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Judgment: approved by the Court for handing down | *Delivered:* **21/11/2016**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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BETWEEN:

CAPITAL HOME LOANS LIMITED

Appellant/Plaintiff;

-and-

HEWITT AND GILPIN SOLICITORS LIMITED
(SUED AS A FIRM)

Respondent/Defendant.

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Before: Gillen LJ and Weatherup LJ

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WEATHERUP LJ (delivering the judgment of the court)

[1] This is an appeal from the decision of Horner J dated 15 February 2016, neutral citation [2016] NIQB 13, holding that the defendant solicitors were in breach of their duty to the appellant client, a lending institution, but that the appellant had failed to prove that the solicitors' breach of duty caused any loss to the appellant. Mr Gibson appeared for the appellant and Mr Good QC and Mr McMahon for the defendant solicitors.

The transactions financed by the appellant.

[2] George Young was the owner of 7 properties in Belfast which he had acquired for investment purposes subject to mortgage. Mr Young was a shareholder and director of Nendrum Properties Limited ("Nendrum") and on advice he decided to transfer his 7 properties to Nendrum. For the purposes of the transaction he engaged the defendant as solicitors. Finance for the transaction was agreed with the appellant who carried on business as a secured lender. The appellant also engaged the defendant as solicitors.

[3] At the hearing of this action the parties focused on one particular transaction as illustrative of all. The completion of the mortgage application form was confusing as to the identity of the parties to and the nature of the transaction. While there were references to George Young and to Nendrum, the application form was inconsistent in identifying the applicant for the mortgage. Further, the application form was inconsistent as to whether the transaction involved a purchase of the properties by Nendrum or a re-mortgage of the properties. Horner J stated at paragraph [6] of his judgment that there were enough clues on the application forms as to who owned the properties and the nature of the transactions for a competent underwriter to understand that George Young was transferring the properties to Nendrum and hence, for example, stamp duty had to be paid.

[4] A number of features of the transactions may be identified. The loan to value (LTV), that is, the proposed amount being lent compared to the value of the properties, was in each case less than 50%. The properties were purchased by Nendrum with the aid of the mortgage monies from the appellant. The balance of the purchase price was not being paid in cash but in the form of issued share capital in Nendrum. The consideration in the form of issued share capital did not go through the solicitors' client account. Part of the mortgage monies forwarded by the appellant was used to discharge the stamp duty due by Nendrum on the purchase of the properties and other outgoings. Hence some 5% of the total consideration was utilised to discharge costs of the transactions.

The judgment of Horner J.

[5] Horner J found that the solicitors were in breach of duty to the appellant in not complying with the terms of their retainer, which included the letter of instruction and the CML Handbook, in not informing the appellant of a number of matters. First of all, that the transactions involved a sale of the properties from Young to Nendrum, subject to mortgage. It was not a re-mortgage. Secondly, part of the consideration involved shares in Nendrum rather than cash, when the value of the shares was not known and the consideration in the shares was not going through the solicitors' client account. Thirdly, the full purchase price was not being paid, as part of the mortgage monies was being used to discharge stamp duty and other

outgoings, amounting to 5% of the full consideration, with the result that this was a sale at an undervalue. Fourthly, the vendor's legal costs were being paid out of the mortgage monies, which Horner J stated would amount to a "kick back".

[6] Horner J concluded that the appellant's underwriting department knew that this was a sale of the properties by Young to Nendrum and not a re-mortgage of the properties by Young or Nendrum. He expressed the view that, in the state of the market at that time, the appellant would have advanced the money even if it had not known and could not have known that it was a sale to Nendrum.

[7] Horner J proceeded to consider whether the solicitors' breach of duty caused loss to the appellant, taking account not only of the transactions being sales of the properties but also of part of the consideration being in shares and part of the advance being used to discharge stamp duty and legal fees so as to constitute a sale at an undervalue. The issue became whether, had the appellant been aware of the full particulars of the transactions, the appellant had proved that it would not have advanced the mortgage monies. The appellant was found not to have discharged the burden of proving that it would not have advanced the mortgage monies and therefore failed to prove that a loss had been sustained as a result of the solicitors' breach of duty.

