Neutral Citation Number: [2021] EWHC 1473 (QB)

Case No: F90LS844

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY

The Combined Court Centre,
Oxford Row, Leeds

Date: 07/06/2021

Before :

HIS HONOUR JUDGE GOSNELL
(sitting as a Judge of the High Court)

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Between :

Michelle Frances Lennon (1) **Kathleen Teresa Lennon (2)**	**Claimants**
- and -	
Philip Anthony Devereux Englefield (1) **Grace Associates Limited (2)** **Philip Moody and Co (a firm) (3)** **Ms Glenys Winifred Marlow and Ms Ann Moody (as personal representatives of Philip Moody deceased) (4)** **Rachel Elizabeth Bourne (5)**	**Defendants**

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Mr Francis Bacon (instructed by Levi Solicitors LLP) for the Claimants
Mr Ben Patten QC (instructed by Reynolds Porter Chamberlain LLP) for the Third to Fifth Defendants
Mr Englefield did not appear and was not represented
Hearing dates: 10th-12th May 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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His Honour Judge Gosnell :

1. This claim is brought by the Claimants against the five Defendants named above. The claim against the first two Defendants has settled and the claim now proceeds only by the First Claimant against the Third to Fifth Defendants. In this judgment if I refer to "the Claimant" I am referring to the First Claimant as she is effectively the only Claimant in the claim against the remaining Defendants. The Third Defendant is a firm of solicitors who acted for the First Claimant in a conveyancing transaction. The Fourth Defendants are the personal representatives of the late Philip Moody, one of the partners in the firm and the Fifth Defendant is a solicitor who actually conducted the transaction and was the late Mr Moody's partner in the Third Defendant firm of Solicitors. I will refer to these defendants collectively as "The Solicitor Defendants" as nothing turns on their individual positions. I understand that they are insured against liability for professional negligence. Whilst the case against the First and Second Defendant has settled it is necessary to understand the First Defendant's involvement in this and other transactions. The Second Defendant is merely a corporate entity through which Mr Englefield ran his business. I will henceforth mainly refer to him as Mr Englefield.

2. **Introduction**

The First Claimant Michelle Lennon, who was born on 20 July 1972, is the eldest child of the late Francis Lennon ("Frank") and Kathleen Lennon, the Second Claimant. Frank died in a flying accident on 30 March 2004. By his final will dated 8 March 2001 [541-542], Frank gave and devised all his real and personal estate to his late wife, the Second Claimant. Frank's estate was substantial and included properties in Florida, Canary Islands, Leeds and London. It included a leasehold property known as Flat 24, Aria House, Newton Street, London WC2B 5EN ("The Property"). I will refer to the Claimants mainly by their first names.

3. It seems that Kathleen Lennon was introduced to the Mr Englefield by Frank's former accountant Brian Sochall in about June 2004. Mr Englefield assisted her in applying for probate which was granted to Kathleen on 2nd December 2004. Her case is that she believed that Mr Englefield was a solicitor and she placed her trust and confidence in him. The existence of this belief was conceded in submissions by the Solicitor Defendants. In fact Mr Englefield had been struck off the Roll of Solicitors in 1991 for stealing £900,000 from his firm's client account. He was convicted of theft in 1993 and served a six-year prison sentence. It would appear that at all relevant times the Second Defendant was balance sheet insolvent.

4. Frank had purchased the Property in August 1999 , but in his daughter Michelle's name and on 23rd December of the same year she entered into a Declaration of Trust whereby it was declared that she held the property on trust for her father [540]. Although Michelle was technically the owner she was aware that her mother Kathleen was entitled to the property after the death of her father. It seems that Kathleen managed things like renting out the property and arranging for a substantial sum of money to be spent on refurbishing it. By 2013 Kathleen had decided to sell the property and a sale was negotiated for £1,250,000 through Winkworths as agents on 20th February 2013.

5. It would appear that Kathleen asked Mr Englefield to assist in the sale and he made an arrangement with the Solicitor Defendants that he would act as some sort of interface between Kathleen and Michelle on the one part and the Solicitor Defendants who would actually be conducting the sale on the other. It would appear that Michelle signed at least part of an engagement letter but the contact between the Solicitor Defendants and Kathleen and Michelle took place through Mr Englefield. When Michelle signed the contract and transfer they were delivered to her by hand probably by her mother who had been supplied them by Mr Englefield. She signed the contract but also signed a letter addressed to the Solicitor Defendants authorising them to pay the entire proceeds of sale to the client account of the Second Defendant. Another letter confirming that in fact Michelle held the Property on trust for her father's estate was not forwarded by Mr Englefield on to the Solicitor Defendants.

6. Contracts were exchanged on 8th May 2013 and the transaction completed on 10th May 2013. The Solicitor Defendants received £ 1,250,507.39 and after payment of their own fees and estate agents fees etc the sum of £1,218,519.39 was transferred to the Second Defendant in accordance with the written instructions of Michelle on 10th May 2013 [509].

7. Mr Englefield appears to have systematically withdrawn significant funds from the Second Defendant's client account over time. It is accepted that he paid £216,259.69 to the Claimants but has never repaid the balance. It was his case that he had invested the balance of the proceeds of sale in a joint venture involving a dam in South America but an examination of his bank accounts showed that this could not be substantiated. The Claimants made an application for summary judgment against First and Second Defendants which was granted by consent in the sum of £ 2,124,009.30 inclusive of interest on 20th April 2021. Nothing has been paid by either the First or Second Defendant.

8. The First Claimant makes this claim against the Solicitor Defendants contending: that they failed to comply with various provisions of the Solicitors Regulatory Authority Code of Conduct and other guidance and regulations introduced pursuant to the Money Laundering Regulations 2007; that they should have investigated the status and background of Mr Englefield; that they should have advised Michelle that by authorising the transfer of money to Mr Englefield she was acting to her own manifest disadvantage ; and that they should have advised Michelle that the monies should have been paid into a bona fide solicitor's client account. The Solicitor Defendants concede that there may not have been complete compliance with all the relevant regulatory provisions but assert that these duties are not owed to the client (Michelle) and are not capable of founding a claim in contract or tort. They also assert that there is no causal link between any such breach and the loss which was suffered due to the dishonesty of Mr Englefield and the Claimants gullibility in trusting him. The Solicitor Defendants emphasise that their retainer did not include advising on the commercial sensitivities of the deal or the wisdom of dealing through Mr Englefield as some sort of agent. They were instructed to deal with the conveyancing of the Property and disburse the proceeds of sale where instructed , which they did.

