Neutral Citation Number: [2020] EWHC 3056 (Ch)

Case No: BL-2019-LDS-000030

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
BUSINESS LIST (ChD)

Combined Court Centre
1 Oxford Row
Leeds

Date: Monday 16 November 2020

Before :

MR JUSTICE SNOWDEN

Vice-Chancellor of the County Palatine of Lancaster

- -

Between :

NDH PROPERTIES LIMITED	**Claimant**
- and -	
LUPTON FAWCETT LLP	**Defendant**

- -

Anthony Elleray QC (instructed by **Williams & Co Solicitors**) for the **Claimant**
Jason Evans-Tovey (instructed by **DWF Law LLP**) for the **Defendant**

Hearing dates: 2-5 December 2019

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Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10.00 a.m. on 16 November 2020.

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

Introduction

1. This is a claim in professional negligence by NDH Properties Limited ("NDH") against a firm of solicitors, Lupton Fawcett LLP ("Lupton Fawcett"). The claim relates to a short term loan facility of about £350,000 (the "Loan") which was taken out in May 2012 by NDH from a company known as Amalgamated Finance Limited ("Amalgamated"). The Loan was secured by a charge over a commercial property owned by NDH at 157-159 Fylde Road, Preston (the "Property"). Lupton Fawcett was instructed by Amalgamated to act in relation to the Loan and associated security documentation.

2. The purpose of the Loan was to enable NDH to discharge a pre-existing debt of about £282,000 owed by the sole director and majority shareholder of NDH, Mr. Dashrathbai Nayee ("Mr. Nayee"), to Yorkshire Bank plc (the "Bank"). The debt to the Bank was secured by a charge over the Property pursuant to which the Bank had appointed receivers. The receivers had obtained a number of offers to buy the Property and were proposing to sell it. The repayment of the debt to the Bank using the monies lent by Amalgamated enabled the redemption of the security and the termination of the appointment of the receivers.

3. Three months later, at the maturity of the Loan, Amalgamated demanded repayment of the amount then due from NDH which had risen to about £390,000 as a result of interest and fees. NDH was not able to repay that amount, and on 2 November 2012 Amalgamated appointed its own receivers over the Property. The Property was subsequently sold by the receivers on 7 March 2013 for a price of £751,000. By that time, and by reason of the provisions as to default interest and fees under the Loan agreement, the amount said to be owing to Amalgamated and secured by its charge had risen substantially to £647,459.57. Of that amount, NDH received only £62,456.56 as mortgagor from the balance of the sale proceeds of the Property, the remaining monies being disbursements and costs paid to the receivers, agents and auctioneers.

4. Mr. Nayee had originally been introduced to Amalgamated as a potential lender to NDH by a related company, The Bankruptcy Protection Fund Limited ("BPFL"), whose principal contact was a Mr. Chris Holmes ("Mr. Holmes"). Lupton Fawcett was accustomed to being instructed by BPFL to act for companies associated with BPFL, as well as for individual bankrupts, in relation to a scheme under which BPFL's associated companies made secured loans to bankrupts to assist them in obtaining an annulment of their bankruptcies.

5. NDH contended that as a result of Mr. Nayee signing a letter dated 28 February 2012 which appeared to identify BPFL and Lupton Fawcett as being authorised to act for him in relation to the annulment of his bankruptcy, together with the subsequent conduct of the parties, Lupton Fawcett was implicitly retained to act for NDH as well as for Amalgamated in relation to the Loan. Alternatively NDH contended that Lupton Fawcett owed duties of care in tort to give it advice in relation to the Loan, or at very least to warn NDH that Lupton Fawcett was not acting for it. NDH alleged that Lupton Fawcett breached such contractual or tortious duties by failing to advise NDH that the high levels of interest and fees payable under the Loan, coupled with

the absence of any certainty that there would be long-term finance available to NDH to refinance the Loan at the end of the term of three months, meant that the Loan was manifestly disadvantageous to NDH and should not be entered into by it.

6. NDH submitted that as a consequence of Lupton Fawcett's breaches of duty, NDH suffered loss and damage in the amount of the difference between the balance of the sale proceeds which it would have received if the Property had simply been sold in 2012 by the receivers appointed by the Bank, and the amount which it actually recovered from the sale by the receivers appointed by Amalgamated in 2013. In large measure, that difference is attributable to the very significant cost of borrowing from Amalgamated.

7. Lupton Fawcett denied the existence of any implied retainer, or that it assumed any responsibility to NDH so as to owe it any duties in tort. Lupton Fawcett placed reliance on the fact that it was known to be acting for the other party to the Loan (Amalgamated) and the fact that it never had any contact or communications whatever with Mr. Nayee or NDH. Lupton Fawcett contended that in such circumstances there was no basis upon which Mr. Nayee could reasonably have thought that the firm was acting for NDH or could reasonably have been relying on the firm for any advice; and that the firm also had no duty to warn Mr. Nayee that it was not acting for NDH. In these respects, Lupton Fawcett also strongly relied on the fact that NDH had appointed a financial adviser who had been introduced to it by BPFL, a Mr. Jamie Bleakley ("Mr. Bleakley"). Given Mr. Bleakley's involvement, the firm contended that Mr. Nayee would not have been looking to solicitors for commercial advice about the Loan.

8. Lupton Fawcett further argued that Mr. Nayee was an experienced businessman who was perfectly capable of forming his own view on behalf of NDH as to the commercial wisdom of entering into the Loan and was determined to refinance the indebtedness to the Bank in order to preserve ownership of the Property for redevelopment. The firm submitted that whatever it might have advised, Mr. Nayee would have gone ahead and committed NDH to the Loan in any event, so that any failure on its part to advise him did not cause NDH any loss.

THE WITNESS EVIDENCE

9. I only heard live evidence from Mr. Nayee and his daughter, Ms. Neeta Nayee ("Ms. Nayee"). Witness statements had been filed by NDH from a number of individuals who had other dealings with BPFL and Lupton Fawcett in relation to BPFL's scheme to annul their bankruptcies, but there was nothing in those statements that was directly relevant to the facts of this case or in any dispute, and so I did not need to hear them being cross-examined.

10. For its part, Lupton Fawcett offered a witness statement from a partner in its business recovery and insolvency team. However, he had had no direct involvement with the facts of the case and could only narrate documents, provide non-expert evidence on commercial practice, or express his own opinions on matters that were for me to decide. After I raised the point, his evidence was not relied upon.

11. Lupton Fawcett chose not to adduce evidence from the solicitor (Ms. Rachael Markham) who had actually dealt with the matters in issue. I was told that she had

moved to another firm. That would not, of course, have prevented her from giving evidence (subject to Amalgamated's privilege). Her absence was the subject of adverse comment by Mr. Elleray QC on behalf of NDH, and was regrettable. However, as the question of an implied retainer and the imposition of a duty of care are to be determined objectively, and there was no documentary evidence to suggest that Ms. Markham ever sought to contact Mr. Nayee, in the end I do not think that her evidence would be likely to have made any difference to the result.

12. Against that background, I should briefly record my impressions of the two witnesses who did give evidence.

Mr. Nayee

13. Mr. Nayee is a man who at the time of the events in question had amassed considerable practical business experience over many years in owning and running first a manufacturing business, and then a property rental business. Mr. Nayee accepted that in the course of that career he had used a number of firms of solicitors for legal advice from time to time. He was familiar with the normal process of instructing solicitors and receiving letters setting out their fee rates, charging structures and the like. Mr. Nayee had also used firms of accountants for tax advice (e.g. in connection with setting up NDH in the first place), and prior to engaging Mr. Bleakley he had also been using a firm of financial advisers. He accepted that one does not normally look to solicitors for business and financial advice.

14. In terms of giving evidence, whilst I thought that Mr. Nayee largely gave truthful answers, that was not always so. He was aware of the arguments that NDH was pursuing and some of the danger areas for NDH's case, and shaped some of his answers accordingly. Mr. Nayee was also imprecise in what he said and at times I got the impression that he feigned a lack of understanding or simply decided not to answer difficult questions directly where it did not suit him.

15. In broader terms, Mr. Nayee was clearly annoyed at having been, as he saw it, cheated by Mr. Holmes and Amalgamated which had taken advantage of him with very expensive short-term credit, and also that he had been let down badly by the incompetence of Mr. Bleakley, the financial adviser who BPFL had insisted that he should use and whom he had trusted. As I shall explain, Mr. Nayee had no contact with Lupton Fawcett throughout. I believe that much of his evidence about what he thought that the firm had agreed to do was not founded on fact but was a rationalisation to which he had come after the event, influenced by a feeling that the firm was in league with BPFL and Mr. Bleakley, and therefore just as responsible as those others who he blamed for NDH's losses.

16. As a general observation I should also record that in giving his answers, Mr. Nayee almost always failed to draw any distinction between himself and NDH, referring to Lupton Fawcett as being instructed by him and owing him duties. I do not place too much weight on that manner of speaking: like many small businessmen who run their own company, Mr. Nayee identified with the company which he largely owned and controlled.

Ms. Nayee

17. Ms. Nayee was an intelligent and forthright witness. She had studied law at university, graduating in about 2003, but did not practice, instead pursuing a career in business administration in government service.

18. Ms. Nayee plainly saw her role as supporting her father's evidence and NDH's case, in particular in relation to meetings with Mr. Holmes and Mr. Bleakley which she attended with her father. She was very alive to advancing NDH's arguments through her evidence and rather than answer the questions she was asked directly, she often resorted to repeating the arguments contained in her witness statement with which she was obviously very familiar.

19. Ms. Nayee clearly shared her father's view that NDH had been cheated by BPFL and badly let down by Mr. Bleakley. She said that Messrs. Holmes and Bleakley had "sold us a dream", and had given false or inaccurate oral assurances about the availability of long-term finance. I gained the very distinct impression from seeing Ms. Nayee give evidence that far from being asked by her father simply to attend the meetings as a passive observer for "moral support" as she suggested, Ms. Nayee was invited because her background as a law student and her work as a business administrator complemented her father's more informal business experience. The force of Mr. Evans-Tovey's point that Mr. Nayee never contacted Lupton Fawcett, even though he now contends that he thought he had instructed the firm to act for NDH, is increased because neither did Ms. Nayee suggest that he should do so, even though she was aware of the difference between the strict terms of the Loan documents and the informal assurances that she and her father were given by Messrs. Holmes and Bleakley.

