promised.
12. Ms Lim obtained the results of an anti-money laundering search on Monday 2 December 2013. This warned that Mr Harper’s identity had not been independently verified, that his date of birth could not be checked as no available sources held this data, and that he was not found on the electoral role (or, indeed, on previous rolls). It stated that further checks might be required. Ms Lim accepted that, when a search comes back referred, this constitutes an amber light and means that she needs to make further enquiries with the client. In this case, however, she did not do so. Instead, her evidence was that, given that Mr Harper had said that he had been working in Dubai for some time, she concluded that he had de-registered himself for Council Tax purposes and that this accounted for the fact that he was not on the electoral role. I am not satisfied that Ms Lim had any real idea of how long Mr Harper had in fact been working in Dubai or where he lived in England when he was here and, in any event, she did not make further enquiries. Whilst she said that she did make further enquiries by asking Mr Harper for copies of his bank statements, these had already been requested and were required to satisfy the requirement for two forms of confirmation of address.
13. On Tuesday 3 December 2013 Ms Lim learnt that Mr Harper had decided to try and sell the Property rather than obtain a mortgage in respect of it.
14. On Wednesday 4 December 2013, Ms Lim received the courier package from Mr Harper containing copies of his bank statements. Ms Lim says that she skimmed through them. She says that she noticed that they referred to transactions in Dubai and that this was consistent with Mr Harper’s presence in Dubai. In my view, the bank statements should have prompted Ms Lim to re-consider what she knew about Mr Harper. Ms Lim knew that Mr Harper was not living at the Property and apparently thought that he had been working in Dubai for some time. Whilst it would not be reasonable to expect Ms Lim to have carried out a forensic exercise on the bank statements, a cursory glance would have indicated that most of the payments were for a variety of everyday purchases in and around London. Whilst, as Ms Lim observed, they do refer to two transactions in Dubai on 15 August 2013, they also refer to a transaction at Heathrow Airport on the 14 August which suggests that Mr Harper may have flown out the day before. They are not, at least on their face, supportive of Ms Lim’s understanding that Mr Harper was working and living in Dubai. Ms Lim said that she did not need to consider such matters, as the bank statements were relevant only because they gave his address as that of the Property and provided her with the third document that client due diligence procedures required. I disagree. In the circumstances and given what they indicated, I would have expected them to have prompted further consideration by Ms Lim.
15. On the same day Ms Lim would also have seen the e-mail from Mr Neiland saying that he understood that his client had been asking Mr Harper for various documentary evidence for his residence in Dubai, including evidence of his contract of employment and bank statements, explaining that all of this was important as it would establish Mr Harper’s principal residence being other than at the Property. One would have expected this to have further prompted Ms Lim to review what she knew about where Mr Harper was living and working, even if it did not, at that stage, prompt her to consider whether Mr Neiland’s client’s request had in any way been connected to Mr Harper’s change of plan.
16. Ms Lim needed to review the position when she received the bank statements as it was only then that she had received the three documents that she had requested. In my view, the results of the anti-money laundering search and the other information that she had been provided with, should have prompted her to ask Mr Harper for more information to ensure that she properly understood the position. There is no contemporaneous note recording the basis on which Ms Lim concluded that this was not necessary. So far as the results of the anti-money laundering search is concerned, she simply assumed what Mr Harper might say. She did not ask him. Although she said in evidence that clients do not like it if their solicitor asks too many questions this is not, in my view, an adequate response. Nor did the fact that exchange of contracts was to take place two days later and that Mr Harper continued to emphasise the urgency of the matter justify her in not asking further questions, although it obviously complicated matters.
17. Mr Blaker QC submits that Ms Lim also did not act reasonably in failing to be concerned by the fact that Mr Harper kept on, as he put it, changing his desired completion date. I do not accept this. The explanations that Mr Harper provided, which related to the completion date on his Dubai purchase and the date by which as a result he needed to have received the completion monies, were not such as should have put Ms Lim on notice.
