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Judgment: approved by the Court for handing down | *Delivered:* **30/04/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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THE MORTGAGE BUSINESS PLC AND BANK OF SCOTLAND PLC (TRADING AS BIRMINGHAM MIDSHIRES)

-and-

THOMAS TAGGART AND SONS

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DEENY J

[1] The plaintiffs herein seek delivery up of files held and retained by their former solicitors, the defendant firm. The files relate to 28 properties on which the plaintiffs in one or other of their manifestations, including Halifax plc, held mortgages. In each case the defendant acted both for the plaintiff and for the borrowers and purchasers of the properties.

[2] Mr Keith Gibson appeared for the plaintiffs and Mr William Gowdy for the defendants. The court had the benefit of written and oral submissions from both counsel which I have taken into account whether expressly referred to or not. The plaintiffs' application is brought under the inherent jurisdiction of the court and the power of the court under Article 71C of the Solicitors (NI) Order 1976 to order the delivery by a solicitor of any document in his possession, custody or power.

[3] Prior to or at the hearing there was some modest measure of agreement about the categories of documents in dispute between the parties. The defendant agreed to disclose any documents deducing title and any correspondence between the defendant and the Land Registry of Northern Ireland relating to the properties. The plaintiffs agreed not to pursue disclosure of extracts from the account ledger which they accepted belonged to the defendant solely.

[4] The specific documents sought were not set out in the originating summons but were set out at paragraph 55(a) of the affidavit of Katherine Kimber, of 31

October 2013. Four of the seven categories sought therein are still in dispute, namely:

(i) Correspondences (sic) between the Defendant and the Plaintiffs.

(iii) Pre-completion searches.

(vi) Correspondence between the Defendant and the Borrowers.

(vii) Any other relevant documents/correspondence.

[5] The general approach is summed up in a pithy fashion at *Halsbury's Laws of England, 5th Edition, Volume 66, paragraph 7.85*. 'Ownership and Use of Documents'.

> "Documents coming into existence in the course of business transacted under a retainer, and either prepared for the benefit of the client or received by the solicitor as agent for the client, belong to the client. However, documents prepared by the solicitor for his own protection or benefit, and letters written to the client by the solicitor, belong to the solicitor."

Similarly, I am of the view that there is no general right of the lender, where the solicitor is acting for both the borrower and for the lender, to see everything in the file pertaining to borrower as well as lender. Nationwide Building Society v Various Solicitors [1999] P.N.L.R. 52. As will be seen below the plaintiffs here say their position has been enhanced by the borrowers' execution of a mortgage deed and mortgage conditions.

[6] I propose to deal with item (i) first. The exchange of correspondence between the parties to these proceedings is of its essence not confidential between the two parties. They came into existence because the plaintiffs as clients instructed the defendant as solicitor. As a general principle it seems to me that the client should be entitled to ask for copies of this correspondence, if it has lost the same. It may be that that is also the case if it is unsure if it has a full set of correspondence. It could therefore ask to inspect the correspondence file and take copies of any correspondence which it did not have. However, this right as a client is qualified by the fact that the originals of the correspondence from the solicitor will have been sent to the plaintiffs and the plaintiffs should have retained copies of any replies they gave to the defendants. They are therefore putting the former solicitor to trouble and expense in completing lacunae or possible lacunae in the plaintiffs' own management of its records and affairs. It seems to me, therefore, that the plaintiffs, if they aver that their own files are believed to be incomplete, are entitled to see and copy these but would have to pay the professional fees of a solicitor to the extent that a solicitor has to spend time checking the files and of clerical assistance to the extent to which that is required in the course of furnishing copies.

[7] Mr Gowdy resists the approach I have outlined above on the basis of the judgment of Jessel M.R. in In Re Wheatcroft (1877) 6 Ch. D. 97. In that case the applicant, who was the legal personal representative of a deceased testator, had employed Mr Wheatcroft as her solicitor in business connected with the administration of the testator's estate until October, 1876 when she ceased to employ him, paid him his bill of costs, and transferred the business to other solicitors, to whom Wheatcroft handed over the deeds, books, papers and writings relating to the said business. The question arose whether Wheatcroft was entitled to retain certain original letters written to him by the applicant in connection with the business, and also copies of his own letters to the applicant in his own letter book. In a splendidly succinct judgment Jessel M.R. held that the solicitor was entitled "to retain the letters from the client and the copies of his own letters in his letter book, as such letters and copies were his own property". I respectfully accept the decision of Jessel M.R. but I do not think it assists the defendant here. The solicitor's own letter book would indeed be his own property. As the very word implies it would consist of the letters that had come into him, presumably in any particular case, and copies of his replies. In the unhappy event of any legal dispute it might be of assistance to have the physical letter book and show that a reply was written to a particular letter. I can well see that that book would remain the property of the solicitor. But that does not preclude the plaintiff whose records are incomplete from asking to have copies of the correspondence with his former solicitor, subject to paying the necessary costs involved. In case there is a dispute about the authenticity of an original letter from the plaintiffs to the defendant the defendant should be entitled to retain such originals; likewise with original copies if they exist although in this day and age they may only exist electronically. But Wheatcroft does not seem to me good authority against the former client having access to copies of the correspondence and I so rule.