THE FACTS

20. In the end there was little or no material dispute between the parties as to the relevant sequence of events. The dispute was largely over the inferences to be drawn from the primary facts. I shall set out below my findings of fact as drawn from the documentary and witness evidence, highlighting some of the areas where there were relevant disputes.

The early background

21. Mr. Nayee set up his first business, trading under the name of Jubilee Knitwear, in 1978. The business made clothing and rented part of the Property. Mr. Nayee built up the knitwear business over the years and, with the assistance of finance from Yorkshire Bank, he bought the Property in two tranches in 1989 and 1994. His plan was to trade from it in part, whilst letting out the remainder to commercial tenants.

22. That arrangement continued until Mr. Nayee decided to end the business of Jubilee Knitwear in about 2001. Thereafter Mr. Nayee continued to collect rents from his remaining tenants, but also investigated the possibility of redeveloping the Property into a block of flats for students. Using monies borrowed from the Bank he took steps to clear the site and made an application for planning permission. This was refused in 2007, whereupon Mr. Nayee took professional planning advice before submitting a revised application in March 2008.

23. NDH was incorporated at about the same time as submission of the revised planning application in March 2008. Mr. Nayee has at all times been the sole director of the Company, and he owns 52% of its shares. The remaining shares are held on discretionary trusts for his children. Shortly after the company's incorporation, the Property was transferred to NDH, which executed a charge over the Property to secure the monies owed by Mr. Nayee to the Bank. Mr. Nayee's evidence was that the idea for setting up NDH as the vehicle for development of the Property came from a solicitor at Napthens who he was using at the time. He also took financial and tax advice in this respect from his accountants, Moore & Smalley.

24. Planning permission to redevelop the majority of the Property into 44 flats and 20 studio flats was granted to NDH on 1 September 2008. The permission required the development to be commenced within three years. A valuation of the Property at around this time put the gross development value at about £11 million. With estimated build costs of £9.1 million, the residual valuation of the land was about £2.175 million.

25. Mr. Nayee's and NDH's plans were affected by the restriction in the availability of credit after the global financial crisis in 2008-2009. In spite of enlisting the assistance of a financial adviser, Mr. Paul Arabskyj of JR Commercial Mortgages plc ("JR Commercial"), NDH could not find finance to develop the Property on terms which were acceptable to Mr. Nayee. So, for example, the Bank was only prepared to lend 60% of the necessary development finance instead of lending 100% which it had indicated it might have been prepared to do prior to the credit crunch. In addition, a valuation in mid-June 2010 suggested that the gross development value of the Property had reduced to £10.25 million, and its residual land value had reduced to £1.85 million.

26. In 2011, the Bank sought repayment of the debt owed to it by Mr. Nayee. When he was unable to repay, it appointed receivers from Begbies Traynor on 30 June 2011 with a view to selling the Property.

27. After the appointment of the receivers, and with the continued assistance of JR Commercial, Mr. Nayee approached a number of potential lenders without success with a view to obtaining finance to refinance the debt owed to the Bank and to finance the development and construction of the flats and studios. One particular sticking point was that Mr. Nayee was unwilling to contemplate a joint venture between NDH and a lender under which the lender would obtain an equity interest in the profits from the development.

The business of BPFL, Amalgamated and Consolidated Finance Limited

28. BPFL, Amalgamated and a company known as Consolidated Finance Limited ("Consolidated") are associated companies based in Manchester. The companies operated a business making short-term secured loans to bankrupts to fund an application to annul their bankruptcies. The outline of the bankruptcy annulment scheme was described by Sir Stanley Burnton in paragraph 9 of his judgment in the Court of Appeal in Consolidated Finance Limited v Collins and others [2013] EWCA Civ 475 ("Consolidated Finance"),

> "9. Consolidated and [BPFL] are associated companies, with the same directors. Their business model involves contacting persons who have been made bankrupt on a creditor's petition … In essence, the companies' business involves offering to secure the annulment of the bankruptcy order by the advance of moneys on short-term loan, with substantial interest and fees payable by the debtor and the total of the moneys advanced, interest, fees and costs incurred in connection with the annulment secured on the property of the debtor. For this purpose, the equity of the debtor in the property to be charged must be sufficient to cover the ultimate indebtedness. If the debtor secures refinancing of the short-term indebtedness, it is repaid out of its proceeds. If not, and the debtor is unable to repay his or her liabilities to the companies, the security may be enforced."

Mr. Nayee is introduced to BPFL and Amalgamated

29. Mr. Nayee learnt of BPFL through an unsolicited mail shot. It prompted him to contact BPFL by telephone at some point in February 2012. Mr. Nayee's written evidence contained no detail was to what was said in that telephone call, but in his oral evidence he stated that he had been asked by Mr. Holmes, who was a director of BPFL, to sign a copy of what was referred to at the trial as the "Letter of Authority", and to return it before coming to a face-to-face meeting.

30. Following that initial contact, on 28 February 2012 Mr. Nayee was sent an email from a case manager at BPFL which attached what was simply described as the "attached authority", but which included both the "Letter of Authority" and a set of terms and conditions (the "Terms and Conditions").

31. The Letter of Authority comprised a one-page letter with a BPFL heading and small print at the foot of the notepaper which identified BPFL, Amalgamated and Consolidated as "linked companies". The Letter of Authority was addressed to Mr. Nayee at the address of the Property and was dated 28 February 2012. It made no mention of NDH.

32. The body of the Letter of Authority read as follows,

> "To Whom It May Concern
>
> Dear Sir/Madam,
>
> Please note that I have given formal instructions to:
>
> [BPFL and Lupton Fawcett]
>
> and its agents [sic] to act on my behalf, and to take all necessary steps to stop bankruptcy proceedings. I confirm that the above and its agents may perform a credit search and pass data on to third parties.

> Would you therefore please be kind enough to accept this as notice of authority for that purpose and provide information and assist as necessary.
>
> I confirm I have read and accepted the enclosed Terms and Conditions and retained a copy for my records.
>
> Signed,
>
> [space for signature]
>
> Dashrathbai Nayee
>
> Applicant"

33. As indicated above, the Terms and Conditions to which reference was made in the Letter of Authority were also attached to the email from BPFL. They included the following,

> "1. Amalgamated Finance Limited (AFL) or any of its linked firms will have the exclusive right for a period of 6 months (unless by mutual agreement such arrangement is terminated) from the date of your authority to act on your behalf in connection with the negotiation of your secured and unsecured creditors and raising finance with a view to settlement "the transaction". In your case assisting with refinancing of property and land. The Bankruptcy Protection Fund Limited will supply the service and co-ordinate what needs to happen.
>
> 2. AFL, after confirming the said instructions with you, may, at their discretion, appoint a solicitor from their recommended panel to act on your behalf to secure monies loaned.
>
> 3. AFL, BPF or their agents have your full authority to correspond with any parties to obtain any information required in your transaction or refinancing.
>
> 4. BPF will immediately arrange sufficient funds for the refinancing in full and repay as much of your registered charge(s) as they deem necessary to effect the securing of the monies provided.
>
> 5. AFL/BPF may refer you to an independent mortgage broker who will use their best endeavours to arrange, through their agents, a remortgage of your property (or other transaction which will release monies from your home) for such amount as is required to pay off the full indebtedness to AFL, together with the amount outstanding on any charge on your property and costs incurred herewith, if this is applicable. This is not a guarantee and the responsibility to ensure that any bridging

> loan advanced is repaid within the specified period is yours (usually 90 days). We cannot guarantee that any repayment method will be available during and at the end of this period. The loan is secured on your property by way of a registered charge. Failure to repay may result in the enforcement of the security which could result in the loss of your home.
>
> 6. Fees will include charges and interest associated with the new loan which will be detailed to you prior to the advance being made. There will also be a separate transaction fee which will also be detailed to you in advance.
>
> 7. Fees may be charged by other parties during this transaction, the refinancing and the subsequent remortgage process (if required)."

34. Mr. Nayee signed both documents in his own name and returned them by fax to BPFL on 28 February 2012.

35. The following day, 29 February 2012, the case worker at BPFL sent Mr. Nayee a further email containing two "Key Features" documents. The documents in essence contained a table setting out the ultimate cost of taking out what was described as a three-month (90 day) bridging loan from Amalgamated to discharge Mr. Nayee's debt to the Bank (£260,000) and the fees owing to Begbies Traynor (as receivers) (£20,000). The only difference between the two Key Features documents was that the first was for a larger loan which would also have enabled repayment of the fees owing (by NDH) to the architects which had been instructed in relation to the planning application (£87,000).

36. Each Key Features document contained an entry under the heading "BPF Fees" for "Your solicitor" charged at £1,000 and referred in two places to a "separate solicitor's advice note". No such advice note was provided.

37. On the second page immediately above the place for a signature there was a box containing the following text:

> "You have advised BPF that the repayment of the loan will be by a remortgage/secured loan of commercial property if that is not possible you will sell 157-159 Fylde Rd.
>
> The loan is provided by Amalgamated Finance Ltd – linked company.
>
> Where you take up this service, once the annulment is successful you will become liable to pay the charges of the Companies.
>
> The bridging period is for 90 days from the date of the annulment which is provided by AFL.
>
> It is your responsibility to ensure that the loan is repaid within the 90 day period.

> The loan is secured on your property by way of a registered charge.
>
> We cannot guarantee that any repayment method will be available during and at the end of this period.
>
> Failure to repay may result in the enforcement of the security which could result in the loss of your home.
>
> For Cancellation Rights please see your Terms and Conditions or visit www.bpfltd.co.uk."

Discussions concerning the involvement of Lupton Fawcett and Mr. Bleakley

38. Mr. Nayee's evidence was that he understood from Mr. Holmes that it was a condition of the funding offered by BPFL that he should use the services of both a firm of solicitors and a financial adviser nominated by BPFL.

39. Mr. Nayee's written evidence was not clear as to when such a conversation between himself and Mr. Holmes concerning Lupton Fawcett took place. Mr. Nayee's written evidence simply stated that,

> "In the same way in which I was required to take the services of Mr. Bleakley, it was also a condition of the funding offered by BPFL that I use the services of their appointed solicitors, [Lupton Fawcett]."