9. **The Factual Evidence**

Michelle Frances Lennon is of course the daughter of Frank Lennon and Kathleen Lennon. She took no part in her father's business empire and is in fact a Social

Worker who lives in Leeds. She gave evidence that the Property was bought in her name and was held in trust for her father under a Declaration of Trust. There was a loan secured on the property but it was discharged by 2013. She has been involved in personal property purchases previously but is not experienced in buying and selling properties.

10. She was unable to recall when her mother first started to deal with Mr Englefield but thought he had been introduced to her mother by her late father's accountant. She said she believed and understood that he was a reputable solicitor who assisted her mother with her late father's estate. She says that she only became aware that Mr Englefield had been struck off the Roll of Solicitors for dishonesty when they started to chase the balance of the completion monies in 2017. She said had she known of his past she would not have dealt with or through him.

11. She recalls that her father bought the Property off plan but she did not receive any income from it and following her father's death her mother dealt with all issues relating to the property. She recalls her mother saying that she planned to sell the Property but she wasn't personally involved in negotiating the sale. She does not now recall receiving any letters or documents from either Mr Englefield or the Solicitor Defendants about arrangements being made for her to sign documents. She has no recollection of agreeing to Mr Englefield acting as an "interface" between her and the Solicitor Defendants nor really any conversation at all about his role. If he had said he was liaising with other professionals however she would not have been concerned as he had been doing that for the family for some years by then.

12. In her witness statement Michelle accepts that she signed the last page of the Client Engagement Letter dated 8th March 2013 from the Solicitor Defendants. She denies having any direct contract with Ms Bourne, the solicitor who wrote the letter. She says she was asked to provide identity documents but never did so. Michelle does not recall meeting with Mr Englefield during this crucial time and in particular on 11th April 2013 when there appears to have been a meeting with her mother in Leeds.

13. She says that her mother handed her two letters dated 2nd May 2013 to sign, both gave an incorrect address. One of them authorised the proceeds of sale to be paid into the Second Defendant's client account [594] and the other confirmed that she was holding the Property on trust for her father's estate [595]. Her brother had suddenly and tragically died on 22nd March 2013 and the family were still grieving at this stage. She thought nothing of it because at this point she thought Mr Englefield was a reputable solicitor. She accepts that she signed the contract and transfer shortly afterwards.

14. The completion took place and the proceeds of sale were paid into the Second Defendant's account. She says she never received a completion statement. She recalled that her mother requested money from time to time and was paid what she asked for and that she herself received a cheque for £1,000 in March 2015 which was a retention. She said she never discussed the investment of the proceeds of sale with Mr Englefield.

15. In October 2017 Mr Englefield wrote to Michelle suggesting a discussion about his company's costs after "*the investments are realised"* . This caused Michelle and Kathleen to actively pursue Mr Englefield for return of the proceeds of sale. Mr Englefield was evasive but eventually wrote to Kathleen on 14th December 2017

confirming the investment in the joint venture in Guatemala. They reported the matter to the police who took no action as they felt it was a civil dispute.

16. Michelle Lennon was cross-examined remotely by Mr Patten QC at the trial. Her attitude appeared rather indifferent. Mr Patten attempted to take her through the various documents she had signed in relation to the transaction regarding the sale of the Property. In relation to each document she said "*it could be my signature*" or "*it looks like my signature*" rather than confirming that she had signed it. She was unable to explain who had given or sent her the document for signature, which was odd given that the evidence showed that these documents had first been sent to her mother and she saw her mother almost daily. She was also unable to explain why she had signed the individual document and what she understood it meant.

17. She said she knew who Mr Englefield was , a Solicitor who had been helping her mother with some legal issues since her father's death. She had no recollection of meeting him or speaking to him until he attended her wedding in 2016. Understandably, she was asked about conversations that she would have had with her mother about the sale of the flat and the various documents which, it was alleged , her mother had given her to sign. She said she couldn't recall any conversations with her mother about the sale nor any conversations about Mr Englefield and his role. She said that she never spoke to the solicitor Ms Bourne. She accepted that at first she thought that she had not seen the client care letter but accepted that when she was shown the document it appeared to have her signature on the third page. She accepted that she had signed the transfer and had it witnessed by her friend Lindsay Dunn but she could not recall signing and could not say who had given it to her.

18. The only question she answered where she was able to give a firm recollection was in relation to the letter of authority she is alleged to have signed authorising Ms Bourne to send the proceeds of sale to the Second Defendant's client account [594]. She said she knew what a client account was. It is where a solicitor keeps his client's money and it is a regulated account which is safe. Understandably, she was asked why she agreed to sign this letter rather than question why it was necessary to send over a million pounds to Mr Englefield rather than her mother, but she was unable to recall why, or any conversation she may have had with her mother about it. I gained the impression overall that she was a defensive witness who had decided to be unhelpful. She was however determined to emphasise the importance of the security of a solicitor's client account.

19. Kathleen Lennon was born on 13th October 1945 and was married to Frank Lennon in 1969. They had three children including Michelle. Frank was a successful businessman but Kathleen did not take an active part in his business having trained as a nurse and brought up her family.

20. Kathleen was introduced to Philip Englefield by her late husband's accountant, Brian Sochall. Mr Sochall told her that Mr Englefield was a solicitor and she met him at his offices in Knightsbridge. He became a trusted legal adviser over the years and a friend of the family. After her husband's death she dealt with the management of the letting of the Property but by 2013 she had decided to sell it. She described Mr Englefield as her solicitor in diary entries at the time and he dealt with issues surrounding probate to her husband's estate.