[8] Horner J was critical of the appellant on the basis that relevant witnesses were not called to deal with the issue of causation. The evidence relied on by the appellant on the issue of causation was that of Ms Macleod, the appellant's litigation specialist, Mr Bloomfield, the appellant's expert witness and the appellant's lending documents. Horner J stated that a deliberate decision had been taken not to call the underwriter(s) responsible for a decision to make the advance and speculated that the relevant witness was not called because the appellant did not want to concede that it knew full well the true nature of the transactions and as a consequence the court was left in the dark. The Judge considered that neither Ms Macleod nor Mr Bloomfield could know what the underwriter(s) knew or thought at the relevant time. Horner J concluded that, on the evidence, the appellant had failed to discharge the onus of proof on the issue of causation.

The grounds of appeal.

[9] The appellant's extensive grounds of appeal are that Horner J was in error:

(i) In finding that the failure to call evidence from the relevant underwriter was fatal to the appellant's claim.

(ii) In that the conclusion that the appellant would have proceeded with the transaction was not supported by the evidence.

(iii) In that the conclusion that the plaintiff had not proved causation ignored and failed to take into account properly or at all (a) the oral

evidence given by the appellant's witnesses, (b) the appellant's underwriting manual, (c) the appellant's underwriting file and (d) the evidence of the solicitors' expert.

(iv) In holding that the giving of evidence by an underwriter involved in the transaction was a prerequisite to establishing causation.

(v) In that the conclusion that the appellant had deliberately decided not to call a member of the original underwriting team was not supported by the evidence.

(vi) In that the conclusion that the underwriters knew that this was a sale of properties by Young to Nendrum was not supported by the evidence.

(vii) In that the conclusion that the underwriters knew this was a sale of properties by Young to Nendrum was inconsistent with the finding that the underwriters must have turned a blind eye to what was happening.

(viii) In that the findings of fact that (a) the transaction was at an undervalue (b) it was accepted by both experts that no reasonable lender would have advanced monies if there was a transaction at an undervalue (c) the appellant was a reasonable lender, are consistent with the appellant having proved causation and the decision to the contrary was perverse.

(ix) In giving undue weight and influence to the entry on the mortgage application form pertaining to capital raising to pay off stamp duty and ignoring or properly failing to take into account the appellant's evidence.

(x) In coming to a conclusion that contributory negligence applied to the appellant's claim.

(xi) In failing to take into account properly or at all the appellant's submissions on the issue of contributory negligence and/or failing to properly consider any of the authorities.

(xii) In concluding that the plaintiff had failed to mitigate its loss.

(xiii) In ignoring or failing to take into account properly or at all that the guarantor was in an insolvency and in holding the appellant had failed to mitigate its loss.

(xiv) In considering the evidence as to underwriting on the issue of undervalue.

(xv) In giving undue weight to his conclusion that stamp duty was an integral part of purchase monies advanced and not a re-mortgage.

(xvi) In rejecting expert evidence.

(xvii) In ignoring or properly failing to take into account that shares were being utilised as part of the consideration for the transfer and sale to the purchaser and that such consideration was prohibited.

[10] By agreement of the parties, grounds (xii) and (xiii) do not require consideration on this appeal. The main grounds of appeal concern the interconnected matters of the evidence of causation and the state of knowledge of the appellant's underwriters. Finally there is the issue of contributory negligence at grounds (x) and (xi).

The approach of an appellate court.