40. Mr. Nayee expanded upon this account during cross-examination. The gist of Mr. Nayee's evidence was that Mr. Holmes told him that Lupton Fawcett were working together with BPFL and that they could also act for him; that he should sign and return a letter which BPFL would provide, and that Mr. Holmes would send that letter to Lupton Fawcett and arrange for Lupton Fawcett to act for him; that Mr. Nayee regarded the Letter of Authority which he subsequently signed as constituting his instructions to Lupton Fawcett to act on his behalf; and that Mr. Holmes told him that Lupton Fawcett would contact him. Since Mr. Nayee signed the Letter of Authority which referred to Lupton Fawcett before he had actually met Mr. Holmes face-to-face, I infer that Mr. Nayee was suggesting that this conversation took place during their earlier telephone conversation.

41. Mr. Nayee said in his oral evidence that after signing and returning the Letter of Authority to BPFL, he assumed that the firm had been instructed to advise NDH on financial matters. He accepted, however, that in spite of having been told by Mr. Holmes that Lupton Fawcett would be in contact, he had not received any letter or other communication from Lupton Fawcett confirming that the firm was acting at any time thereafter; and in particular he had not received any communications from Lupton Fawcett setting out its terms and conditions or any fee structure for its work.

42. Although Mr. Nayee's answer when pressed on this latter point was that he assumed that the firm would be acting on its standard terms and conditions, I do not accept that Mr. Nayee in fact had that thought process at the time. Mr. Nayee was familiar with the process of instructing and using solicitors, and his explanation did not ring true.

As I shall explain later in this judgment, I consider that the absence of any contact from the firm or any attempt by Mr. Nayee to verify that the firm was acting for NDH, or upon what basis it was doing so, is telling.

43. So far as the requirement for a financial adviser was concerned, it was Mr. Nayee's written evidence that at their first face-to-face meeting, Mr. Holmes explained that BPFL would only be prepared to provide short-term bridging finance if it could be "guaranteed" that long-term finance would be available to repay it. This requirement was said to have led to Mr. Holmes insisting at the meeting that Mr. Nayee instruct Mr. Bleakley as financial adviser to NDH, and that NDH should terminate the engagement of its existing financial adviser (JR Commercial). Ms. Nayee's written evidence also confirmed that account.

44. Mr. Nayee and his daughter subsequently met Mr. Bleakley at a second meeting, also attended by Mr. Holmes, at the offices of BPFL in Manchester on 28 March 2012. Their evidence was that they were impressed with Mr. Bleakley, who said that he was confident of being able to find long-term finance within days that would enable BPFL to have its desired exit when the Loan matured, and that he would also be able to find finance to develop the Property.

45. After the meeting on 28 March 2012, Mr. Nayee sent an email to Mr. Arabskyj of JR Commercial effectively terminating his engagement. The email was in a format drafted for Mr. Nayee by Mr. Bleakley and read as follows, (I have corrected various grammatical and spelling mistakes),

> "Dear Paul,
>
> As you are aware, I attended a meeting this morning with [BPFL]. All in all the meeting was very positive, however there were some conditions. I know you are aware of the constraints I am under with the receivers. These now have an offer that we are all in agreement they will push through to exchange and completion ASAP. This would be detrimental to what I am trying to achieve. Therefore the lender has given me a way out of losing my site and possible bankruptcy. However, the Clause [sic] is that they will only lend me the money if they have a clear exit. I have told them that you have been helping me with this but they did not seem too happy with the length of time it's taken. Therefore they would like me to work with Jamie Bleakley who they have experience with and trust to move things to the next stage for me…."

46. That email was followed the next day, 29 March 2012, by a longer email from Mr. Bleakley to Mr. Nayee setting out his proposals and terms. He proposed a three-stage process,

> "Stage 1
>
> Stop Begbies selling your site and obtain funding from Chris Holmes.

> Stage 2
>
> Refinance the site via bridging finance or a JV Partner… [or via other methods…]
>
> Stage 3
>
> Build commences through to completion."

The email then set out Mr. Bleakley's terms, which included a sentence that,

> "…for me to start the work on your behalf for stage 1 only I would usually ask for £2000 upfront fee however I am willing to start the work for the upfront cost of £1000…"

Mr. Bleakley also set out his view of his role as follows,

> "My role is not just to obtain finance for you. My role is to give you advice and act in your best interest. I will always try and negotiate the best terms and ensure things move quickly. As I said to your daughter we are not only under pressure to ensure we don't lose the site, we are under pressure that we can get the development built out for the next student year…."

47. There was, so far as I am aware, no challenge or response by Mr. Nayee to Mr. Bleakley's view of his role. In my view, these written exchanges make it clear that Mr. Nayee was engaging Mr. Bleakley to act as NDH's financial adviser in place of JR Commercial in connection with the entire three-stage process that Mr. Bleakley referred to in his email.

48. Although Mr. Nayee's own written evidence referred to NDH being "required to take the services of Mr. Bleakley", when giving oral evidence on the first day of the trial, towards the end of the first afternoon of his cross-examination, Mr. Nayee was adamant that he did not think at the time that Mr. Bleakley was working for him (or NDH) or that Mr. Bleakley would be acting in his (or their) best interests. Mr. Nayee subsequently sought to retreat from this and to place greater emphasis on the fact that he trusted Mr. Bleakley to introduce longer-term finance to repay Amalgamated and to develop the Property, and that he (Mr. Nayee) thought (with the benefit of hindsight) that Mr. Bleakley had failed to do a good job in that respect.

49. In light of the contents of the email exchanges between Mr. Nayee and Mr. Bleakley, I do not think that Mr. Nayee's initial evidence to me was candid or truthful. Instead, I believe that Mr. Nayee well understood at all relevant times that Mr. Bleakley was acting for him (and NDH) in relation to the matters identified in the email of 29 March 2012, namely to obtain finance for NDH and give it financial advice. I do not doubt that Mr. Nayee and his daughter genuinely feel that Mr. Bleakley failed them and NDH. However, I consider that Mr. Nayee's answers were an inappropriate attempt to shape his evidence to meet the point that he (and NDH) would not have been looking to a firm of solicitors for advice about the commercial wisdom of taking the Loan if NDH had a separate financial adviser acting for it. I shall return to that point later in this judgment.

Events leading up to the making of the Loan

50. On 12 April 2012 BPFL wrote to the receivers (Begbies Traynor) to indicate that it was willing to lend sufficient funds to Mr. Nayee to enable him to repay his debt to the Bank and to pay the costs of the receivership so as to enable the charge to be released over the Property. BPFL indicated that the funds would be advanced within seven days and sought confirmation that the receivers would not accept any other offers for the Property in the meantime.

51. The receivers responded quickly, asking for evidence of the existence of funds and indicating that they had two strong third party offers to buy the Property. The next morning, 13 April 2012, BPFL responded, stating (among other things),

> "Before we are ready to make the payment, Lupton Fawcett LLP, our solicitors of six years, will be able to confirm that they are holding the required funds."

52. That exchange prompted BPFL to email Rachael Markham, a solicitor at Lupton Fawcett, to instruct Lupton Fawcett to act for Amalgamated in relation to a "new bridging loan matter". The email attached a copy of the land register entries and title plan in relation to the Property, showing that NDH was the owner of the Property, together with the Letter of Authority signed by Mr. Nayee. The copy of the email from BPFL to Rachael Markham produced at trial was heavily redacted on the grounds that neither BPFL nor Amalgamated had waived privilege, and so it is not known what further explanation BPFL gave of the proposed transaction to Lupton Fawcett. There is no evidence that the Terms and Conditions to which I have referred in paragraph 33 above were sent to Lupton Fawcett.

53. On 13 April 2012 BPFL sent Mr. Nayee a further Key Features document based solely upon repayment of the amounts owing to the Bank and Begbies Traynor (£280,000). The document indicated that with BPFL's fees, an increased sum of £2,500 for "Your solicitor" and interest and various fees payable to Amalgamated, the total cost of the Loan would be £357,833.69. The document again referred to a "separate solicitor's advice note" which was not provided, and included text similar to that which had appeared in the earlier Key Features documents, save that the first sentence now read,

> "You have advised BPF that the repayment of the loan will be by refinancing of the site at 157-159 Fylde Road, Preston, PR1 2XP after the building project has progresses [sic]. Failing this you agree that the site will be sold within the loan period."

54. On 18 April 2012 Mr. Nayee and his daughter attended a further meeting at BPFL's offices with Mr. Holmes and Mr. Bleakley at which Mr. Nayee signed various documents. The documents signed included the Key Features document dated 13 April 2012 which Mr. Nayee signed in his own name.

55. Although his witness statement had said something different, Mr. Nayee accepted in his cross-examination that he knew from reading the Key Features document that the proposed loan was for three months only and that Amalgamated was not guaranteeing to find a repayment method for NDH at the end of the term. When questioned further

on this, Mr. Nayee said that Mr. Holmes and Mr. Bleakley had said that he shouldn't worry about such formalities. Mr. Holmes said that Amalgamated would not ask for immediate repayment, but that they would sort the fees and interest out when the loan was refinanced. Mr. Bleakley apparently said that Mr. Holmes was a "nice man" and that he would sort it all out. Mr. Nayee said that he trusted Mr. Holmes, who always emphasised the positives rather than the negatives.

56. At the meeting on 18 April 2012, Mr. Holmes also presented Mr. Nayee with a number of documents that had been prepared by Lupton Fawcett. Lupton Fawcett had obviously learned at some point before this meeting of the proposed structure of the transaction. In particular, Lupton Fawcett must have known of the connection between Mr. Nayee and NDH, and that the transaction involved a loan by Amalgamated to NDH, because the firm had prepared a draft minute of a board meeting of NDH resolving to enter into a £350,000 secured credit facility with Amalgamated, a Sterling Facility Letter setting out the terms and conditions of that credit facility, and an Equitable Charge over the Property to secure the credit facility.