[8] I turn to (iii) Pre-completion searches. The defendant states that these were forwarded to the plaintiffs and the defendant has not retained them. These pre-completion searches, which are necessary for the protection of the borrower but which are also of assistance to the lender, are in practice sent to the lender as Mr Stephen Wilson avers in his affidavit of 11 December 2013. But if the plaintiffs have not kept the pre-completion searches, as quite possibly they have not, having forwarded them to the purchaser/borrowers after inspection, are they entitled to get them from the defendants? I would be inclined to the view that they are so entitled, again on payment of proper professional costs. However, counsel states on behalf of his client that the defendants do not have these searches. Given that the defendant and its constituent partners are officers of the court I am inclined to accept that. If the plaintiffs dispute that I will order an affidavit to that effect from the defendant but the plaintiffs may well be liable in costs incurred in that regard. In any event I will only order such an affidavit from the defendants if the plaintiffs aver that they no longer have these searches and have not retained copies.

[9] The main issue in contention at the hearing related to items (vi) and (vii) i.e. correspondence between the defendant and its other clients, the borrowers, in each

case and any other relevant documents and correspondence. By way of background the defendant pointed out that although it had accepted a retainer from the lender it is only paid by the borrower. It was contended on behalf of the defendant that, notwithstanding that, the purpose of the plaintiffs' application in this case, and similar applications are pending against other solicitors, is to fish through the documents to see if a case can be brought against the defendant solicitors. The court was informed that in each of these cases the borrowers had fallen into arrears and the properties had been sold, almost invariably at a loss to the lender. The defendant says that the lender is now casting about to try and reduce its loss by suing the solicitor. An example of such a case is Mortgage Express Limited v Bowerman and Partners [1996] 2 All ER 836. There the defendant solicitor was acting for both the purchaser and the lender, as is common. The lender was lending £180,150 to H who wished to purchase a property for £220,000. There was a valuation of the property at £199,000. The solicitor became aware that the vendor himself was purchasing the property for £150,000 and selling it on simultaneously to H for the significantly higher figure. The solicitor warned H of this but he did not tell the lender. H later defaulted on the loan after one payment and the property was repossessed. It was resold for only £96,000 leaving the lender with a substantial loss. The lender successfully sued the solicitor in negligence for failing to inform it of the circumstances just outlined.

[10] Counsel for the plaintiffs does not dispute that the plaintiffs have such an outcome in mind, without at this stage having any grounds to criticise the defendant. Indeed, as the properties have been successfully resold the solicitor had discharged its primary duty of ensuring that the purchaser had got good title for the money thus protecting the lender as well.

[11] What the plaintiff really wants, as indicated in paragraph 12 of Miss Kimber's affidavit, is to see whether the solicitor discharged all of their legal duties. They hope to prove a case along the lines of the judgment of the Court of Appeal in England in Mortgage Express Ltd v Bowerman & Partners. The solicitor in these circumstances owes duties to parties, borrower and lender. It does not seem that the lender is entitled at common law to see the correspondence between the solicitor and his client the borrower/purchaser for which the latter enjoys legal professional privilege.

[12] However, here the lenders required the borrowers to sign mortgage deeds with conditions which they say are highly relevant. One clause of those, at 16.1, reads as follows:

> "By way of security you appoint us, and (as a separate appointment) any receiver we appoint, to be your attorney. You cannot cancel this appointment until the money secured by the mortgage is paid off in full. Your attorney will be authorised to act in your name

> and on your behalf and will have the following rights."

The right of particular relevance here is at 16.1(d) (page 125 of the trial bundle).

> "To instruct anybody (such as a solicitor) who has any documents or accounting information (including tapes, films or computer records) about the property or the ownership of the property to let us look at them, take copies of them and ask for them to be sent to us."

[13] The wording of the Power of Attorney differs slightly between the different versions of the mortgage conditions but it is agreed between the parties that the effect is the same.