[11] As to the approach of an appellate court to the findings of fact or inferences drawn by the trial Judge, it was stated by Kerr LCJ in McClurg and Others v Chief Constable of the RUC [2009] NICA 37 (*italics added*) -

> "[42] Where a judge has to form an impression of, for instance, the authority of a witness on a particular issue, his judgment on this should be accorded respect (by the Appellate Court), even if it does not involve an assessment of whether the witness is being honest and truthful. Therefore, on an appeal in an action tried by a judge sitting alone, *the burden of showing that he was wrong in his decision as to the facts lies on the appellant and if the Court of Appeal is not satisfied that the judge was wrong, the appeal will be dismissed* – Savage v Adam [1895] WN (95) 109 (11). On the other hand it is the court's duty to consider the material that was before the trial judge and not to shrink from overruling the judge's findings where it concludes that he was indeed wrong - Coghlan v Cumberland [1898] 1 Ch 704.
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> [43] Where the appeal focuses not on the judge's findings of primary facts but *on his analysis of those facts and the drawing of inferences from them, the Appellate Court is generally in as good a position as was the trial judge to conduct its own analysis and to reach its own conclusions.* The reason that I say that this is generally the case is that there will be occasions where the drawing of inferences and the reaching of

> conclusions on them will be dependent, to some extent, on subjective impression. Thus, whether a particular witness's opinion should be deemed to carry more weight than another's may depend not only on an analysis of the content of his evidence but also on the manner of its delivery. In such a situation, the trial judge enjoys an advantage over an Appellate Court which should be reflected in the latter's reticence in reversing the judge's conclusions."

The discharge of the burden of proof on causation.

[12] The discharge of the burden of proof on causation was considered in Goldsmith William Solicitors v E Surv Limited [2015] EWCA Civ. 1147. On a sale of property, surveyors overvalued the property. Solicitors failed to inform the lender of discrepancies in the particulars of the history of the property. The lender's claim against the surveyors for negligent valuation of the property was settled. The surveyors brought contribution proceedings against the solicitors. The Court of Appeal found that the burden of proof was on the surveyors to establish that the solicitor's breach of duty was a cause of the lender's loss and that the surveyors had failed to discharge that burden -

> "[45] In the absence of evidence from at least one of the underwriters making the decision for the lender, and without any Lending Manual that might have indicated what action should be taken when information such as that in the present case comes into the possession of the lender, the judge was driven to speculate what would have happened if the solicitors had informed them of the date and price of the borrower's purchase of the property….
>
> [48] …. It was for the surveyors to establish that the solicitors' breach of duty was a cause of the lender's loss. It was of course open to the solicitors to adduce such evidence as they considered appropriate on the issue of causation, but it could not be held against them that they did not do so. It was for the surveyors to secure the evidence they required, if necessary by the issue of a witness summons against a relevant witness….
>
> [49] …. In my judgment, the surveyors did not prove that the lender would have reacted to the information that the solicitors should have provided

on the purchase price and date of purchase of the property, which was not materially different from the information given to them by the borrower…."

[13] Mr Gibson for the appellant relied on the reference above to evidence being provided either by the underwriter or by the production of the Lending Manual. He contended that, while the evidence of the underwriter was not available in the present case, the evidence of the Lending Manual was available. Accordingly he contended that if proper regard had been had to the contents of the Lending Manual it would have been evident that, had the solicitors informed the appellant of the full particulars of the transactions, the mortgage monies would not have been advanced by the appellant.

The contents of the Lending Manual.

[14] Capital Home Loans Limited Lending Manual dated 13 August 2007 included the following -

"2.6 Builders Deposits/Cashback/Incentives

- Any incentives given will be deducted from the Purchase Price/Valuation, before the maximum loan is calculated.

2.18 Sale Under Value

A sale at undervalue occurs where the purchase is lower than the market value of the property. This could relate to our transaction or a previous transaction at apparent undervalue which completed within the last 5 years.

Our concern here is that there may be an underlying reason why the property is being sold at a price lower than the value. Examples of reasons for this may be:

a. Parents are selling to children for a lower price to help them get a 'foot on the ladder'.

b. Someone is moving abroad and wants a quick sale.

c. Someone is being pursued by creditors and needs to make cash quickly or free themselves of assets – they may be heading for bankruptcy.