57. Mr. Nayee contended in his oral evidence that he was rushed into signing these documents at the meeting on 18 April 2012 by Mr. Holmes ("he didn't give me a chance"), and that he did not have the opportunity to read them properly. He was asked why, if this was so and if he believed that Lupton Fawcett was acting for NDH, he had not contacted Lupton Fawcett afterwards for advice as to the effect of what he had been pressured into signing. Mr. Nayee's answer was that there was "no point". I found that totally unconvincing, especially as there was still a lengthy period before the Loan was actually drawn down. Again, for reasons that I will explain later, I consider that Mr. Nayee's failure to refer anything to Lupton Fawcett at any time is a telling feature of this case.

58. In his written evidence, Mr. Nayee had painted a slightly different picture, saying that although he did not have the opportunity to read the documentation properly, he signed "having received reassurances from Mr. Holmes." In his written evidence Mr. Nayee added that,

> "I was not concerned at all as I understood that the documents were prepared by [Lupton Fawcett] who I had retained to act on behalf of NDH and advise NDH. Had there been any immediate concerns that the documents were not in the best interests of [NDH], I would have expected to have been contacted by them to set these risks and concerns out to me prior to signing."

59. When this was put to Mr. Nayee in cross-examination, he added that when he was told by Mr. Holmes that Lupton Fawcett had prepared the documents, he assumed that the documents were for the benefit of NDH. He accepted, however, that this assumption was not based on anything said or done by Lupton Fawcett, but was based entirely on what he had been told by Mr. Holmes.

60. For her part, Ms. Nayee also said that she was not concerned about the documents that had been provided to her father and herself at the meeting because they had been drafted by Lupton Fawcett. In cross-examination, however, Ms. Nayee accepted that she was aware that the documents required repayment in the short term and gave

security rights over the Property to Amalgamated. She said that she and her father thought that Mr. Holmes and Mr. Bleakley were trying to help them, and that Mr. Holmes and Mr. Bleakley gave them oral reassurances that whatever the documents said, everything would be "sorted out" at the end of the term.

61. Ms. Nayee was then asked why, in these circumstances, she had not sought to contact Lupton Fawcett at the time for advice about the differences between the rights and obligations contained in the written documents and the reassurances given by Mr. Holmes and Mr. Bleakley, or as to how the former might be affected by the latter. In my judgment, Ms. Nayee had no answer to that question.

62. In the circumstances, I reject the suggestion that Mr. Nayee's decision to sign the documents presented to him on 18 April 2012 had anything to do with them having been prepared by Lupton Fawcett. In my judgment, Mr. Nayee signed the documents knowing that they provided for a short-term loan without any formal guarantee of the ability to refinance the loan at the end of the term, but relying on the assurances of Mr. Holmes and Mr. Bleakley that everything would be "sorted out", irrespective of what the documents said.

63. After Mr. Nayee had signed the board minutes of NDH and the documents for the Loan and security over the Property, there was a delay before the Loan was advanced while a valuer instructed by BPFL inspected the Property and reported. The receivers chased BPFL in relation to progress on 23 April 2012 and again on 30 April 2012 when nothing had been heard from Lupton Fawcett. That prompted Lupton Fawcett to email the solicitors for the receivers (Addleshaw Goddard) on 30 April 2012, confirming that they were instructed by Amalgamated in relation to repayment of the debt to the bank and redemption of the charge over the Property.

64. On 1 May 2012, BPFL sent two further Key Features documents to Mr. Nayee by email. They were dated 30 April 2012. The first showed the total cost of the proposed facility under which £282,128 would be drawn down and used to repay the debt to the Bank and the receivers fees (assuming no payment of the architects). The projected total cost of the facility, taking into account fee and interest charges, had risen from the £357,833.69 shown on the Key Features document of 18 April 2012 to £383,454.27.

65. The justification given by BPFL to Mr. Nayee in correspondence for the increase was that the valuers instructed by Amalgamated had given a much lower valuation of the Property than expected (£630,000) and that the fees and interest to be charged had been increased to take account of the increased risk. Specifically, instead of fees payable to BPFL of £37,000 (including £2,500 for "Your solicitor") as shown in the Key Features document which Mr. Nayee had signed on 18 April 2012, BPFL's fees had been increased to £57,568.93 and now included an increased fee of £2,835 for "Your solicitor".

66. The revised Key Features document dated 30 April 2012 also showed that the terms as to interest and Amalgamated's fees were to increase significantly. Previously, interest was to be charged at 2.5% per month together with an arrangement fee of 2.5% and an exit fee of 2.5%. The basic rate of interest was unchanged but a footnote to the document of 30 April 2012 indicated that the rate would increase to 5% per month if the loan defaulted. This later Key Features document also showed that the

arrangement fee and exit fee would be each increased to 5%, with a proviso for them to be reduced to 2.5% if paid within the three months term of the facility.

67. Mr. Nayee's evidence was that he caused NDH to enter into the Loan on the basis of this Key Features document dated 30 April 2012 together with various statements and promises which he said were made orally to him at a further meeting with Mr. Holmes at BPFL's offices. He said that after receiving the Key Features document dated 30 April 2012 he had requested a meeting with Mr. Holmes, which was also attended by his daughter and Mr. Bleakley. Mr. Nayee said that he had challenged Mr. Holmes over the increases in the level of the fees and the interest rate, but Mr. Holmes had refused to reduce either the fees or the interest rate.

68. In cross-examination, Mr. Nayee accepted that he had not sought an extension to the three month period of the Loan. He said that he understood the nature of the Loan and the equitable charge. He said that although he understood that the Loan would be significantly more expensive than the amount needed to repay the Bank and redeem its charge, he took the view that NDH would only have to pay the increased borrowing costs and exit fees to Amalgamated when the Loan was refinanced with a long term facility. In short, Mr. Nayee's evidence was that he was not overly concerned about the level of interest and charges, as he saw them as liabilities which would only have to be paid from the proceeds of the long term refinancing loan which was being sought.

69. In this regard, Mr. Nayee also accepted that he knew that the documents indicated that it was his (NDH's) responsibility to get replacement funding at the end of the three months. However, Mr. Nayee said that he relied on what he termed a "verbal guarantee" from Mr. Bleakley that NDH would be able to get the necessary long term finance. He said that he also drew some comfort from the fact that Mr. Holmes was happy because Mr. Bleakley had been instructed. When asked whether he had consulted Lupton Fawcett to ascertain whether he could rely on the "verbal guarantee" and whether it was enforceable in law, Mr. Nayee accepted that he had not.

70. For her part, Ms. Nayee said that she and her father were aware of the increase in the interest and charges on the face of the Key Features documents, which she accepted that she saw. She said, however, that she did not appreciate how quickly such interest and charges could keep going up if the Loan was not repaid. In that regard, it was not clear whether Ms. Nayee read the revised facility agreement that was subsequently provided and signed by her father after the Loan was drawn down (see below).

71. At the end of her cross-examination, Ms. Nayee said that at this stage when the Loan was due to be drawn down, she and her father were relying on Mr. Bleakley to arrange the "secure exit" that Mr. Holmes had told them that Amalgamated was also counting on. Ms. Nayee accepted that she and her father were not relying on Lupton Fawcett for that.

The making of the Loan and subsequent events

72. The transaction completed the next day - 2 May 2012. The £282,218 borrowed from Amalgamated which was needed to discharge Mr. Nayee's debt to the Bank and the amounts owing to the receivers was paid to the receivers' solicitors. The Bank's

charge over the Property was then released and the receivers ceased to act on 9 May 2012.

73. A few days after the making of the Loan, Mr. Nayee signed a revised form of the Sterling Facility Letter providing for the increased interest rates and fees as shown in the Key Features document dated 30 April 2012. He was also sent a copy of the executed documentation on 17 May 2012, and the equitable charge over the Property in favour of Amalgamated was registered at Companies House on the same day.

74. Thereafter, Mr. Bleakley communicated with Mr. Nayee in relation to obtaining offers to refinance the Loan and develop the Property. There were apparently discussions about obtaining a loan of £500,000 from a "Dave Miller". On 7 June 2012 Mr. Bleakley asked Mr. Nayee for £10,000 to enable "work on the funding to commence", and Ms. Nayee stepped in to provide that sum to her father from her own resources, writing to Mr. Bleakley asking him to agree to repay it if such a loan was not obtained. He did not.

75. On 15 June 2012, Mr. Nayee called Lupton Fawcett for the first time. He did so in order to obtain office copy entries in relation to the Property, including the section 106 agreement relating to planning permission. When he contacted Lupton Fawcett, Mr. Nayee did not ask to speak to, and was not put through to, Rachael Walker who had acted in relation to the Loan transaction. Instead he spoke to a Mr. Gopichandran, who sent him hard copies of the registry documents.

76. I have set out above the chronology of the demand made by Amalgamated for repayment of the Loan together with its associated interest and charges, and of the appointment of the second set of receivers by Amalgamated on 2 November 2012. As also indicated above, the Property (excluding two small strips) was ultimately sold for £751,000 in February 2013, at which time the amount owing to Amalgamated in respect of the Loan was said to have risen to £647,459.57.

77. That sum was said, in a schedule provided to Mr. Nayee, to include £3,234.50 (including VAT) as a "solicitors fee" but I had no further information in that regard, and no point was taken on it. It is apparent, however, that when Mr. Nayee sought to question the amount of fees and charges deducted from the proceeds of sale by Amalgamated, it was Mr. Bleakley to whom he turned for assistance, rather than Lupton Fawcett.

ANALYSIS

Implied Retainer

78. As indicated above, the first issue between the parties is whether Lupton Fawcett was implicitly retained to act as solicitors for NDH by Mr. Nayee. It is common ground that there was no express retainer.

79. Even if there is no express relationship of solicitor and client between two parties, the court may be prepared to find that there is an implied retainer if, viewed objectively, the parties act as if such a relationship existed. At the risk of stating the obvious, however, what must be implicit is that the parties had agreed to enter into the contractual relationship of solicitor and client.

