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Judgment: approved by the Court for handing down | *Delivered:* **29.06.2016**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

BANK OF SCOTLAND PLC

Plaintiff/Respondent;

-and-

CHARLES CHRISTOPHER MALLON
BY LIAM J MALLON HIS APPOINTED ATTORNEY

First Defendant/Appellant;

-and-

LIAM J MALLON

Second Defendant/Appellant.

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Before: Morgan LCJ, Weatherup LJ and Weir LJ

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WEIR LJ (delivering the judgment of the court)

The Nature of the Appeal

[1] The appellants appeal against a decision of Deeny J whereby he gave judgment for the plaintiff in its claim for possession of a dwelling house and lands at 1 Kennedies Road, Killylea, Armagh ("the property") and further for monies due on foot of a mortgage of the property. By order of 6 September 2012 the second defendant, who is the father and attorney of the first defendant, was added by Master Ellison as a defendant in his own right. The proceedings commenced by way of originating summons but by order of Deeny J of 19 November 2012 were converted to a writ action. The plaintiff is the successor in title to Halifax plc.

The background

[2] The first named defendant ("CM") who was at the time a student, made a self-certified mortgage application to Birmingham Midshires, a division of Halifax Plc ("the lender"), seeking an advance of £349,000 ostensibly to purchase the property for his own occupation. In that application, which was made through his uncle, Damien Mallon ("DM"), who was a registered mortgage advisor, he falsely asserted that he was permanently employed as a solicitor in the firm of LJ Mallon & Co. He claimed that he was not related to his employer whereas the principal of that firm was in fact his father Liam J Mallon ("LM") the second named defendant and also CM's attorney in the present proceedings. CM further falsely claimed that he was in receipt of a salary from his employment of £100,000 per annum. His signature on that application was certified by DM. Based upon that bogus information the lender made an offer of advance ("the first offer") on 22 September 2006 in the sum of £350,000, which offer of advance was sent both to CM and to DM.

[3] Certain of the terms of the offer are especially instructive:

> "2. Which service were you provided with? DM recommended that you take out this mortgage. If you have any queries about this service you should contact DM. Birmingham Midshires is not responsible for the advice or information you received.
>
> 3. Declared income £100,000. This offer is based upon your declared income. If the figure is incorrect you must notify us immediately by telephoning [X] and you must not proceed with the transaction without our prior approval. It is an offence to make a false, inaccurate or misleading declaration …
>
> 13. Using a mortgage intermediary. BM will pay £1,850.22 in procuration fees and inducements, which will be split between St James' Place Partnership and DM if you take out this mortgage."

[4] At the same time as the offer was sent to CM and to DM, LM's firm was instructed by the lender to act for it in the mortgage transaction and a copy of the letter of offer was enclosed with those instructions.

[5] LM was obviously at all times well aware that his son CM did not have an income of £100,000 and that his declaration to that effect was fraudulent as was his denial of a relationship with the alleged employer. Notwithstanding that knowledge and the fact that his firm had been instructed by the lender to act for it and therefore to safeguard its interests, LM said and did nothing but allowed the fraudulent

mortgage application to proceed, the Mortgage Deed being executed on 2 October 2006 and witnessed by LM's assistant solicitor who was also the wife of DM and therefore the aunt of CM. The documents of title were sent to the lender by LM's firm on 20 April 2007 under cover of a letter bearing LM's personal reference. Again nothing was said by him to alert the lender to the true state of affairs.

[6] Why did LM behave in this dishonest fashion so as to allow the advance to be obtained on the basis of a seriously misleading representation by CM? The explanation emerges from the affidavit of LM sworn on 2 May 2012 in which he averred that:

> "On completion of the conveyance of the premises, I took up occupation with my wife and my son. Initially, we lived together as a family. However, in 2009, my son left Northern Ireland to take up employment abroad. He currently resides in New Zealand. I have since continued to reside in the premises with my wife. The premises are our only home."

and further:

> "My son does not currently live in the premises and does not make any contribution towards the mortgage or other financial liability in respect of the premises. It was always intended that I would pay the mortgage instalments."