21. At around the time of the sale of the Property an issue arose whether Grace Associates were solicitors . Mr Englefield wrote to Kathleen to confirm that they were *"legal advisers and consultants"* which re-assured her. He recommended that other solicitors should act for her in the conveyancing and she agreed with this , without questioning the need for it. Mr Englefield recommended the Solicitor Defendants and said he would "interface " with them. She was sent the Property Information Form to complete and return to Mr Englefield once Michelle had signed it, which she did. She cannot recall seeing the Client Engagement Letter of 8th March 2013 but accepts that it may have passed through her. Kathleen was also deeply affected by the loss of her son Austin , who died unexpectedly on 22nd March 2013.

22. Kathleen's diary recalls she met her solicitor Mr Englefield on 11th April 2013 but she has no recollection of the meeting now, although she does not believe that Michelle would have been present. She accepts that the two letters dated 2nd May 2013 were sent to her house for onward transmission to Michelle, who did not also live there. She said that she did not object to the proceeds of sale going into Mr Englefield's client account because she trusted him and she was still dealing with the effects of Austin's death. She was told that the money would be held in his client account until she needed it and she thought it would be safe there as it was a solicitor's client account, she believed. Nothing was discussed about investing the money anywhere else she says. The sale of the property went through and, as far as she was concerned, the money was safe in her solicitor's client account.

23. From 2016 onwards Kathleen was attempting to overcome her grief and started to ask Mr Englefield to release the proceeds of sale to her. The letter of 4th October 2017 speaking about agreeing costs and realising investments caused her concern. She received a statement which indicated that the balance of £972,259.70 (which was £30,000 too little) had been invested at her request , which she denied. She took legal advice and started to text Mr Englefield in October 2017. Mr Englefield was evasive but eventually claimed that Kathleen had authorised the joint venture investment in Guatemala which she still denies she did. She tried reporting the matter to the police but they were not interested. She did some internet research at this time and only then found out about Mr Englefield's striking off and prison sentence. Despite his promises to liquidate the investment and return her money, nothing has been paid.

24. Kathleen Lennon also appeared to have a selective memory when cross-examined at the trial. She had disclosed a number of investment interests she had following her husband's death in her witness statement in an effort to show that she was not a sophisticated investor. At trial she was able to remember virtually nothing about any of them, even one that appeared to involve a transfer of £900,000. She accepted that Mr Englefield had assisted with legal issues surrounding her late husband's probate and the tax investigation into his companies which was also dealt with by Mr Sochall the accountant, and other accountants called McClarens.

25. It was put to her that Mr Englefield was involved from the beginning of the transaction and was in touch with the estate agents, Winkworths. Kathleen seemed reluctant to concede this, suggesting that Mr Englefield had somehow interposed himself into the transaction by dealing directly with the estate agents. This does not seem likely. She exhibited exactly the same defensive attitude and amnesia to all the contemporaneous documents she was taken to by Mr Patten QC. It is clear that they were sent to her by Mr Englefield and she got her daughter to sign them. Her evidence

was however that she couldn't remember the individual documents , she couldn't say if the signature was Michelle's and she could not remember asking Michelle to sign them. She denied contributing to any of the documents but could not remember them anyway.

26. She specifically could not remember asking Michelle to sign the letter authorising the proceeds of sale to be sent to Mr Englefield's client account. Like her daughter she was keen to tell the court that she was happy for the money to go to Mr Englefield's client account because her husband had told her that if money went into a solicitor's client account it would be safe. She says she never discussed what she wanted to do with the money after completion with Mr Englefield. She denied having authorised him to invest it. She said she never got a completion statement from him after the sale and kept asking for one but she was fobbed off. She said she asked for various sums of money throughout 2014-2016 and this was provided to her by Mr Englefield. Although she tried to suggest that she had reported the matter to the police during this period the evidence seemed to show that she had not done so until around November 2017. This seems to support the proposition that it was Mr Englefield's letter in October 2017 which triggered the investigation into his conduct. There was an obvious question why Kathleen chose to leave over one million pounds with Mr Englefield after completion when everyone at the time would have agreed it was her money. She could not really answer this question other than to say when she asked him for money he provided it. It still does not explain why he still supposedly had about a million pounds of her money in late 2017 from a transaction which had completed in May 2013. Like her daughter, her memory appeared to be selective almost as if they had both decided to say that they could not remember anything useful about the transaction.

27. Rachel Elizabeth Bourne is the Fifth Defendant and was, at the relevant time, a partner in the Third Defendant practice. She is a qualified solicitor who specialises in residential conveyancing. She is unable to remember the details about this transaction but has had access to the Third Defendant's file to refresh her memory. She recalls getting an email from Mr Englefield asking an estimate of the firm's charges for acting in the sale of the Property. As far as she can recall Mr Englefield had recommended their firm on one previous occasion and the transaction was uneventful. She does not recall having met him and has only spoken to him on the telephone. She said that until this claim was brought she knew nothing about Mr Englefield's history.

28. She accepts that she never met Michelle, because she lived in Leeds. All documents were sent to Mr Englefield who arranged for Michelle to sign them and return them. This arrangement was not unusual where an agent is involved. She sent a client care letter to Michelle by email to Mr Englefield for onwards transmission. The client care letter was returned endorsed with Michelle's signature. Ms Bourne cannot recall whether in fact she received proof of identity which she had requested in the client care letter. She accepts however that the identity documents cannot now be located, or the signed client care letter.

29. She says Mr Englefield confirmed that he had met Kathleen and Michelle in Leeds on 11th and 12th April and asked her to send the contract to him to arrange signature. Additional enquiries and requisitions were sent to Mr Englefield who provided replies after , he said , discussing with Michelle , including the proposed £1,000 retention against service charges.

30. The contract and transfer were signed by Michelle and returned by Mr Englefield with a letter from Michelle addressed to her asking her to send the completion monies to Mr Englefield's firm's clients account. She said she did not think this request was odd or irregular and the letter contained clear instructions which was signed by Michelle. She thought Mr Englefield was continuing to act for the family in an advisory capacity. Her current employer has a policy not to pay completion monies to third parties but the Third Defendant had no such policy in 2013. There was nothing about this transaction that made her suspicious of fraud or undue influence on Michelle.