[14] Powers of Attorney are to be construed strictly. See Bowstead and Reynolds on Agency at 3-101. It was the submission of counsel for the defendant that the powers in this Power of Attorney did not extend to the kind of "fishing expedition" that the plaintiff here was intent upon. He submitted that there was no difficulty with the security here as the lenders had succeeded in reselling all 28 of these properties after the borrowers had defaulted and therefore the solicitor had discharged his duty by ensuring that the lender had good title to enable it to do so.

[15] However, Mr Gibson contends that that is not a proper construction of the phrase "by way of security". He, in effect, submitted that the issue of security was not confined to good title to the property but to the valuation of the property on which the lenders had lent money. The security for the loan was the building which the loan was to be used to purchase. If, as in Bowerman, the value of the security was in reality far less than was being represented to the lender that prejudiced the security to the lender and, if the solicitor was aware of it, should have been communicated to the lender.

[16] It seems to me the phrase "by way of security" in Clause 16 is not confined to the time of the appointment but covers the on-going situation until repayment of the loan; that is the "purpose for which the authority is given". Attwood v Munnings (1827) 7 B & C. 278, at 284. I consider that the plaintiff is right and that "security" does include the value of the property and is not confined to good title. Good title is worthless if the property is worthless.

[17] The third sentence of 16.1 was debated; see [12] above. The plaintiffs here claim they are "authorised to act in your name and on your behalf" and in that capacity can ask to see the borrower's correspondence with their then solicitors. The plaintiffs accept that without such a clause they would not be entitled to see that correspondence but they were careful to include this clause in the mortgage deeds.

[18] The point of interpretation arises about the phrase "on your behalf". There is no doubt that the plaintiffs are acting in the name of the borrower. I find that their enquiries are "by way of security". Are they acting "on your behalf" i.e. the borrower's behalf? If that means "for your benefit" an interesting argument arises. Mr Gowdy submits, persuasively, on the authority of Howkins & Harrison (a firm) v Tyler and another, E.W.C.A., 12 July 2000, per Sir Richard Scott VC, that no benefit will accrue to the borrower by a successful action by the plaintiffs against the solicitor arising out of an opportunity to inspect the files. However, I have come to the conclusion that I need not pursue the interesting issues that arise there. It seems to me that on a proper reading of 16.1, taking into account the nature of the deed generally and the intention of the parties, that the plaintiffs herein are not confined to pursuing matters for the benefit of the borrower. I have drawn attention to the first and third sentences of 16.1 already. The fact that the second sentence prohibits the borrower from cancelling this appointment of the lender as attorney "until the money secured by the mortgage is paid off in full" makes it clear that this clause is for the benefit of the lender. The Power of Attorney is removed by redemption in full. Until then the lender can use this clause to try and recover its money. It seems to me that the words 'on your behalf' are to a degree otiose or tautologous in the third sentence. That might sometimes point to them having an alternative meaning which is not otiose but it seems to me that would be against the thrust of the whole of Clause 16 and the deed and the relationship which in reality existed between the lender and borrower. "On your behalf" here need not and does not mean 'for your benefit'. I need not, therefore, venture further down that road.

[19] I consider that the plaintiff is entitled to rely on 16.1(d) of the Power of Attorney. I find that the requests are "about the property or the ownership of the property" i.e. these are documents about how the borrower with the assistance of the lender obtained ownership of the property. The plaintiff, therefore, is entitled to look at them, take copies of them or ask for them to be sent to them.

[20] In reaching that conclusion I need not distinguish nor disapprove, as Mr Gowdy invited me to do, either of the decisions at first instance in England in Mortgage Express Ltd v Sawali [2010] EWHC 3054 (Ch.) and Mortgage Business plc v Oliver & Co. (a firm) [2013] EWHC 3240 (QB).

[21] It is not necessary, therefore, for Birmingham Midshires to rely on the express clause it had in the Consents relating to Properties 7, 15, 18, 19, 21 and 26.

[22] However, it does seem to me that the defendant is entitled to be paid for its time if asked, as here, to send the documents to the plaintiff. I consider that a solicitor is entitled to charge his normal professional fees for going through the files and selecting what is to be disclosed on foot of this Order. He is also entitled to charge for his secretary's time in photocopying any materials that are sent and for the postage or delivery costs. If the plaintiffs choose to inspect and take copies they will still be liable for any reasonable costs incurred by the defendant as a result of the search, including the presence of a solicitor in the room while the files are being

inspected. As the solicitor's professional conduct is being challenged that seems a reasonable precaution for them to insist on, if they so choose, to avoid any suggestion of a document being introduced from another file or elsewhere, and one for which the plaintiffs should pay, in advance, at the normal professional rate charged by the defendant.