Examples a and b are acceptable but c is not, however we need to treat them all with the same level of caution and protect ourselves against the future possibility of our transaction being set aside and the property being returned to the original vendor.

We will do this by obtaining protection under the provisions of the Insolvency (No 2) Act 1994.
However, unless the solicitor knows the parties, it is unlikely that they will be satisfied that the parties are acting in good faith. If they have any doubts about this they must obtain:

- An insolvency Indemnity Policy and it is their responsibility to check that this policy provides us with adequate protection under the Insolvency Act.

- Clear bankruptcy searches on all parties to the transaction.

In the Buy to Let market, Directors transferring a property into the name of their Company or vice versa. This often done for tax reasons, we would:

- Treat this type of transaction as a purchase (two separate legal entities).

- Would still expect this transfer/sale to be at full market value.

5.3 Remortgage Purposes

- We will consider a remortgage for any purpose up to the maximum published LTV.
- We will lend against the current value of the security. As long as the property was purchased over six months ago."

[15] Mr Good QC for the solicitors contended that the actions of the underwriters cannot be determined simply by the wording of the Lending Manual as there was flexibility in the appellant's decision-making process. Horner J had referred to an aspect of this at paragraph [42] of his judgment where he stated that it was clear that the appellant was prepared to relax the standards set out in its Lending Manual in two respects. First of all, in relation to occupancy by DHSS tenants of three of the

properties, where paragraph 4.5 of the Lending Manual deals with income that can be considered and excludes certain rental income such as state benefits. Secondly, in relation to the ratio of rental payments to interest after the concessionary period has expired, where paragraph 5.4 of the Lending Manual provides for the rental income calculation where monthly gross rental must provide 115% interest cover for monthly mortgage payment.

[16] More broadly Mr Good referred to the underwriters' discretion. In the course of cross-examination Ms Macleod accepted that the underwriters had discretion and were permitted to make recommendations within their own mandates. She referred to each individual underwriter being given a mandate based on their expertise and experience, although she was not aware of the contents of the mandates. It was accepted that the mandates extended discretion as to the application of the Lending Manual. Horner J requested that Ms Macleod obtain a copy of an underwriter's mandate, but no such copy was produced during the trial. Ms Macleod was unable to give evidence as to the scope of the discretion granted to any of the underwriters in relation to the application of the Lending Manual.

[17] While relevant to the solicitors' duty to the appellant, the Lenders Handbook for Northern Ireland, updated 31 July 2007, also serves to inform of the demands of the solicitors. They should report if the owner or registered proprietor has been registered for less than six months or the person selling to the borrower is not the owner or registered proprietor (paragraph 5.1.1); should ascertain from the borrower how the balance of the purchase price is being provided and report if the borrower is not providing the balance of the purchase price from his own funds and/or is proposing to give a second charge over the property (paragraph 5.9): should report if the purchase price for the property is not the same as set out in the instructions (paragraph 6.3); should note that cashback to the buyer or part of the price being satisfied by a non-cash incentive to the buyer may lead to the mortgage being withdrawn or amended (paragraph 6.3.1); should report if there is not control over the payment of all of the purchase money (paragraph 6.3.2).

[18] At paragraph 5.12, headed "Insolvency considerations", the solicitor must obtain a clear search in the Bankruptcy and the Enforcement of Judgments Office against each borrower and each mortgagor or guarantor, to provide the appellant with protection at the date of completion of the mortgage. If the solicitor is aware that the title to the property is subject to a deed of gift or a transaction at an apparent undervalue completed within five years of the proposed mortgage then the solicitor must be satisfied that the appellant will acquire its interest in good faith and will be protected under the provisions of Articles 312 to 315 and 367 to 369 of the Insolvency (Northern Ireland) Order 1989. If the solicitor is unable to give an unqualified certificate of title, the solicitor must arrange indemnity insurance.