31. Completion took place on 10th May 2013 and after various payments were made the sum of £ 1,218,519.39 was transferred by way of bank transfer to the Second Defendants as instructed by Michelle. In March 2015 the purchasers confirmed that the retention of £1,000 could be released to Michelle . By this time Ms Bourne was on maternity leave and a colleague arranged for a cheque to be sent to Michelle for this sum.

32. Ms Bourne was cross-examined by Mr Bacon comprehensively but courteously on the second morning of the trial. He first took her through the SRA Principles in the Code of Conduct including the mandatory outcomes and indicative behaviours. She was also taken to certain passages in a book "the conveyancers handbook" and a SRA Practice Note on Property Fraud. She was also referred to the Law Society's Solicitor's Handbook (19th Edition). She accepted that whilst she may not know the absolute detail of these various documents she was familiar in general terms with her professional obligations as a conveyancing solicitor. She accepted that the company who had taken over the Third Defendant's practice in about 2015 had not been able to locate any "KYC" (know your customer) identification documents for Michelle or Kathleen Lennon. She accepted that it should have been kept and disclosed for the purposes of this litigation.

33. She accepted that she had to exercise due diligence in relation to proving the identity of her client and enhanced due diligence where she did not actually meet the client. She accepted that looking at Mr Englefield's letterhead it was obvious that he was neither a Solicitor nor someone regulated by the Solicitors Regulatory Authority or the Financial Conduct Authority. She thought he was a middle man who assisted people with legal issues , she said. She accepted that she did not do an internet search against Mr Englefield's name at the time and that if she had she might have found out about his shady past. She did not attempt a company search about the financial records of the Second Defendant either.

34. As far as she was concerned she considered Michelle Lennon to be her client. She accepted that certain documents like the Sales Memorandum contained the name of Kathleen Lennon. She assumed it was a mistake, which often happened she said. She said the original client care letter was sent to Michelle and it would have been on headed paper containing their address and her phone number. She could not explain why the only full copy of this letter now was not on headed notepaper. She said that she had no indication from Mr Englefield or anyone else that Kathleen had any interest in the property. If she had been told about a trust she would have asked to see the Declaration of Trust deed.

35. Ms Bourne accepted that as the transaction approached exchange of contracts and completion she should have spoken to Michelle to discuss the completion date, the

proposed retention of £1,000 and the fact that the purchasers were not going to hand over the 10% deposit on exchange. She said she could not remember whether she spoke to Michelle and accepted that there was no evidence on file that she had done so.

36. She accepted that the letter of 2nd May 2013 was sent to her on 7th May 2013 and instructed her to pay the proceeds of sale to Grace Associates' client account [594]. She accepts that she should probably have rung Michelle to check that these were her instructions but cannot say that she did so. She was not shown the other letter of 2nd May 2013 about the existence of the trust at the time [595]. She said had she been shown this she would have asked for a copy of the trust deed and then spoken to Michelle and Kathleen. At the time however she did not do that , and had no reason to believe that Kathleen had any interest in the property.

37. She was asked whether, if she had known about Kathleen's interest in the property it would have made a difference. She said she would have wanted to see the Trust Deed and speak to Kathleen about it but if Kathleen agreed that the sale could proceed and agreed where the proceeds should go, she would have acted on those instructions. She accepts with the benefit of hindsight that it would have been safer to send the money to Michelle or transferred the money directly into her bank account. She did not agree however that this is what she should have done in 2013. She had direct instructions from her client to send the proceeds to Mr Englefield and this is what she did.

38. In re-examination she confirmed that if she had noticed that Michelle had not provided identity documents she would have reminded her and insisted that she did , with the transaction not proceeding without them. If she had known about Kathleen's interest she would have checked with Kathleen whether she agreed with the sale , established her identity and sought her instructions about where to send the proceeds of sale. If Kathleen had instructed her to pay them to the Second Defendant then Ms Bourne said she would have done so. The only thing that may have prevented her doing this was if she had known at the time about Mr Englefield's previous conviction for fraud which, of course, she was not aware of. Overall, she was a helpful witness. She fairly conceded where she had no recollection of an event but did her best to assist the court what was likely to have happened from reference to contemporaneous documents and what was her usual practice. I had no concerns about her credibility as a witness.

39. **The Statutory and Regulatory Duties of a Conveyancing Solicitor**

The Claimant relies on a number of different provisions which regulate the way in which Solicitors should deal with their own clients. It is submitted by counsel for the Claimant that whilst they may not found a cause of action per se they are important background features in determining what liability should be imposed on Solicitors who act for vendor clients.

40. The then applicable SRA Code of Conduct 2011 provided that solicitors must achieve certain mandatory outcomes including:

"O (1.2) you provide services to your clients in a manner which protects their interest in their matter, subject to the proper administration of justice.

O (1.5) the service you provide to clients is competent, delivered in a timely manner and takes account of your clients' needs and circumstances."

41. The SRA Code of Conduct also provides examples of Indicative Behaviours IB (1.25) and IB (1.28) which provided that the following behaviours were indicative of a solicitor's failure to achieve the Mandatory Outcomes:

> "*acting for a client when instructions are given by someone else, or by only one client when you act jointly for others unless you are satisfied that the person providing the instructions has the authority to do so on behalf of all the clients"* and
> *"acting for a client when there are reasonable grounds for believing that the instructions are affected by duress or undue influence without satisfying yourself that they represent the client's wishes."*

42. Paragraph 3.1.1 of the Law Society's Property and Registration Fraud Practice Note gave the following advice and guidance:

> *"Conveyancing and Anti-money Laundering*
>
> *Conveyancing transactions are regulated activity under the Money Laundering Regulations 2007. You must therefore take steps to:*
>
> - *Identify and verify your client by independent means*
> - *Identify and, on a risk-sensitive approach, verify any beneficial owners, and*
> - *Obtain information on the purpose and intended nature of the business relationship.*
>
> *This last requirement means more than just finding out that they want to sell a property. It also encompasses looking at all the information in the retainer and assessing whether it is consistent with a lawful transaction. This may include considering whether the client is actually the owner of the property they want to sell.*
>
> *You should comply with Money Laundering Regulations and Law Society general practice information."*