[7] From this it clearly emerges that CM was never intended to benefit from the funds raised by this mortgage. The application was a sham in that it was made in his name when the intended occupier was LM, his earnings were falsely stated as LM must have known and it was always intended that LM would make the mortgage repayments. None of this, all of which was within LM's knowledge, was made known to Halifax, whose interests LM's firm had been paid to protect.

[8] Not content with having obtained £350,000 in this way, a second application to raise further money on foot of the same mortgage, this time £100,000, was made during 2007, purportedly for the carrying out of "home improvements". Again DM was the intermediary or mortgage advisor and again CM was said in the application to have a salary of £100,000 although on this occasion enhanced by a claimed bonus of £10,000 per annum. Since he was in this application described merely as "a trainee solicitor" with LM's firm the apparent improvement in his already considerable employment good fortune was all the more remarkable. However no one at the lender's offices seems to have noticed this singular circumstance if indeed anyone there examined the application at all.

[9] Predictably, this second fraudulent application produced, on 3 August 2007, an offer of a further advance. It contained the same significant terms as in the first offer document as noted at [3] above and again was copied on the same date to DM. On this occasion the amount of cash and benefits paid to DM and another intermediary was £508. It emerged in the course of the evidence of LM before Deeny J that the £100,000 thereby obtained was not in fact used for "home improvements" but rather, as conceded by LM himself, "mostly to buy blood stock".

[10] Although LM has deposed that he always intended to pay the mortgage instalments the lender was never advised of this and while LM did make the payments until about November 2010 he then ceased to do so with the result that, following unsatisfied demands for the arrears, proceedings were commenced on 17 May 2011 against CM and LM as his attorney on foot of an enduring power of attorney given to him by CM before the latter had departed abroad. CM appears to have taken no personal part in the proceedings before the Master or Deeny J and similarly took no part before us.

The proceedings before Deeny J

[11] At this stage CM and LM had the benefit of counsel with Mr Coyle appearing for them and Ms Simpson QC for the lender. It appears that a miscellany of matters was initially advanced by way of purported defence to the claim but ultimately these were narrowed by Mr Coyle to the two themes recorded by the judge:

> "1. Was DM an agent of the plaintiff with actual or ostensible authority thereby binding his principal [the lender] by his actions?
>
> 2. If DM is found as a matter of fact to have been an agent of the plaintiff at the material time, as the defendants contend, does the public policy and principle encapsulated in the maxim *ex turpi causa non oritur actio*, operate in this action to prevent the plaintiff recovering possession and any short fall following its sale of the premises as a trustee for the first defendant?"

[12] As appears from the lengthy transcript the learned judge heard a good deal of evidence as to whether DM was indeed the agent of the lender. The case made by LM was that his brother DM was "unquestionably an agent in his mind" and in support of that view he produced various letterheads and compliments slips of some vintage pertaining to DM in which he was described, inter alia, as an 'agent for Halifax Building Society'. LM said that DM had told him that Halifax had paid to refurbish business premises of his and that having transacted thousands of mortgages with Halifax over the years he had always dealt through DM. He said he would never go to the central core of Halifax save on issues of title or other matters

regarding the issue of the loan or security. Therefore, because DM knew that he, LM, would be living in the house and not CM that meant that Halifax knew. He acknowledged however that the letters of offer from the lender said that they were not responsible for DM and that a clear distinction was made in Section 2 of each of the offers between the roles of DM and the lender and that mortgage intermediary fees were in each case paid to DM, shared for the first loan with an entity known as "St James' Place Partnership" and on the second with another entity known as "M&E (LIME)" which both appear to be "umbrella" intermediaries under which DM carried on his own activities as an intermediary.