[19] The Lending Manual appears to have operated as a guideline rather than a fixed policy. This court is satisfied, based on a reading of the Lending Manual and the evidence as to the application of the Lending Manual to decision making, that

the trial Judge could not and this court cannot reach a conclusion as to the decision that would have been made on behalf of the appellant by an underwriter with knowledge of the full particulars of the transactions.

The evidence of Ms Macleod on causation.

[20] Ms Macleod, the appellant's litigation specialist, had experience as a mortgage interviewer, assistant manager and deputy manager with a building society and then worked as a mortgage consultant and a mortgage and compliance manager. She became a borrowing and recovery specialist with the appellant before becoming a litigation specialist. Accordingly, she had no background as an underwriter with the appellant. However, she had some underwriting experience while working for the building society.

[21] Ms Macleod's evidence was that the appellant regarded the transactions as re-mortgages and not as purchases; that Nendrum was believed to have purchased the properties more than six months prior to the mortgage application; that had a borrower owned property for less than six months and applied for a re-mortgage it would not have been considered; that if the consideration for the transfer of a property had been unissued shares or a mixture of unissued shares and cash the appellant would have declined a mortgage offer on the property on the basis that there was an unacceptable source of deposit; that the appellant had concerns about any sale at an undervalue because of the potential that, in the event of insolvency, the transaction could be set aside and the appellant would be at risk; that while a transfer of property from directors into the name of a limited company was within the Lending Manual, a safeguard would be included to ensure that solicitors had full control of purchase monies and deposits.

[22] Counsel for the solicitors was critical of Ms Macleod's evidence on these matters. Ms Macleod had no underwriting experience with the appellant. In particular the underwriters mandate gave discretion in particular cases, the manner and extent of which Ms Macleod was unaware.

[23] Ms Macleod referred to a sale at an undervalue being a cause for concern. In referring to paragraph 2.18 of the Lending Manual it was acknowledged that there was no blanket refusal of lending in the event of an undervalue. Rather, caution must be exercised in the event of a sale at an undervalue and the appellant must be protected against the possible set aside of the transaction under insolvency provisions.

[24] The evidence was that the appellant would not provide mortgage funds on a transfer of property between the directors and a company without a requirement for indemnity insurance. Again, the risk to the appellant was that if the limited company was a new owner of the property the transaction might be set aside in the event of the insolvency of the vendor on the basis of a sale at an undervalue. The evidence was that in the refinancing of property the identities of the directors and

the company were often interchanged in the mortgage application forms and that such interchange as had occurred in the present case was not such as would alert the appellants to the transactions being transfers rather than re-mortgages. To seek to make good this evidence Ms Macleod filed an affidavit exhibiting the particulars of eight other transactions involving directors and limited companies. There were illustrations of transfers from a director to a company with a requirement for indemnity. However, the solicitors drew attention to two cases where the property had been owned by the director and which appeared to involve a transfer to the company without reference to a requirement for an indemnity.

[25] This court is satisfied that the opinion of Ms Macleod as to the decision that would have been taken by underwriters with knowledge of the full particulars of the transactions was not such as to discharge the burden of establishing that the appellant would not have made the advance in those circumstances.

The evidence of the experts related to causation.

[26] Adrian F Bloomfield was the expert witness for the appellant. Kevin P Molloy was the expert witness for the solicitors. It was the appellant's case on the appeal that, while there was flexibility on the application of the Lending Manual in many respects, there was no such flexibility in relation to a sale at an undervalue and that this position was agreed by the expert witnesses. Mr Bloomfield's evidence was that no lender would agree to finance a transaction at an undervalue. However, Mr Molloy was more equivocal as he stated in evidence "…. it depends what represents the shortfall, if that was a discount then it falls into the realms of was it a gift, a family gift and all that, those facts, conditions. But without seeing the documents… I would have expected the lender to seek an explanation … of the difference." Contrary to the submissions of the appellant, it cannot be said that there was agreement between the experts on the absence of flexibility on a sale at an undervalue.