43. Part 2 of the Money Laundering Regulations 2007 deals with the requirements relating to "customer due diligence" (CDD). Regulation 5 defines CDD as meaning:

> *(a) "Identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source.*
> *(b) Identifying where there is a beneficial owner who is not the customer, the beneficial owner and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the relevant person is satisfied that he knows who the beneficial owner is, including, in the case of a legal person, trust or similar legal arrangement, measures to understand the ownership and control structure of the person, trust or arrangement.*
> *(c) Obtaining information on the purpose and intended nature of the business relationship."*

44. If the solicitor cannot comply with its CDD it should cease to act: Regulation 11 (1) provides that:

> *"where, in relation to any customer, a relevant person is unable to apply customer due diligence measures in accordance with the provisions of this Part, he (a) must not carry out a transaction with or for the customer through a bank account; (b) must not establish a business relationship of carry out an occasional transaction with the customer; (c) must terminate any existing business relationship with the customer.*

45. Counsel for the Claimants submits that this was in fact a situation where enhanced customer due diligence had to be carried out. Regulation 14 provides:

> *Enhanced customer due diligence and ongoing monitoring*
>
> *(2) where the customer has not been physically present for identification purposes, a relevant person must take specific and adequate measures to compensate for the higher risk, for example, by applying one or more of the following measures –*
> *(a) Ensuring that the customer's identity is established by additional documents, data or information.*
> *(b) Supplementary measures to verify or certify the documents supplied or requiring confirmatory certification by a credit or financial institution which is subject to the money laundering directive.*
> *(c) Ensuring that the first payment is carried out through an account opened in the customer's name with a credit institution."*

46. **The parties' submissions**

I heard from both Mr Bacon and Mr Patten QC for most of the last day of the trial by way of oral submissions which were very helpful. I cannot do justice to the detail of their submissions in this judgment but will attempt to give a brief summary of both parties' positions before embarking on an analysis of the facts and law involved in this case.

47. **For the Claimant**

Mr Bacon commended both Michelle and Kathleen as witnesses of fact submitting that whilst their recollection may not be good they were at least honest. Both of them were consistent that if they had known that Mr Englefield was a struck off solicitor they would not have trusted him to become involved in this transaction in any way. Both of them believed that he was a solicitor and that the money was going into a solicitor's client account which they both believed would be regulated and safe. They both suggest that if they had been properly advised by Ms Bourne that Mr Englefield was not a solicitor they would not have agreed to the proceeds of sale going into his company's account.

48. Ms Bourne was aware of her obligations as a solicitor in particular the duty to protect client's money and assets. Although she was aware of the need to show due diligence

to check her client's identity and enhanced due diligence because she never met her client, it was submitted that she failed to complete the minimum necessary "know your customer" checks. In addition she must have known from the documentation that Kathleen had some involvement in this property but she never made any enquires about who the beneficial owner was. It was submitted that once Ms Bourne received instructions to pay the proceeds of sale into an account controlled by Mr Englefield she had a duty to tell her client that Mr Englefield was not in fact a solicitor, which is something Ms Bourne conceded she must have known. It was also submitted that she should have made an internet search against his name which would have revealed that he had been struck off as a solicitor and served a six-year sentence for fraud. She could also have initiated a search at Companies House against the Second Defendant which would have revealed that it was balance sheet insolvent.

49. It was submitted that before completing the transaction Ms Bourne should have spoken directly with Michelle to discuss three things: the completion date; the fact that the purchaser was not actually paying a 10% deposit over; and that there was a retention of £1,000 against service charges. Ms Bourne accepted that she should have had this conversation but could not give evidence from recollection that she had. Ms Bourne also accepted that she should have double-checked that Michelle wanted the money paid to Mr Englefield and that this would have been the opportunity to advise her that Mr Englefield was not actually a Solicitor as Michelle clearly believed. Mr Bacon also relied on Ms Bourne's replies to his questions when she conceded that an unregulated account like Mr Englefield's was not as secure as a regulated account that a Solicitor would have and that it would have been more sensible to pay the money directly into Michelle's bank account. She also accepted that she would not do the same thing now.

50. Mr Bacon suggested that there was no real issue between counsel as to the law but it was clear that Mr Bacon sought to rely on many of the same authorities Mr Patten QC relied on, to make a different point. Mr Bacon sought to argue that the SRA Code of Conduct and the Money Laundering Regulations place obligations on Solicitors which can found a breach of duty. It was put on the basis that these rules and obligations provide background features that assist in determining the scope of the duty of care. In this respect the Claimant relies on the authorities of *P & P Property Ltd v Owen White &Catlin LLP and another* [2018] EWCA Civ 1082 and *Johnson v Bingley Dyson and Finney (a firm)* [1997] PNLR 392 (1995). I will refer further to these authorities in my analysis of the legal position.

51. Whilst Mr Bacon accepted that a solicitor's duty of care is normally defined by the scope of the agreed retainer she may have to give advice which is reasonably incidental to the work being carried out and if a risk or potential risk becomes evident it is her duty to inform the client. It was submitted that a potential risk arose from the fact that Mr Englefield was not actually a solicitor and his client account would not therefore be regulated. Mr Bacon rejected the submission made by Mr Patten QC that this was an "information only" case for the purpose of causation. Mr Bacon submitted that the solicitor had a duty to give advice in these circumstances which made it an "advice" case for causation purposes. It was submitted that advice to the effect that Mr Englefield was not a solicitor and did not have a regulated client account was within the scope of the duty of care and so any damages which flowed from that

failure to give advice were recoverable. There is also a compensation fund which would have paid out if Mr Englefield had in fact been a solicitor.

52. Mr Bacon submitted that the Solicitor Defendants should have done enhanced due diligence in relation to the risk of undue influence. The fact that Mr Englefield was purporting to be a solicitor showed that the first limb of the test was established. It was submitted that Ms Bourne could not have satisfied herself that Michelle was not being unduly influenced without actually speaking to her.

53. In relation to contributory negligence Mr Bacon reminds the court that Michelle is the only Claimant against the Solicitor Defendants. She cannot be held responsible for Kathleen's failure to pursue Mr Englefield. By July 2013 only about £500,000 of Kathleen's money remained in the account in any event.