80. The leading statement of when a retainer will be inferred in this way is to be found in the decision of the Court of Appeal in Dean v Allin & Watts [2001] PNLR 39 ("Dean v Allin & Watts"). In that case, Lightman J, with whom Robert Walker and Sedley LJJ agreed, stated at [22]:

> "… As a matter of law, it is necessary to establish that A&W by implication agreed to act for Mr Dean: an implied retainer could only arise where on an objective consideration of all the circumstances an intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties. In Searles v Cann and Hallett [1993] PNLR 494 the question arose whether the solicitors for the borrowers impliedly agreed to act as solicitors for the lenders. Mr Philip Mott QC (sitting as a deputy judge of the Queen's Bench Division) held that there was nothing in the evidence which clearly pointed to that conclusion. He went on:
>
> > 'No such retainer should be implied for convenience, but only where an objective consideration of all the circumstances make it so clear an implication that [the solicitor himself] ought to have appreciated it.'
>
> 'All the circumstances' include the fact, if such be the case (as it is here), that the party in question is not liable for the solicitors fees and did not directly instruct the solicitors. These are circumstances to be taken into account, but are not conclusive. Other circumstances to be taken into account include whether such a contractual relationship has existed in the past, for where it has, the court may be readier to assume that the parties intended to resume that relationship, and where there has been such a previous relationship the failure of the solicitor to advise the former client to obtain independent legal advice may be indicative that such advice is not necessary because the solicitor is so acting: see e.g. Madley v. Cousins Combe & Mustoe [1997] EGC 63 …."

81. In Caliendo v Mishcon de Reya [2016] EWHC 150 (Ch), Arnold J cited that statement of principle and referred also to the decision of Hamblen J in Brown v InnovatorOne plc [2012] EWHC 1321 (Comm) on the requirements for an implied contract. In that case, Hamblen J emphasised that it is for the party alleging the existence of an implied contract to show the necessity for implying it and observed, at [1016],

> "1016. Necessity in this context generally requires demonstrating that the parties have acted in a way which is consistent only with an intention to make a contract. If they would or might have acted the same way in the absence of such a contract then necessity is unlikely to be established. In The Gudermes [1993] 1 Ll.R. 311 at 320 the Court of Appeal approved the following direction given by the Judge (Hirst J):

> 'In my judgment no implied contract can be inferred unless it is necessary to give business reality to the transaction, and unless conduct can be identified referable to the contract contended for which is inconsistent with there being no such contract; and it is fatal to the implication of such a contract if the parties would or might have acted exactly as they did in the absence of such a contract..'"

82. In Caliendo at [682], Arnold J summarised the test by asking,

> "Was there conduct by the parties which was consistent only with [the defendant firm] being retained as solicitors for the Claimants?"

83. Applying these principles in the instant case, I have no doubt that Lupton Fawcett did not implicitly agree to act as solicitors for NDH in relation to the Loan.

84. The first, and important, point of background is that there had been no prior relationship of any sort between Lupton Fawcett and NDH (or Mr. Nayee).

85. Secondly, although it would appear that Lupton Fawcett were accustomed to act both for BPFL and its associated companies and for a bankrupt wishing to obtain an annulment of his bankruptcy using the BPFL scheme described in Consolidated Finance, this was not such a case. Specifically, whatever might have been the relationship between BPFL and Lupton Fawcett in relation to the bankruptcy annulment scheme, this provides no objective basis for a finding that Lupton Fawcett had generally authorised Mr. Holmes to be the firm's agent either to accept instructions to act, or to give any assurance that the firm would accept instructions to act, for a borrower in relation to a transaction which did not involve an annulment of his bankruptcy. Such an arrangement would be highly unlikely in relation to the bankruptcy annulment scheme and even more unlikely in relation to some other type of transaction. A firm of solicitors would doubtless wish to retain a discretion to decide for itself whether to act for a particular client in relation to a particular transaction. In this respect, in cross-examination, Mr. Nayee realistically accepted that even after receipt of the Letter of Authority, Lupton Fawcett would have had the choice as to whether or not to accept instructions to act for NDH in relation to the Loan.

86. Thirdly, although NDH and Mr. Nayee placed great reliance on the signature by Mr. Nayee of the Letter of Authority as being his instructions to Lupton Fawcett to act for NDH in relation to the Loan, when viewed objectively, that is simply not what the Letter of Authority says. Nor, in my judgment, could the Letter of Authority fairly be understood to be the foundation for an implied contract between NDH and Lupton Fawcett in relation to the Loan. Rather, the Letter of Authority is directed generally to third parties ("To whom it may concern"), and it purports to record instructions having previously been given to BPFL and Lupton Fawcett to act for Mr. Nayee to stop bankruptcy proceedings against him. Mr. Nayee was well aware when he signed the Letter of Authority that he had not previously given any such instructions to Lupton Fawcett and there were no bankruptcy proceedings against him.

87. Although paragraph 1 of the Terms and Conditions document makes it marginally clearer that the proposed transaction was not the annulment of a bankruptcy, but "In your case assisting with refinancing or property and land", no emphasis was placed on that document by Mr. Nayee, who said in his written statement and confirmed in his cross-examination that although he signed them, he did not fully understand the Terms and Conditions. There is, moreover, no evidence that this document was sent to Lupton Fawcett together with the Letter of Authority.

88. Nor did the Letter of Authority mention NDH at all. The closest that the document came to a reference to NDH was that it was addressed to Mr. Nayee at the Property rather than at his home address. I do not, however, consider that there is any great significance in that. Mr. Nayee was the sole director of NDH and the mere use of the that address in the letter does not signify, objectively, that any arrangements contemplated by the letter would relate to a commercial loan to NDH.

89. Fourthly, there is no evidence to support Mr. Nayee's assertion that he thought that the Letter of Authority had actually been accepted by Lupton Fawcett as his instructions to act on behalf of NDH. The high water mark of Mr. Nayee's oral evidence in that regard was that on their first telephone call Mr. Holmes told Mr. Nayee that he would arrange for Lupton Fawcett to accept instructions to act for him. But Mr. Nayee was not subsequently told by Mr. Holmes (or anyone else connected with BPFL or Amalgamated) that Lupton Fawcett had actually accepted instructions to act for him or NDH.

90. Fifthly, and importantly, at no time did Lupton Fawcett itself send any letter, email or other communication to Mr. Nayee or NDH that might have signified that the firm had accepted any instructions to act for NDH. In particular, in contrast to the procedure which was followed under the bankruptcy annulment scheme as explained in Consolidated Finance (and the witness statements in this case from those who had used the scheme), Lupton Fawcett never sent an acknowledgment of instructions or a client care letter to NDH or Mr. Nayee. Nor did any solicitor from Lupton Fawcett ever initiate or attempt to make direct contact with Mr. Nayee or NDH by letter or email or in any other way.

91. Sixthly, at no time did Mr. Nayee ever make even the most basic inquiries about the firm of solicitors that he now contends was implicitly retained to act for NDH. So, for example, he did not even inquire or have any idea of the identity of the particular solicitor at Lupton Fawcett who was to deal with the transaction on behalf of NDH. So it was that when Mr. Nayee eventually made contact with Lupton Fawcett to ask for the land registry documents, he did not ask for anyone in particular, and he appears to have been assisted by a solicitor unconnected with the transaction.

92. Nor did Mr. Nayee question what basis of charging or hourly rates Lupton Fawcett might be charging, or what they had been doing to justify the increasing costs for "Your solicitor" shown in the Key Features documents he was sent by BPFL. When asked in cross-examination why he had not contacted Lupton Fawcett over such matters, Mr. Nayee's response was simply that he was "not worried" about the solicitors' fees, but had his mind on developing the Property. That was an unconvincing answer from someone who (on his own account) challenged Mr. Holmes (unsuccessfully) over the increases in the charges and interest rates in the later Key Features documents which he was sent by BPFL.

93. Seventhly, Mr. Nayee never asked Lupton Fawcett for any advice or assistance for NDH until he asked for a copy of certain land registry documents well after the Loan had been advanced. Specifically, Mr. Nayee never asked for advice about the transaction documents that Lupton Fawcett had drafted with which he was presented by Mr. Holmes. Nor did he ever ask to see the "separate solicitor's advice note" referred to in the Key Features documents or even inquire what it related to.

94. Finally, as well as not making any direct contact with Mr. Nayee, Lupton Fawcett never conducted itself in any other way that was, viewed objectively, consistent only with it acting for NDH. So, for example, in preparing the documentation in relation to the Loan and associated security, Lupton Fawcett were acting in a way that was entirely consistent with the firm acting for Amalgamated as lender. Commercial lenders invariably instruct their own solicitors to produce the form of loan agreement and charge that they require to be executed by borrowers.

95. Likewise, in dealing with Addleshaw Goddard on behalf of the receivers appointed by the Bank, Lupton Fawcett were doing no more than might be expected of solicitors acting for Amalgamated as lender. Lenders who are proposing to advance money to discharge previous loans secured upon a property over which they intend to take new security will not pay over the monies until they are satisfied, via their own solicitors, that the result of releasing the funds will be the discharge of the previous debts and the release of the prior security over the property. That task of protecting the new lender is not normally left up to solicitors acting for the borrower.

96. One thing that Lupton Fawcett did that might be thought consistent with acting for NDH was the preparation of the draft board minutes of NDH approving the entry into the Loan agreement and the execution of the charge over the Property. But again, that is not consistent only with Lupton Fawcett being retained as solicitors for NDH, because it is commonplace for the solicitors for a lender to provide draft board resolutions and other relevant corporate documents to a corporate borrower in a standard form which the lender requires in order to be satisfied that the borrower will be bound and that the loan and security will be enforceable.

97. Taking these points together, in my judgment there is simply no documentary evidence and no conduct of the parties which, when viewed objectively, supports the inference that Lupton Fawcett had agreed to be retained to act as solicitors for NDH in relation to the Loan transaction. There is nothing to suggest that Lupton Fawcett thought they were acting for NDH in addition to acting for Amalgamated, and they did nothing which, viewed objectively, indicates that they must have been acting for NDH. Further, although Mr. Nayee now claims that he thought that Lupton Fawcett had accepted his "instruction" in the Letter of Authority, Lupton Fawcett did nothing to indicate to Mr. Nayee that this was so, and Mr. Nayee had no reasonable basis for making any such assumption.

98. In reality, moreover, Mr. Nayee's behaviour was not consistent with a belief that Lupton Fawcett was actually retained by NDH. He never contacted Lupton Fawcett at any relevant time prior to the Loan being made and he failed to show any interest in any of the things that a client would obviously wish to know about their firm of solicitors. Nor did he or Ms. Nayee ask for any advice from the firm when it would have been entirely natural to do so had they thought that the firm was actually acting for NDH. Their explanations for such inaction were wholly unconvincing.