[27] The experts also disagreed on the matter of shares forming part of the consideration for the transfer. Mr Bloomfield was not aware of any lender who would have accepted share capital as part of consideration. On the other hand, Mr Molloy's evidence was that it would certainly not be uncommon for shares to be part consideration in this type of transaction.

[28] This court is satisfied that the opinions of the expert witnesses as to the decision that would have been taken by underwriters with knowledge of the full particulars of the transactions was not such as to discharge the burden of establishing that the appellant would not have made the advance in those circumstances.

The absence of evidence from underwriters.

[29] The appellant's underwriting department closed down in 2008. The appellant, as a matter of policy, did not call former underwriters to give evidence on its behalf in legal proceedings. The reason for the adoption of that policy was not disclosed. There were eight underwriters identified in the files as having been concerned in the consideration of these mortgage applications. The appellant had not contacted any former underwriters, or their superiors at the relevant time, with a view to their giving evidence as to the circumstances in which the appellant would or would not have made the advance in the present case, had the appellant been fully appraised of the particulars of the transactions. For other purposes the appellant had traced one of the underwriters but had not sought to engage that person as a witness in the present case.

[30] In the course of Ms Macleod giving her evidence about the mortgage applications the trial Judge asked counsel for the appellant as to the whereabouts of the person who dealt with the mortgage applications. Counsel indicated that no such person was available to give evidence. The trial Judge returned to the topic later in the evidence of Ms Macleod when a question arose as to the state of knowledge of the appellant in relation to the transactions. The trial Judge stated that one of the key issues was what the person actually dealing with the transactions thought. Counsel's reply was that it was a conclusion that the trial Judge would have to draw. The trial Judge stated that he could draw an inference as to why the witness was not present. Circumstances arose whereby it was necessary for the hearing of this action to be adjourned for six months. The appellant had every opportunity to follow up on the observations made by Horner J by seeking to secure the attendance of a witness who could give evidence as to the decision-making of the underwriters. No such witness was produced.

[31] Horner J dealt with the state of the evidence as follows –

> "26. …. Evidence was not available from the underwriter(s) to say:
>
> (a) Whether he knew that this was a sale?
>
> (b) If he did not know that it was a sale, whether he accepted that he should have known it was a sale?
>
> (c) Whether he knew, or should have known that part of the purchase price was the issue of shares in Nendrum?
>
> (d) Whether he knew or should have known that part of the loan was going to be used to pay outlay such as stamp duty and legal costs and that there would be a 5% discount

approximately on the stated total purchase price?

(e) Whether the LTV was all important? As a consequence would he have relaxed the requirements that would normally have applied in accordance with the lending manual? For example by accepting shares as part of the consideration and/or by accepting a payment which amounted to only 95% of the purchase price.

[27] All this evidence was and remains available. It has not been offered to the court. Ms MacLeod could certainly not give it herself. She was challenged on the absence of evidence from an underwriter(s) who accepted this business. She was unable to offer a satisfactory explanation. But obviously a decision was taken not to call the underwriter(s) who was responsible for making this loan to Nendrum. In the absence of such a witness the court has had to rely on the unsatisfactory evidence of two expert witnesses about what might or might not have been the state of knowledge or the reaction to that knowledge by the actual underwriter(s). Unsurprisingly their speculation on these issues resulted in conclusions which for the most part were entirely favourable to their respective clients. I do not blame them. I do not criticise them. But in the search for the truth and for a just result, the assistance that experts can offer the court on this issue was marginal in the absence of direct evidence from the person(s) who actually underwrote the business."

[32] Horner J was not persuaded on the evidence that the appellant would have acted differently if it had known all the particulars of the transactions.

[33] The appellant has not satisfied this court that Horner J was wrong in respect of any of the facts found by him. We are satisfied that, in respect of his analysis of those facts and the inferences drawn, this court would reach the same conclusions.