54. **For the Defendant**

Mr Patten QC submitted that whilst Mr Englefield is clearly a dishonest man he did not behave as such until the proceeds of sale were placed into his account. Before then he behaved as a facilitator on behalf of the Lennons and their agent in dealing with the Solicitor Defendants. Whilst Kathleen was obliquely mentioned in some of the initial documentation there was nothing to suggest to the Solicitor Defendants that she was in fact the beneficial owner.

55. Mr Patten accepted that Kathleen genuinely believed that Mr Englefield was a solicitor and she completed trusted him. She was not concerned about regulation and insurance as he was by then a long-standing family legal adviser. Even though she could not remember asking Michelle to sign the contract and transfer, and more particularly the letters dated 2nd May 2013 she clearly understood the documents and did not disagree with the contents of them. Mr Patten submitted that even if Ms Bourne had discovered that Kathleen was the beneficial owner she would have confirmed her wish to sell the Property for £1,250,000, to use Mr Englefield as her agent and for the proceeds to be placed in his account at completion. It was also submitted that if asked, both Michelle and Kathleen would and could have provided identity documents to satisfy money-laundering regulations and that the transaction would still have proceeded in exactly the same way.

56. It was submitted that Ms Bourne knew that Mr Englefield was some sort of adviser or facilitator but that he acted as agent for Michelle in a genuine sale. Ms Bourne had given evidence that if she had been told about Kathleen's interest she would have wanted to see the Declaration of Trust deed and have spoken to Kathleen. If however Kathleen confirmed it was a genuine sale and the proceeds of sale should be paid into Mr Englefield's account Ms Bourne said she would have done so. It was submitted that this was an entirely genuine transaction and the fraud was only perpetrated after completion after the Solicitor Defendants' involvement had ended. The court was cautioned about acting on Ms Bourne's evidence about what , with the benefit of hindsight she thought she should have done. This was an issue for the court to decide irrespective of Ms Bourne's views now.

57. On legal issues it was submitted that a solicitor's duty to her client is determined by the scope of the retainer. This is limited in this type of case to the normal conveyancing functions together with any further steps that the solicitor becomes

obliged to take as a result of matters arising on the retainer. There is no overarching duty to protect the client or investigate matters which might be to the client's advantage. It was particularly submitted that there is no obligation to advise the client what to do with the proceeds of sale. The Solicitor Defendants submit that the SRA Code of Conduct and the Money Laundering Regulations 2007 give rise to no private law duties which could found a cause of action. The duties are owed to society as a whole to prevent money-laundering and the client is actually the person under scrutiny, not the one to be protected. The Solicitor Defendants rely on the authority of *P & P Property Ltd v Owen White &Catlin LLP and another* referred to above.

58. It is denied that it was within the scope of the Solicitor Defendants' duty of care to Michelle to investigate Mr Englefield. He clearly was instructed to act as agent on behalf of Michelle and she gave clear instructions in writing to pay the proceeds of sale to him. There was nothing about his conduct which should have led the Solicitor Defendants into an implied obligation to further investigate his background.

59. Whilst it was conceded that as Mr Englefield appeared to be acting qua Solicitor so far as Michelle was concerned and so the first leg of the test for undue influence was present, there was no evidence to suggest that Michelle was acting to her manifest disadvantage. There was no question of a gift to Mr Englefield and Ms Bourne was entitled to assume that he would be looking after the money for Michelle and to her order.

60. On the issue of causation the Solicitor Defendants submit that any claimant seeking to recover loss which results from a decision taken on the basis of advice provided by a professional person must demonstrate that the loss sought to be recovered falls within the professional's scope of duty. In this case it is submitted that the Solicitor Defendants were not advisers , at the most they were providing information. Michelle and Kathleen Lennon made a commercial decision to appoint Mr Englefield as their agent and entrust him with their money. Even a negligent failure to provide information which might have shown that transaction was commercially undesirable does not result in the loss falling with the solicitor's scope of duty, it is argued. The loss did not stem from the fact that he was not a solicitor and his client account was not regulated or in credit . It stemmed from the fact that he was a thief and even if he had been a solicitor the money would still have been stolen, the account would have remained in debit and the solicitor's professional indemnity insurers would not have indemnified him for the loss it was submitted.

61. Mr Patten submitted that Michelle was clearly a trustee of the proceeds of sale in accordance with her duty under the Declaration of Trust. It was therefore incumbent on her to recover the money from Mr Englefield and hand it over to her mother. It is submitted that she therefore is partially responsible for her own , and ultimately her mother's loss.

62. **Analysis**

Findings of Fact

Both counsel attempted to persuade me that their own witnesses were credible and reliable. Ms Bourne was certainly credible, but she cannot actually remember anything about the transaction other than what is in the Solicitor Defendants' file,

which is very limited. This is not surprising given that this for her was a routine working transaction. Whilst I might have expected Michelle and Kathleen to remember some of the details and not others in fact neither of them appeared to have any independent recollection of the communications which must have taken place during this transaction save for the importance of the security of a solicitor's client account. The fact that both of them emphasised how important this was against a background of remembering virtually nothing else makes me doubt whether this was in fact an honest recollection and suspect it is more something which has become reinforced over the years against a background of understandable resentment about being victims of a fraudster.

63. Doing the best I can, taking into account he oral evidence and the contemporaneous documentation I make the following findings of fact. Shortly after her husband's death in 2004 Kathleen was introduced to Mr Englefield on the basis that he was a solicitor. He never officially held himself out to be a solicitor to others but Kathleen clearly believed that he was. Mr Englefield then became a trusted family legal adviser assisting in the probate of the late Mr Lennon's estate and assisting others to deal with a complex tax investigation instigated by the Inland Revenue. He also advised from time to time on other legal matters and it is clear he was credible. Whilst Kathleen could not be said to be an experienced investor, neither could it be said that she was unsophisticated, as the contents of her witness statement clearly show that she was involved in various purchases and investments after her husband's death. She also continued to manage the Property and another flat in the same block also bought by her husband and held by her son as nominee. Michelle was not an experienced investor but she is a social worker with a degree level education and so she is certainly of above-average intelligence.