Duty of care in tort

99. The conclusion that Lupton Fawcett was not contractually retained to act for NDH does not, however, exclude the possibility that Lupton Fawcett owed NDH a duty of care in tort. Although such a duty may be more likely to exist where there is a "relationship equivalent to contract" (to use the phrase of Lord Devlin in Hedley Byrne v Heller [1964] AC 465 at 530) the authorities make it quite clear that a duty of care in tort can exist independently of contract.

100. The modern law of liability in tort for recovery of pure economic loss in negligence originates in the decision of the House of Lords in Hedley Byrne v Heller [1964] AC 465. In a number of subsequent decisions the House of Lords and Supreme Court have sought to rationalise the basis for finding that there was a duty of care. In Customs & Excise v Barclays Bank plc [2007] 1 AC 181 at [4], Lord Bingham identified the three techniques or tests which have from time to time been used,

> "… The first is whether the defendant assumed responsibility for what he said and did vis-à-vis the claimant, or is to be treated by the law as having done so. The second is commonly known as the threefold test: whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant … Third is the incremental test … approved by Lord Bridge of Harwich in Caparo Industries v Dickman [1990] 2 AC 605, 618, that:
>
> > "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories …"

101. Lord Bingham then proceeded, at [4]-[8] to offer a number of general observations upon these tests. These included the following,

> "4. … First, there are cases in which one party can accurately be said to have assumed responsibility for what is said or done to another, the paradigm situation being a relationship having all the indicia of contract save consideration. Hedley Byrne would, but for the express disclaimer, have been such a case. White v Jones and Henderson v Merrett Syndicates Ltd, although the relationship was more remote, can be seen as analogous. Thus, … I think it is correct to regard an assumption of responsibility as a sufficient but not a necessary condition of liability, a first test which, if answered positively, may obviate the need for further inquiry. If answered negatively, further consideration is called for.
>
> 5. Secondly, however, it is clear that the assumption of responsibility test is to be applied objectively … and is not

> answered by consideration of what the defendant thought or intended. Thus Lord Griffiths said in Smith v Eric S Bush [1990] 1 AC 831, 862, that:
>
> > "The phrase 'assumption of responsibility' can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice."
>
> The problem here is, as I see it, that the further this test is removed from the actions and intentions of the actual defendant, and the more notional the assumption of responsibility becomes, the less difference there is between this test and the threefold test."

102. Each of the other members of the House of Lords expressed similar misgivings about the inter-relationship and use of the tests: see e.g. per Lord Hoffmann at [35]-[37], per Lord Rodger at [49]-[53] and per Lord Walker at [71]-[73].

103. At [91]-[93] Lord Mance dealt specifically with the interface between the "voluntary assumption of responsibility" test and the "threefold test" in the context of the liability of solicitors to persons other than their clients. He referred in that regard to the decision in White v Jones [1995] 2 AC 207 in which a disappointed beneficiary under a will sued the solicitor who had failed to act upon instructions from a testator to draw up a new will leaving legacies to him and to revoke an earlier will which had disinherited the testator after a family quarrel. Lord Mance said,

> "91. In White v Jones the general approach was revisited. Lord Goff, at p. 257a , referred to assumption of responsibility as the test which "as a general rule" determined whether there could be liability under for purely financial loss, but he recognised that the testator's solicitor could not be said actually to have assumed responsibility towards a disappointed beneficiary, pp 262 b – c and 268 a – b. It was only because there would otherwise be a lacuna in the law leading to injustice that he concluded that the House:
>
> > "should in cases such as these extend to the intended beneficiary a remedy under the Hedley Byrne principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor."

92. Lord Browne-Wilkinson, at pp 273g – 274g, addressed the doubts expressed by Lord Griffiths in Smith v Eric S Bush and Lord Roskill in Caparo Industries plc v Dickman by explaining assumption of responsibility as "assumption of responsibility for the task not the assumption of legal responsibility". He said:

> "If the responsibility for the task is assumed by the defendant he thereby creates a special relationship between himself and the plaintiff in relation to which the law (not the defendant) attaches a duty to carry out carefully the task so assumed."

On this basis he explained Smith v Eric S Bush and Caparo as cases where there had been "the conscious assumption of responsibility for the task" (p. 274 b), and said that, although the categories of cases of special relationship were not closed, the only two hitherto identified were:

> "(1) where there was fiduciary relationship and (2) where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers or advice. In both these categories the special relationship is created by the defendant voluntarily assuming to act in the matter by involving himself in the plaintiff's affairs or by choosing to speak."

He recognised that neither of these categories covered the circumstances in White v Jones: p. 275 c. But he considered a duty of care in White v Jones to be justified because "the law in this area has not ossified", because Lord Devlin in Hedley Byrne had himself envisaged that there might be other sets of circumstances in which it would be appropriate to find a special relationship giving rise to a duty of care, and because the case fell within Lord Bridge's statement in Caparo that novel categories of negligence could be developed "incrementally and by analogy with established categories". A duty owed by the negligent solicitor to the disappointed beneficiary was closely analogous with existing categories of special relationship: p. 275 f.

93. This review of authority confirms that there is no single common denominator, even in cases of economic loss, by which liability may be determined. In my view the threefold test of foreseeability, proximity and fairness, justice and reasonableness provides a convenient general framework although it operates at a high level of abstraction. The concept of assumption of responsibility is particularly useful in the two

> core categories of case identified by Lord Browne-Wilkinson in White v Jones, at p. 274 f-g, when it may effectively subsume all aspects of the threefold approach. But if all that is meant by voluntary assumption of responsibility is the voluntary assumption of responsibility for a task, rather than of liability towards the defendant, then questions of foreseeability, proximity and fairness, reasonableness and justice may become very relevant. In White v Jones itself there was no doubt that the solicitor had voluntarily undertaken responsibility for a task, but it was the very fact that he had done so for the testator, not the disappointed beneficiaries, that gave rise to the stark division of opinion in the House. Incrementalism operates as an important cross-check on any other approach."

104. In NRAM plc v Steel [2018] 1 WLR 1190 the Supreme Court returned to the question of the circumstances in which a solicitor might be held liable in negligence to someone other than their client. The claimant was a commercial lender who had granted a loan to a borrower for the purchase of a number of commercial properties over which the lender took security. Subsequently the borrower wanted to sell one of the properties and it was agreed that on sale there would be a partial repayment of the loan and a release of the one property to be sold from the security. Shortly before the completion of the sale the borrower's solicitor sent an email to the lender, wrongly stating that all of the loan was being repaid and asking for documents releasing the entire security. Without checking the accuracy of the email, the lender discharged the security. The borrower subsequently went into liquidation, the remainder of the loan was not repaid, and the lender sued the borrower's solicitor for negligent misrepresentation, seeking to recover its losses.

105. In explaining the development of the law in this area, Lord Wilson held that the assumption of responsibility was the appropriate test to be applied, saying, at [24]-[25],

> "24. In Williams v Natural Life Health Foods [1998] 1 WLR 830, Lord Steyn remarked at p. 837 that there was no better rationalisation for liability in tort for negligent misrepresentation than the concept of an assumption of responsibility. It has therefore become clear that, although it may require cautious incremental development in order to fit cases to which it does not readily apply, this concept remains the foundation of the liability.
>
> 25. The legal consequences of Ms Steel's careless misrepresentation are clearly governed by whether, in making it, she assumed responsibility for it towards [NRAM]. The concept fits the present case perfectly and there is no need to consider whether there should be any incremental development of it. Nevertheless the case has an unusual dimension: for the claim is brought by one party to an arm's length transaction against the solicitor who was acting for the other party. A solicitor owes a duty of care to the party for whom he is acting

> but generally owes no duty to the opposite party: Ross v Caunters [1980] Ch 297, 322."

106. The reference to Ross v Caunters was to a dictum of Megarry V-C, to the following effect,

> "In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb "properly," that duty is a paramount duty. The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he will have served his client."

107. In NRAM, Lord Wilson illustrated the general principle by reference to six cases. One of the six cases was Dean v Allin & Watts. The claimant (Mr. Dean) proposed to make a series of loans to two borrowers on the basis of security provided by two of their business associates (Mr. and Mrs. S) over a property which they owned. The borrowers instructed a solicitor at the defendant firm to effect the security and the claimant made a loan on the footing that the security was in place. Due to the solicitor's failure to advise that for a valid security a written memorandum of deposit was needed in addition to a deposit of title deeds, when the loan was not repaid, Mr. and Mrs. S were able successfully to argue that the security was invalid. The lender sued the borrowers' solicitors for his loss in making the loan.

108. Giving the first judgment in the Court of Appeal, Lightman J set out the general principle at [33],

> "33. In a situation such as the present where (to the knowledge of both parties) a solicitor is retained by one party and there is a conflict of interest between the client and the other party to a transaction, the court should be slow to find that the solicitor has assumed a duty of care to the other party to the transaction, for such an assumption is ordinarily improbable. But the special circumstances of a particular case may require a different conclusion to be reached."

109. On the facts of Dean v Allin & Watts, the claimant succeeded in establishing that a duty of care was owed by the solicitor. The key factual findings were twofold. First, that although there was a conflict of interest between the borrowers and the lender as regards the terms of the proposed loan (e.g. as to interest rates before and after a default) there was an identity of interest between the borrower and the lender as regards the grant of effective security by the third parties, because both lender and borrower saw it as essential for valid security to be granted in order that the loan could be made: see per Lightman J at [34(6)]. Secondly, it was crucial that the court found that the solicitor knew or should have known that the lender (who was not sophisticated) had not instructed his own lawyer and, as a result of a series of meetings and communications between them, was relying on the solicitor to ensure

that effective security was provided: see per Lightman J at [34(2)-(4)]. Thus Robert Walker LJ explained the decision as follows at [69],

> "I agree with Lightman J that it is fair, just and reasonable to hold that [the solicitor] did owe a duty of care to Mr Dean. As [the solicitor] knew or should have known, Mr Dean was relying on him, the provision of effective security was of fundamental importance to Mr Dean, and there was on this point a sufficient identity of interest between Mr Dean and [the borrower]. For my part I do not see this as an extension of White v Jones but as an example of the sort of exceptional case contemplated by the Vice-Chancellor in Gran Gelato v Richcliff (Group) [1992] Ch 560, 571–2."