18. On Monday 9 December 2013 Ms Lim received the signed contract and transfer. The package also contained a letter dated 7 December 2013 from Peter Lazarus at Winterhill Largo in Dubai. When dealing with a solicitor Ms Lim said that it was her invariable practice to check that they are on the roll and are therefore a genuine person and a genuine solicitor. She carried out such a search in respect of Mr Neiland and his firm. But she did not seek to make any equivalent enquiries to satisfy herself about Winterhill Largo or Mr Lazarus. She says that she simply assumed that he was a solicitor. As it turns out, Winterhill Largo appears to have been a firm of debt collectors and a search of the Law Society website would have indicated that Mr Lazarus was not currently recorded by the Law Society as a practising solicitor.
19. On Thursday 12 December 2013 Ms Lim obtained Mr Robinson’s agreement to the£430,000 being held by Owen White as agent for Mr Harper so that she could remit the money to him as soon as possible. She explained to Mr Robinson that this was necessary to avoid Mr Harper suffering losses. Although she was thereby relaying what Mr Harper had told her, she had no independent confirmation of the existence of the supposed purchase in Dubai.
20. In the circumstances, had I concluded that Owen White were liable for breach of trust, I would not have been satisfied that they would have discharged the burden of demonstrating that, on this occasion, Ms Lim acted reasonably for the purposes of section 61.
21. I should add, in this context, that I obtained the impression during her cross-examination that, whilst Ms Lim was undoubtedly aware of her obligations in respect of client due diligence and was careful to ensure that she was provided with the necessary documents, she was less prepared to insist on her client answering any further questions that she had. Although I am conscious that Mr Harper was not Ms Lim’s only client and that the demands of a conveyancing solicitor’s practice are likely to be such as to make complying with a solicitor’s obligations in this respect more difficult, such obligations are important and, in my view, on this occasion Ms Lim would have fallen short of the high standard equity expects of a trustee.
22. It is difficult to know what would have happened had Ms Lim asked Mr Harper for more information about his residence and work in Dubai. The fraud was plainly a sophisticated one which appears to have carried out with some expertise. However, in my view, it is plainly possible that, despite the obvious sophistication of the fraud, further questions would have revealed the true position or discouraged Mr Harper from proceeding further and, even if they did not, they would have increased the prospect of that occurring.
23. So far as the question of discretion is concerned, such factors as exist reinforce the conclusion that, if Owen White had been liable for breach of trust, they should not have been granted relief. P&P Property is not, as I understand it, insured against the fraud, and incurred a liability to City & Western in respect of the loan for the purchase price. It also incurred a potential liability to the true Mr Harper as a result of the work that it carried out on the property. No submissions have been made as to whether P&P Property might have or have had a potential claim against Peter Brown & Co. and nothing in this judgment should be taken as expressing any views on that issue one way or another. In any event, I do not consider that, even if such a claim were to exist, it would provide a reason for exercising the court’s discretion to grant relief to Owen White.

*Negligence*

1. Whilst, in my view, Owen White would have failed to demonstrate that it was entitled to relief under section 61, I have concluded that Ms Lim would not have been negligent for the purposes of breach of any duty of care.
2. A trustee is not entitled to relief under section 61 merely because they can show that he did not act in a way in which no reasonable trustee would have acted. Equity has higher expectations of a trustee and the burden of showing that he acted reasonably in the relevant sense falls on the trustee. Whilst, in my view, Ms Lim would have fallen short of that standard on this occasion, she was not also negligent.

# Causation, quantum and contribution

1. There are also potential issues of causation and quantum, as well as potential claims for contribution by Winkworth against Owen White and by Owen White against Winkworth in the event that P&P Property’s claims succeeded against them. However, given my conclusions in relation to liability, I do not consider it necessary to lengthen this judgment further by addressing them.

# Conclusions

1. For the reasons set out in this judgment, whilst I have considerable sympathy for the position that it has found itself in, I have concluded that P&P Property’s claims against Owen White and Winkworth for breach of warranty of authority and negligence fail and that its claims against Owen White for breach of trust and breach of undertaking also fail.