64. Kathleen embarked on a project with her late son Austin to improve the Property and just short of £300,000 was spent on these improvements. By 2012 or so she had decided to sell the Property and it is clear that Mr Englefield was involved with liaising with the selling agents and they had him recorded as the vendor's solicitor. I find that Kathleen was aware of this and approved of his appointment even though in evidence she attempted to infer that he had, in some way, inveigled himself into the process. Mr Englefield contacted Ms Bourne and advised her that he was acting on behalf of the vendor Michelle Lennon and invited her to provide an estimate of her charges for dealing with the conveyancing process, which she did. Whilst he mentioned that he had acted for Kathleen Lennon after the death of her late husband in 2004 he gave no indication that Kathleen had any interest in the property. I accept that the Memorandum of Sale provided by Winkworths mentioned Kathleen as the owner rather than Michelle but I accept Ms Bourne was entitled to treat this as an error, given that she had Mr Englefield's instructions that Michelle was the owner, and this would have been confirmed once she obtained the title deeds and office copy entries.

65. Ms Bourne sent a client care letter to Michelle which was sent via email to Grace Associates. I find as a fact that this was forwarded to Michelle , probably through Kathleen as she reluctantly admitted she had signed the final page. I find that all three pages must have been present as she would not have signed a letter which was clearly incomplete. This letter asked for proof of identity which Michelle said she did not provide, without explaining why she had not done so. Ms Bourne could not say

whether or not the documents had been supplied but copies have not been located. I am driven to a finding of fact that Michelle did not provide identity documents as there is clearly an evidential burden on the Solicitor Defendants to show that these documents were produced and recorded, which they cannot discharge.

66. Thereafter various documents were provided to Kathleen by Mr Englefield such as the Property Information Form , Leasehold Information Form and Fixtures Fittings and Contents form. I find as a fact that she mainly completed these forms and asked Michelle to sign them. I make those findings as, on balance of probability she was the only person with the necessary knowledge to answer the various questions. I find that the contract and transfer were either sent to , or given to Kathleen and she arranged for Michelle to sign them. The same is true of the two letters dated 2nd May 2013. I find that both Kathleen and Michelle will have read those letters before Michelle signed them and that Kathleen must have approved of the contents otherwise she would have spoken to Mr Englefield about them or refused to ask Michelle to sign them. I find that Michelle decided to sign those two letters as she thought that is what her mother wanted her to do.

67. Michelle says that she never had a direct conversation with Ms Bourne. Ms Bourne said she cannot directly recall such a conversation and concedes that there is no evidence on file that she did. I therefore find as a fact that Ms Bourne obtained all relevant instructions through Mr Englefield who in turn had sought them where necessary from Kathleen.

68. In terms of the written instructions to pay the completion monies to Grace Associates I find that both Michelle and Kathleen understood that the money would be held by Mr Englefield's firm after completion and that they agreed to this because Mr Englefield suggested it and they perhaps thought it normal and routine. I do not find that they discussed or thought about the additional benefits of a solicitor's client account at the time as I do not accept they were worried about what would happen to the money. I accept that Kathleen trusted Mr Englefield implicitly and Michelle wanted to do what would make her mother happy.

69. The reason I say that Kathleen trusted Mr Englefield implicitly is because after completion she never seems to have asked for either a completion statement or the balance of the proceeds of sale, even though Mr Englefield did not need to hold the money in readiness to use on another project. She just left the money with him and over the next couple of years asked for money when she needed it, which still left about £1 million held by him for no apparent purpose. Although her financial advisers made some enquiries in 2016 to assist them with capital gains tax assessment it would appear that Kathleen did not actually formally ask for her money back until November 2017 over four and a half years after the transaction completed. She also invited Mr Englefield to Michelle's wedding in 2016 , no doubt as a valued legal adviser and family friend. When eventually Kathleen reported the matter to the police in November 2017 she suggested that the Solicitor Defendants had paid the money to Mr Englefield without any authority to do so, no doubt forgetting that she had asked Michelle to sign a letter giving such authority.

70. I also need to make findings about what is likely to have happened if some things that were not done , were in fact done, but it is more appropriate for me to make those findings when I deal with causation.

71. **The extent of the Solicitor's duty of care**

Both counsel appeared to accept that the classic exposition of the legal duty of a solicitor acting for a client was set out by Mr Justice Oliver in *Midland Bank v Hett Stubbs and Kemp* [1979] I Ch 384 as follows:

> *"Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing upon solicitors—or upon professional men in other spheres—duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as Duchess of Argyll v. Beuselinck [1972] 2 Lloyd's Rep. 172; Griffiths v. Evans [1953] 1 W.L.R. 1424 and Hall v. Meyrick [1957] 2 Q.B. 455 demonstrate that the duty is directly related to the confines of the retainer."*

72. This passage was quoted and approved in the decision of the Court of Appeal in *Minkin v Landsberg (trading as Barnet Family Law)* [2016] 1 WLR where Lord Justice Jackson also quoted and approved a passage from the decision of Mr Justice Laddie in *Credit Lyonnais SA v Russel Jones &Walker* [2003] Lloyds Rep PN 7:

> *"A solicitor is not a general insurer against his client's legal problems, His duties are defined by the terms of the agreed retainer. This is the normal case although White v Jones [1995] 2 AC 207 suggests that obligations may occasionally arise outside the terms of the retainer or where there is no retainer at all. Ignoring such exceptions, the solicitor only has to expend time and effort in what he has been engaged to do and for which the client has agreed to pay. He is under no general obligation to expend time and effort on issues outside the retainer. However if, in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing "extra" work for which he is not to be paid. He is simply reporting back to the client on issues of concern which he learns of as a result of, and in the course of, carrying out his express instructions."*

73. A review of the relevant authorities caused Lord Justice Jackson to reach this conclusion:

> *"38. Let me now stand back from the authorities and summarise the relevant principles:*

> *i) A solicitor's contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.*
>
> *ii) It is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.*
>
> *iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.*
>
> *iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.*
>
> *v) The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed."*

74. Both parties accept that a Solicitor is entitled to take instructions through an agent . Counsel for the Claimant is critical of the fact that Ms Bourne does not appear to have had a direct conversation with Michelle about whether Mr Englefield was authorised to act as her agent but in my view nothing turns on this as I find that Kathleen had appointed Mr Englefield and Michelle consented to that appointment.