110. At the conclusion of his summary of the six cases in NRAM, Lord Wilson remarked, at [32],

> "… the six authorities cited above demonstrate in particular that the solicitor will not assume responsibility towards the opposite party unless it was reasonable for the latter to have relied on what the solicitor said and unless the solicitor should reasonably have foreseen that he would do so. These are, as I have shown, two ingredients of the general liability in tort for negligent misrepresentation; but they are particularly relevant to a claim against a solicitor by the opposite party because the latter's reliance in that situation is presumptively inappropriate."

111. On the facts of NRAM, the Supreme Court held that no duty of care was owed by the borrower's solicitor to the lender for her erroneous statement. The lender had all the necessary facts within its own knowledge and it had therefore not been reasonable for it to rely upon the solicitor's statement without checking its accuracy; and by contrast it had been reasonable for the solicitor not to foresee that the lender would rely upon her statement without checking it: see Lord Wilson's judgment on behalf of the court at [38].

112. I therefore turn to apply these principles to the facts of the instant case.

113. It should first be borne in mind that this was the paradigm case in which there was a straight conflict between the interests of the lender for whom Lupton Fawcett was acting and NDH as borrower. This was not a case in which there was any commonality of interest between Amalgamated and NDH. There was, for example, no common interest in obtaining an annulment of any bankruptcy as would have been the case between lender and bankrupt under BPFL's bankruptcy annulment scheme. Nor was there any common interest in obtaining effective security over the property of a third party to facilitate the making of the loan, as was the case in Dean v Allin & Watts. The presumption must therefore be that there was no duty of care, and that some special or exceptional circumstances would need to be shown for such a duty to be imposed: see the extracts from the judgments of Lightman J and Peter Gibson LJ in

Dean v Allin & Watts cited above, referring to the decisions in Ross v Caunters [1980] Ch 297 and Gran Gelato v Richcliff (Group) [1992] Ch 560, 571–2.

114. Secondly, I have already set out above my grounds for concluding that Mr. Nayee did not have a reasonable basis for assuming that Lupton Fawcett were actually acting as NDH's solicitors. Indeed, Mr. Nayee's inaction has led me to the conclusion that he did not in fact hold such a belief at the time. Many of the same points also indicate why Mr. Nayee could not reasonably have been relying on Lupton Fawcett to give advice to NDH. So, for example, I cannot easily see how Mr. Nayee can actually have relied, or reasonably relied, on receiving advice from a firm of solicitors whom he had never sought to contact, and which had never sought to contact him.

115. The unusual fact that there was no contact between Mr. Nayee and Lupton Fawcett provides a stark contrast to the facts of both NRAM and Dean v Allin & Watts in which there were direct contacts between the claimant and the defendant solicitor. In NRAM, the entire focus of the argument for the imposition of a duty of care in the Supreme Court was on the inaccurate email sent directly by the solicitor for the borrower to the lender. In Dean v Allin & Watts, the contacts were far more extensive. Prior to the first loan being made, the lender and borrower went together to the borrowers' solicitor's office for a meeting at which the solicitor gave the lender an undertaking that he (the solicitor) would hold the title deeds and would not release them to anyone except on the lender's instructions. Following the meeting, the solicitor then confirmed that arrangement in writing to the lender. Subsequently, the solicitor wrote to the lender to inquire whether the lender would be requiring a new promissory note for some of the further loans, to which the lender replied saying "if you think a new promissory note is required, then I would like you to obtain one for me". In his judgment, Peter Gibson LJ noted, at [65], that the solicitor had accepted in evidence at the trial that the lender could have got the wrong impression from that exchange, and he concluded that,

> "In my judgment it was by then obvious, even if it had been no more than conjectural before, that [the lender] was relying upon [the solicitor] to look after his interests so far as the form of the security was concerned."

116. The point that the total lack of any contact between Mr. Nayee and Lupton Fawcett indicated that Mr. Nayee was not in fact relying on the firm was put directly to him in cross-examination. Mr. Nayee accepted that although he had previous experience of using solicitors, he had never contacted Lupton Fawcett for any advice. When asked why that was, he said first that it was a solicitor's "privilege" whether to give advice. Appearing to realise the oddity of this response, he then asserted that had been the solicitor's "duty" to contact him to advise whether the transaction was "right or wrong" for him. He then added that Mr. Holmes had said that Lupton Fawcett would contact him, but they had not.

117. It was then suggested to Mr. Nayee that if Mr. Holmes had told him to expect Lupton Fawcett to contact him, this made it all the more surprising that he had not sought to contact Lupton Fawcett when they had not done what Mr. Holmes had said they would. Mr. Nayee simply repeated that the solicitor had a duty to contact him. It was then put to Mr. Nayee directly several times that the reason that he had not sought to contact Lupton Fawcett, even in those circumstances, was that he was not relying on

the firm at all. Mr. Nayee had no answer or explanation, but simply repeated a number of times, "I didn't contact them."

118. In this respect I also reiterate the point to which I referred in paragraph 57 above to the effect that although Mr. Nayee contended in his oral evidence that he was rushed into signing documents prepared by Lupton Fawcett at the meeting with Mr. Holmes on 18 April 2012, he did not contact Lupton Fawcett afterwards for advice as to the effect of what he said he had been pressured into signing. His answer was that there was "no point" was totally unconvincing. Nor, as I pointed out in paragraph 69 above, did it occur to Mr. Nayee to contact Lupton Fawcett to get advice about the "verbal guarantee" that he was given by Mr. Bleakley that long-term finance would be available at the end of the three month term of the Loan, notwithstanding what the formal documents said. As I have indicated, in my judgment Mr. Nayee was in reality just relying on what he was told by Mr. Holmes and Mr. Bleakley when deciding to go ahead.

119. That view of the facts is supported by a further point on reliance. NDH's contention was that Lupton Fawcett had a duty of care to give it advice not to enter into the agreements with Amalgamated because the charges and interest were exorbitant and that there was no guarantee that long term finance would be available at the end of the three month term. But that would have been advice about the financial merits (or otherwise) of the offer from Amalgamated and the commercial risk that no long term refinancing might be available.

120. In cross-examination, Mr. Nayee accepted that from his previous experience in business, that whilst he would look to solicitors for legal advice, he would not look to them for financial or commercial advice. So, for example, Mr. Nayee accepted that he had looked to his accountants, Moore & Smalley, rather than his then solicitors, Napthens, for advice about the financial and tax benefits of setting up NDH.

121. Moreover, in this particular case, as I have indicated above, Mr. Nayee had replaced JR Commercial and specifically instructed Mr. Bleakley in its place. Mr. Bleakley's email to Mr. Nayee of 29 March 2012 had set out the three stage process which he envisaged and then said,

> "My role is not just to obtain finance for you. My role is to give you advice and act in your best interest."

122. These factors provide a further reason why Mr. Nayee did not think to contact Lupton Fawcett, and why he was not relying on the firm to give advice about the proposed transaction. If Mr. Nayee was looking for advice from anyone about the transaction with Amalgamated, he was not looking for advice about the legal nature of the transaction or the drafting of the documents. Mr. Nayee confirmed in his evidence that he was well aware that the Loan from Amalgamated was limited to three months and there was no guarantee that long term finance would be available to refinance it. What Mr. Nayee complains that NDH did not receive, was advice about the financial cost of the Loan and the commercial risks inherent in the transaction. In my judgment, that was advice for which Mr. Nayee was relying on Mr. Bleakley.

123. Mr. Elleray QC sought to suggest, relying on part of Mr. Bleakley's email of 29 March 2012 that Mr. Bleakley was in fact only engaged to search for refinancing and

was not engaged to give advice about the merits of the Loan for NDH. I do not accept that submission, which was not supported by the full text of the email. The potential financial cost to NDH if the Loan were not to be repaid on time, and the commercial risks of enforcement action by Amalgamated, were inextricably linked to the question of whether refinance could be obtained at the end of the three months. That was apparent from the email of 29 March 2012 when Mr. Bleakley outlined his proposals for a three stage process, which included the first stage of preventing the sale by the receivers appointed by the Bank by obtaining funding from Mr. Holmes of Amalgamated.

124. I therefore conclude that Mr. Nayee was not actually relying, or could not reasonably have been relying, on Lupton Fawcett for advice on the financial merits and commercial risks of the Loan for NDH.

125. On the other side of the equation, and for very similar reasons, I do not consider that it would have been reasonable for Lupton Fawcett to think that Mr. Nayee was relying upon the firm to advise NDH on the financial and commercial benefits and risks of the Loan.

126. First, in contrast to the position in the bankruptcy annulment scheme where Lupton Fawcett were accustomed to act for the bankrupt in seeking to obtain an annulment of their bankruptcy by an application to court, in this case there was nothing for Lupton Fawcett to do for NDH which was equivalent to seeking an annulment of the bankruptcy.

127. Secondly, and again in contrast to the cases such as Dean v Allin & Watts in which a duty of care was held to have arisen because the solicitor should have appreciated that the claimant was relying upon him as a result of their various meetings and communications, in this case there was no contact between Mr. Nayee and Lupton Fawcett whatever. Even if a solicitor at Lupton Fawcett might have contemplated the possibility that Mr. Nayee's signature of the Letter of Authority was the result of confusion on his part as to whether the firm would be acting for him in some respect, the fact that nothing was heard from Mr. Nayee thereafter as the transaction proceeded would, in my judgment, have allayed any concerns in that respect and led any reasonable solicitor to the conclusion that Mr. Nayee was not, in fact, relying upon the firm.

128. Thirdly, I do not see why Lupton Fawcett should reasonably have foreseen that Mr. Nayee might be looking to the firm for financial advice about the merits of the transaction. That was not a role that Lupton Fawcett were accustomed to perform for anyone, even in the bankruptcy scheme context; and if it had inquired into the matter, the firm would have discovered that Mr. Nayee had engaged Mr. Bleakley to provide financial advice to NDH.

