

Angel Solicitors (a firm) v Jenkins O’Dowd & Barth (a firm) and Others

The judgment in *Angel Solicitors (a firm) v Jenkins O’Dowd & Barth (a firm) and (1) Barclays Bank Plc and (2) Close Brothers Limited and (3) Ellenwell Properties Ltd* [2009] EWHC 46 (Ch); [2009] WLR (D); [2009] All ER (D) 133 (Jan) earlier this year sent a serious message warning solicitors of the high risks involved in giving undertakings without first obtaining the necessary information on which such undertakings would be based.

The case concerns the enforcement of solicitors’ undertakings given in the course of acting on separate sales of three residential properties. “It demonstrates”, said the presiding judge, HHJ Hodge QC, “both the folly of giving the usual solicitors’ undertaking to redeem or discharge existing mortgages and charges over the property which is being sold without having first obtained a redemption statement and the mortgagee’s agreement to release the properties from all relevant charges upon payment of an ascertained sum, and also the dangers of any delay in paying over the moneys required to redeem such charges following the completion of the sale”.

The Claimant and the Defendant (Jenkins O’Dowd) were firms of solicitors who acted for the purchaser and the seller respectively in the course of three residential property transactions. Two properties were mortgaged to Barclays Bank (“Barclays”) and one to Close Brothers (“Close”). In the case of each of the properties, it was charged to the relevant financial institution by way of an “all-moneys” charge as part security for a loan facility considerably in excess of the value of the individual property.

For each transaction the Claimant sought and obtained from the Defendant standard undertakings to redeem or discharge the mortgages and charges on completion and to send to the Claimant standard discharge forms, the receipted charge(s) or confirmation that notice of release or discharge had been given to the Land Registry as soon as the Defendant received them.

It appeared that the Defendant gave the said undertakings without first obtaining the redemption figures. Furthermore, there was no evidence before the court that any part of the sale proceeds from any of the three properties was ever paid over to Barclays or to Close.

In *Udall v Capri Lighting Ltd* [1988] QB 907 at 917 Balcombe LJ said there are three ways in which a party seeking to enforce a solicitor’s undertaking can proceed (a) by an action at law; (b) by an application to the High Court to exercise its inherent supervisory jurisdiction over solicitors; and (c) by an application to the Law Society. In the exercise of the supervisory jurisdiction over solicitors, ‘what in practice has always been done is that the court, if the circumstances warranted, makes an order on the solicitor to do an act which he has undertaken to do’: *Re a Solicitor* [1966] 3 All ER 52 at 56. It is for the court to determine (1) Whether the Defendant gave the undertakings; (2) If Defendant gave those undertakings, have they been performed? (3) If they have not been performed, are the undertakings ones that are impossible to perform?

Having failed to secure the performance of the Defendant’s undertakings to redeem the existing charges without resort to litigation, the Claimant invoked the summary jurisdiction of the court to enforce the said undertakings pursuant to its inherent supervisory jurisdiction over solicitors. The Defendant did not shy away from the likelihood that, ultimately, it would have to perform the said undertakings (or make payments in lieu). However, it submitted that, had it sought to redeem the relevant charges at, or within a reasonable time after, the said undertakings were given, both Barclays and Close would have accepted a lesser sum than they are now seeking to recover.

However, the judge held in the circumstance that, due to the Defendant’s breach of its undertakings, the sum ‘now’ required for those undertakings to be performed may be greater than if the undertakings had been honoured in due time was unfortunate for the Defendant but it cannot detrimentally affect either the position of the Claimant or the legal and equitable entitlements of the mortgagees of its clients’ properties.

Pursuant to *Udall* before making its application for summary judgment the Claimant had made an application to the Law Society, which led to a delay in making its High Court application. Consequently, relying on observations of Mummery LJ in *Taylor v Ribby Hall Leisure Ltd* [1998] 1 WLR 400 at 409H-410B, the Defendant submitted that judgment ought not to be granted. However, the judge held that the court should be slow to encourage premature resort to litigation before alternative methods of compelling performance of a solicitor’s undertaking have been exhausted. Summary judgment was therefore granted.

This case has implications beyond those dealing solely with undertakings given by solicitors during the property transaction process. It is clear that if a solicitor is contemplating giving an undertaking it must first be sure of the extent of the risk by making suitable enquiries before committing itself accordingly. Otherwise, it runs the high risk of a sum or otherwise ‘now’ required for those undertakings to be performed/fulfilled being greater than had the undertakings been honoured in due time based on information sought and known prior to those undertaking having given.

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