[34] This court is satisfied that the evidence overall as to the Lending Manual and of Ms Macleod and of the experts was not such as discharged the burden of establishing that the appellant would not have made the advance had they had knowledge of the full particulars of the transactions. Accordingly this court is satisfied that this appeal cannot succeed.

Contributory Negligence

[35] As this court is finding against the appellant on the issue of causation the issue of contributory negligence does not arise. However, on the issue of contributory negligence, Horner J concluded that, if he was wrong on the causation issue, the appellant was at fault, the fault was causative of the damage suffered by the appellant, and it was just and equitable that the damages be reduced to take account of that fault. Horner J stated that if the appellant did not know the true nature of the transaction that could only be explained by complete incompetence and it would be just and equitable to reduce any award by 66.7%.

[36] The appellant contended that, given the nature of the findings as to the solicitors' breach of duty, which were said to be based solely in contract, the trial Judge should not have found that there was a basis for a finding of contributory negligence.

[37] In Forsikrings Vesta v Butcher [1986] 2 All ER 488 Hobhouse J divided claims into three categories –

(1) Where the defendant's liability arises from some contractual provision which does not depend on negligence on the part of the defendant.
(2) Where the defendant's liability arises from a contractual obligation which is expressed in terms of taking care (or its equivalent) but does not correspond to a common law duty to take care which would exist in the given case independently of contract.
(3) Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract.

[38] Contributory negligence applies in category (3) and not in (1) and category (2) is problematic.

[39] The appellant placed the present case in category (1) where contributory negligence does not arise. This approach was based on Express Mortgages v Iqbal Hafeez Solicitors [2011] EWHC 3037 (Ch) where the breaches of duty arose under clause 6.3 of the CML Lenders Handbook and the reporting duties outlined above and did not depend on negligence. The appellant therefore sought to rely on the same approach in the present case as the breaches of the solicitors included reporting faults under clause 6.3 of the CML Lenders Handbook.

[40] However clause 1.4 of the CML Lenders Handbook states –

> "The standard of care that we expect of you is that of a reasonably competent solicitor or licensed conveyancer acting on behalf of a mortgagee."

[41] The solicitors agreed to provide a service that was itemised in the Handbook and to a standard that conformed with the common law standard of reasonable care. *Flenley and Leech on Solicitors Negligence and Liability* (3rd ed.) suggests at paragraph 8.05 that the effect of clause 1.4 is that all breaches of terms of Part 1 of the Handbook fall within Vesta category (3) so that contributory negligence is available as a defence. The appellant rejects the approach of *Flenley and Leech.*

[42] Horner J did not address this argument in his judgment when he found that there was contributory negligence on the part of the appellant. He did not state the precise basis of liability on the part of the solicitors that enabled reliance to be placed on contributory negligence. He began his judgment by recognising that the claim was based on contract and retainer but also on breach of fiduciary duty, negligence and breach of trust. While discussing liability in terms that included the solicitors' duty of reasonable care and skill, he found that the solicitors did not discharge their duties under the retainer with the appellant. He introduced the discussion of contributory negligence with reference to the solicitors' breach of duty. The finding of contributory negligence presupposes a basis of liability that is also independent of contract. As these arguments were before Horner J we assume he reached his conclusion on contributory negligence on the basis of the presence of solicitors' liability that was independent of contract. However, the nature and basis of any such liability was not identified.

[43] This court is satisfied that it is not appropriate for this court to seek to undertake the task of identifying the nature and basis of any liability independent of contract. This will require factual findings to support the conclusion. As we are finding against the appellant it is not necessary for this court to do so. Had this court found for the appellant on the issue of causation we would have referred the matter back to Horner J on the outstanding issues, including making such finding as may be required in relation to the foundation for the application of contributory negligence. Were this matter to proceed to a further appeal on the issue of causation and be successful the matter would return to Horner J in any event and the above observations would be noted. Accordingly, we do not propose to express any conclusion on the issue of contributory negligence.

[44] We are not satisfied on any of the appellant's grounds of appeal. The appeal is dismissed.