The decision of Deeny J on the Question of Agency

[13] The judge found that the relationship between the lender and DM was not that of principal and agent and that DM did not have ostensible or apparent authority on which LM could rely. He said this at paragraph [22] of his judgment:

> "It seems striking to me that, despite his evidence that he had arranged thousands of mortgages with his brother up to and after 2006, he produced no letter from his brother from the relevant period indicating an assertion that he was an agent of the Halifax or Birmingham Midshires or anyone else. The few documents he did produce were of some antiquity. Independently of that Liam Mallon was not some elderly person lulled into a false sense of security by the recollection of Damien Mallon having been an agent of the Halifax in the past. He was a practising solicitor. He was the solicitor for both the lender and the borrower here. In truth he was the borrower using his son as his agent, in effect. He had the duty to understand and, if proper, implement the contract to be entered into by the parties. If, as he says he did, he read the application form which had been submitted and the documents which were forwarded to him for conveyancing purposes, he could not properly have concluded that Damien was still an agent of the Halifax, as Liam Mallon repeatedly described him. Whether he was being disingenuous in saying that or whether he had convinced himself I need not determine. Even a lay person reading this form and the other written materials would see that the lender was not accepting Damien Mallon as its agent. For these and the other reasons advanced by Ms Simpson QC I find, in answer to Mr Coyle's first question that Damien Mallon was not an agent of the

> plaintiff with either actual or ostensible authority to bind it as his principal."

[14] The judge then turned, on the assumption that he was wrong to conclude as he had on the agency question, to consider in some considerable detail whether, if DM was in fact the lender's agent with authority to bind it as his principal, either defendant could rely upon a defence of illegality. Having reviewed the applicable law and the evidence bearing on the question he concluded that the defence of illegality was not available to either of the defendants. As will later appear, we have not found it necessary to examine this second element of defence to the lender's claim.

The Appeal to this Court

[15] Ms Simpson again appeared for the lender whereas on this occasion LM appeared in person on his own behalf and that of CM. He sought to use the opportunity to canvas a melange of both novel contentions and old points that had been abandoned by his counsel at the trial before Deeny J. This court therefore confined him firmly to the two areas that had been those agreed for the judge's decision, namely agency and illegality. The essential thrust of his argument on agency before this court was that the learned judge had erred in concluding that DM was not the agent of the lender for either of these loans. He repeated his claimed belief that DM was not an independent financial advisor but rather a Halifax agent. He again accepted that the terms of the letters of offer did not support his argument that DM was other than an intermediary but nonetheless insisted that DM was a Halifax agent as he considered the printed letterheads and compliments slips produced at the trial demonstrated.

[16] The answer to any apparent conflict of roles on the part of DM is to be found in the transcript of the hearing at page 994 *et seq* where Mr Ellson, a witness on behalf of the plaintiff, explained that on the one hand there was the intermediary status of DM in relation to mortgage business where he could seek to place business with any lender he chose and on the other hand there was the quite separate and distinct status of a Halifax agent which would "authorise him to conduct counter-transactions, cash handling, opening of savings accounts, things of that nature for Halifax customers, through his premises".

[17] This court finds that the judge was perfectly entitled on the evidence to conclude that in relation to neither of these advances was DM acting as an agent of the lender, whatever other business he may previously or since have transacted as a "Halifax agent". Similarly, for the detailed reasons that he gave in the passage quoted at [13] above, he was also perfectly entitled to conclude that LM was fully aware of the true position. There is no legal or evidential basis upon which this court could properly depart from the judge's conclusions as they were plainly open to him on the evidence. However our own examination of that evidence, both oral

and documentary, leads us also to positively conclude that the judge's conclusions in relation to agency were incontrovertibly correct.

[18] In those circumstances we find it unnecessary to visit the potentially interesting area of illegality and resist the temptation to do so.

[19] We accordingly affirm the order of Deeny J against both defendants that possession of the property be delivered up to the plaintiff and that there be judgment for all sums due on foot of the mortgage by way of principal and interest until this date. Because, as Deeny J explained, LM accepted in evidence that it was he and not CM who had actually received the benefit of the monies lent, we order as did the judge that the judgment for the monies be against LM alone. For the same reason we make no order as to costs against CM. We will hear the plaintiff and LM in relation to the question of costs as between them.