129. Mr. Elleray QC sought to support his arguments in these respects by seeking to draw an analogy with the role of Lupton Fawcett in relation to BPFL's bankruptcy scheme in Consolidated Finance. However, I do not think that authority assists NDH's case. As appears from paragraphs [17] - [18] of the judgment, Lupton Fawcett's standard form letter to its individual clients in respect of the bankruptcy annulment scheme, described its introduction to the client by BPFL and the scope of its work as follows,

> "We are one of a number of firms of solicitors to whom [BPFL] from time to time refer individuals seeking to annul their bankruptcy with the benefit of funds advanced through [BPFL].
>
> Normally, in addition to acting for you, we will also act for [Consolidated] (a company associated with [BPF]) in arranging for their security (usually a charge over your home) to be completed and registered at H M Land Registry."

The letter then included a section headed "Work not covered". This specifically excluded four areas of advice, of which the third was,

> "Any advice on the terms of the proposed funding by [BPFL] including any advice on the Loan Facility Letter or the security documents."

130. At the end of his judgment, Sir Stanley Burnton expressed concern about Lutpon Fawcett's role and doubted whether Lupton Fawcett could in fact exclude a duty of care to the bankrupt to advise that the terms of the loan were manifestly disadvantageous to her,

> "59. Finally, I am concerned at the part played by the solicitors. They were not represented before us, and so I can only express my concerns, but I do not come to any conclusion. Lupton Fawcett were well aware of the standard terms of the agreements sought by the companies. It must, and certainly should, have been obvious to them that for the reasons I have given the transactions with Mr and Mrs Collins were manifestly to their disadvantage. Mrs Collins was their client. I raise the question whether in such circumstances a solicitor can properly avoid a duty to advise his client by excluding that duty from his retainer, as Lupton Fawcett sought to do. Did Lupton Fawcett permit their client to enter into transactions that, it seems to me, they must have appreciated were to her disadvantage? At the very least I think that they should have advised Mrs Collins in the strongest terms to seek advice elsewhere. Instead, their client letter merely pointed out that she was free to seek advice elsewhere. I am not confident that this would be sufficient, however. One should bear in mind that someone in her situation may in practice be unable to afford to consult another independent solicitor. It may well be that, given their on-going relationship with the companies that habitually introduced work to them, they had a conflict of irreconcilable interests."

131. On proper analysis, that authority shows that in the bankruptcy context, Lupton Fawcett did not give any advice about the loans from BPFL or its associated companies, and took steps to make that clear to their individual clients when setting out the limited scope of the firm's retainer. That express limitation was necessary because of the risk that people who were Lupton Fawcett's clients for the purposes of getting an annulment of their bankruptcy would misunderstand the scope of what the

firm was undertaking to do for them. But it does not follow that in a non-bankruptcy case Lupton Fawcett ought to have appreciated that someone who was not their client, and with whom the firm had never been in contact, might be looking to the firm to give advice of a type that the firm usually excluded from its retainer, and which would have been contrary to the interests of the firm's actual client (Amalgamated).

132. Moreover, Sir Stanley Burnton's comments that the firm ought at very least have advised its bankrupt clients in the strongest terms to seek independent advice elsewhere on the merits of the transaction were based upon his view that the firm would otherwise have a conflict of irreconcilable interests in acting for both lender and borrower. Those comments are no basis for a conclusion that Lupton Fawcett would be obliged to act in the same way if it was not actually acting for both parties.

133. These points also answer the way in which Mr. Elleray QC put NDH's alternative case in tort. As indicated above, he submitted that even if Lupton Fawcett was not under a duty of care to give advice about the wisdom (or otherwise) of NDH taking the Loan from Amalgamated, the firm was nevertheless under a duty to warn Mr. Nayee that it was not acting for NDH and that it ought to seek independent advice elsewhere.

134. In addition to referring to Sir Stanley Burton's comments in Consolidated Finance, Mr. Elleray QC sought to buttress this submission by reference to The Solicitors Regulation Authority's Code of Conduct 2011 (the "SRA Code") which included, in Chapter 3, the principle that a solicitor should not act where there is a conflict, or significant risk of conflict, between two or more current clients, and as indicative behaviour which tended to show compliance with that principle, that the solicitor should decline to act for the clients. Mr. Elleray QC also drew attention to the principle in Chapter 11 of the SRA Code that a solicitor should not take unfair advantage of a third party in his professional or personal capacity, and as indicative behaviour in that regard, that a solicitor should not take advantage of a third party's lack of legal knowledge where they have not instructed a lawyer.

135. In my judgment these materials form no basis for the imposition upon Lupton Fawcett of any duty to warn NDH that Lupton Fawcett was not acting for it and that it should obtain independent advice. In contrast to the position in Consolidated Finance, and that dealt with in Chapter 3 of the SRA Code, Lupton Fawcett was not acting for NDH as well as Amalgamated. Nor did Lupton Fawcett have any reasonable grounds for thinking that NDH was relying upon it for advice. Absent either situation, I cannot see on what basis a solicitor has a free-standing duty in tort to tell the party on the other side of a commercial transaction to get independent advice. Still less can I see on what basis a firm should be under a duty to advise the other party to get independent financial and commercial advice about the transaction if it already appears that the other party has such advice.

136. Nor do I think that Lupton Fawcett could be said to have owed, or breached, any duty not to take unfair advantage of Mr. Nayee's lack of legal knowledge. Lupton Fawcett owed a duty to its own client to draft effective legal documentation for the Loan that Amalgamated wished to propose to NDH. For the very reasons explained by Megarry V-C in Ross v Caunters, the firm was not under any duty to NDH in respect of that documentation. But nor does NDH in fact claim that Lupton Fawcett took advantage of any lack of legal knowledge on the part of Mr. Nayee. NDH's complaint is about a

lack of advice about the financial terms and commercial risks inherent in the proposed transaction.

137. The consequence is that I reject NDH's claims that Lupton Fawcett owed or breached any duties in contract or tort. The claim therefore fails and must be dismissed.

Causation

138. For completeness I should deal briefly with Mr. Evans-Tovey's argument on causation - namely that even if Lupton Fawcett had owed and breached any duties of care to NDH, Mr. Nayee would have caused NDH to take on the Loan nevertheless.

139. Even though I have found that Mr. Nayee was not relying on Lupton Fawcett to advise NDH, and the firm could not reasonably have thought he was, the hypothesis for this point is that NDH would have been relying on the firm for advice and Lupton Fawcett would have advised Mr. Nayee that the Loan from Amalgamated was manifestly disadvantageous to NDH because of the high financial cost and the risks of enforcement proceedings by Amalgamated if a refinancing could not be obtained at the end of three months.

140. In that hypothetical situation, I do not doubt that Mr. Nayee would have reassessed his options. However, he was very proprietorial over the Property with which he had been associated for many years, and he saw its redevelopment as a means to his long-term financial security. At the time, Mr. Nayee was under considerable time pressure from the receivers appointed by the Bank who were threatening to sell the Property. As indicated by his evidence to me and as reflected in the email which he sent (albeit at Mr. Bleakley's dictation) to JR Commercial and the email which he received from Mr. Bleakley on 29 March 2012, Mr. Nayee was extremely anxious to avoid the sale of what he saw as "his" Property, in which he had invested so much time and effort. Mr. Nayee and his daughter also clearly trusted and were much influenced by the assurances of Mr. Holmes and Mr. Bleakley.

141. Mr. Nayee also accepted that he was aware of the critical features that the Loan had to be repaid within three months and that he was reliant on Mr. Bleakley to find the necessary finance, or risk enforcement by Amalgamated. He was also aware of the significantly increased levels of interest and costs, because he challenged Mr. Holmes (unsuccessfully) on them. In this respect, an insight into Mr. Nayee's approach to the high potential cost of the Loan and the taking of commercial risk can be seen from his answers set out at paragraph 68 above – namely that Mr. Nayee was not much concerned about the increased costs of borrowing because he saw them as matters that could simply be refinanced in due course.

142. Taking these matters together, had I been required to do so, and albeit with some hesitation, I would have found that even if Lupton Fawcett had offered cautionary advice about the Loan as NDH now suggests that they should have, Mr. Nayee would probably have been persuaded by Mr. Holmes and Mr. Bleakley that NDH should go ahead with the Loan and take its chances with finding refinancing in order to prevent the immediate sale of the Property by the Bank's receivers.

143. Accordingly, even if I had found a duty of care to exist, I would therefore have held the breach of duty by Lupton Fawcett did not cause the loss of which NDH now complains.

Damages

144. I should also record that if I had found in favour of NDH, I would not have calculated the measure of NDH's loss by making the assumption suggested by Mr. Elleray QC that if Lupton Fawcett had given advice to NDH and stopped the Loan being taken from Amalgamated, the Property would have been sold by the receivers appointed by the Bank in 2012 for the same price at which it was subsequently sold in 2013 by the receivers appointed by Amalgamated.

145. Regrettably, the evidence did not disclose the offers that had been received by the Bank's receivers in 2012, and I had no expert evidence about the movement of commercial property prices in the locality over the intervening period until the actual sale in 2013. I can, however, take some judicial notice of the fact that commercial property prices at this time were generally increasing.

146. As I have indicated, however, I had some evidence that the valuation of the Property for Amalgamated prior to the Loan being made was reported to be £630,000. This was presumably a valuation given on an enforcement basis for the purposes of security and a figure net of the costs of sale. The comparable figure actually achieved in 2013 was about £710,000 (I have assumed that the costs of sale comprise the difference between the actual sale price of £751,000, the amount which was said to be payable to Amalgamated (£647,459.57) and the amount eventually paid to NDH (£62,4456.56) – i.e. about £41,000).

147. In the absence of any other evidence allowing me to calibrate the likely outcome of a sale by the Bank's receivers in 2012 more accurately, I would have simply split the difference between the net value of £630,000 given in 2012, and the net £710,000 achieved in 2013, and would therefore have assessed damages on the basis that the Property would have been sold by the Bank's receivers in 2012 for a net figure of £670,000.

148. From that sum I would have deducted the £282,218 which was required to be paid to the Bank and its receivers, leaving NDH with a net recovery of £387,782. NDH would also have had to give credit for the £62,456.56 which it actually received from the sale in 2013. The result is that if I had been required to do so, I would have assessed the damages attributable to NDH not having been advised against entering into the Loan agreement with Amalgamated at £325,325.

DISPOSAL

149. As it is, however, and for the reasons that I have given, I dismiss NDH's claim.