75. Leading Counsel for the Solicitor Defendants contends that the retainer in this case was limited to dealing with the normal procedures required to successfully transfer a property as vendor to a purchaser in return for the proceeds of sale. It did not include advice as to the commercial wisdom of the sale or what to do with the proceeds of sale after completion. Counsel for the Claimant contends that a situation arose where, on the facts it was necessary to give advice which is reasonably incidental to the retainer, in particular that Mr Englefield was not a solicitor and that his client account was not regulated and insured in the same way as a Solicitor's client account.

76. **The relevance of any breaches of the SRA Code of Practice or the Money Laundering Regulations 2007**

Both Counsel appear to accept that a breach of the SRA Code or the Money Laundering Regulations does not create any statutory liability which would give private law rights to the client to claim against the solicitor. Counsel for the Claimant however argues that the existence of these obligations and whether the solicitor complied with them may be important background features in determining what liability should be imposed on solicitors who act for vendors. This argument by Mr Bacon was based on two authorities. The first is *Johnson v Bingley Dyson and Finney*

(a firm) [1997] PNLR 392 where it was held that a failure to observe the principles in the Guide to the Professional Conduct of Solicitors did not automatically give rise to a liability in damages and that it was a question of fact in every case whether the failure to comply with them was negligent. Mr Patten QC submitted that the facts in Johnson were different and the case of no assistance to the Claimant.

77. Having now read the authority I agree with Mr Patten QC. The case involved a son dishonestly arranging for the sale of a property on behalf of his elderly mother who did not have capacity and retaining the proceeds of sale. The solicitor was criticised for failing to seek either written instructions from the mother that she wished to son to act as her agent or to discuss it with the mother directly. A failure to do so would be a breach of the Guide. Mr Benet Hytner QC sitting as a Judge of the High Court found in terms:

> *"It is, I think, first of all necessary to consider the true status of the Guide. I have had the opportunity—although it was not in evidence at the beginning of counsel's closing speeches—of reading the whole of the Guide current in 1987/88. It is clear that it is a comprehensive Code of Conduct for solicitors. It embraces the conduct expected of a normally careful and skilful solicitor by his or her governing body. I have, however, come to the conclusion that a breach of the Guide cannot ipso facto and of necessity be negligence. Negligence is a legal concept embracing duty situation, nature of duty and breach of duty. The basic approach is enshrined in the well-known speech of Lord Atkin in Donoghue v. Stevenson [1932] A.C. 562 , as developed in voluminous subsequent case law."*

78. The fact that the Solicitors were found liable in negligence in that case does not avail the Claimant in this case because in *Johnson* the failure to seek instructions from the mother was found to be material to the eventual loss and a breach of duty under normal common law principles.

79. The Second case relied on the Claimant is *P & P Property Ltd v Owen White and Catlin LLP and another* [2018] EWCA Civ 1082. The leading judgment was given by Lord Justice Patten and the Claimant relies on this particular passage:

> *"30. Where the customer is not physically present for identification purposes the relevant person must take additional measures to compensate for the higher risk. These include requiring the identity of the customer to be established by additional documents and information and for the documents supplied to be appropriately verified: see regulation 14. This applied to MMS and to Winkworth neither of which firms ever had personal contact with their vendor clients.*
>
> *31. Failure to comply with these requirements renders the relevant person liable to a civil penalty and is also a criminal offence: see regulations 42 and 45. The MLR are designed to implement the European directives (see 2005/60/EC) by preventing the use of the financial system for the purpose of*

> *money laundering and the financing of terrorism. They operate by requiring professionals and financial institutions to identify and verify the identification of their clients on the basis that those relevant persons can be relied upon to carry out their duties under the regulations honestly and diligently and that the transparency which this will bring to the transaction will be sufficient to deter and prevent criminal activity. The MLR do not, however (and are not intended to), create a statutory liability on the part of solicitors and estate agents towards innocent third parties such as the purchasers in the present cases who are the victims of fraud. Although the carrying out of the necessary AML checks in the present cases may have deterred or prevented the frauds from taking place, that is not the purpose behind the MLR and any civil liability which attaches to the solicitors and agents who act for the fraudster must therefore be established under the general law. The existence of the MLR and the obligations they impose may, however, be important background features in determining what liability (if any) should be imposed on solicitors and agents who undertake the sale of property on behalf of a client who turns out to be an imposter."*

80. The previous passage supports the Solicitor Defendants' position in general although it is fair to say that the last sentence gives the Claimant some hope. This was however dashed when their lordships came to deal with the claim against the defendants in negligence when Lord Justice Patten said as follows:

> way.
>
> 78 The MLR do not, as I have said, create a statutory duty which if breached gives rise to a cause of action at the suit of the claimants. That is because the statutory duty was imposed for the benefit of society at large and not for any particular class of persons, such as the purchasers in these cases, who are likely to suffer loss if the vendor turns out to be an imposter. In part, this is because the principal purpose of the MLR is to deter money laundering and terrorism rather than to combat identity fraud. The fact that the AML checks may have a deterrent effect on would-be fraudsters is not enough in itself to create a private law right of action for the benefit of a protected class: see *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 731.

81. The problem in P &P was caused by the fact that the purchaser was an imposter. He pretended to be the person who held the legal title to the land which was sold to the Claimant. Identity checks would therefore perhaps have been useful in preventing the fraud. Despite that the court found against the purchasers in that claim as the vendor's solicitors owed them no duty of care to carry out identity checks on their own client.

82. The difficulty for the Claimant in this case is that even though I find as a fact that the Solicitor Defendants did not carry out identity checks in relation to their own client (the Claimant) this does not give rise to a cause of action unless the obligation to carry out Money Laundering checks falls within the scope of the duty of care which the Solicitor Defendants owe to their own client. It is difficult to see how a provision aimed at preventing fraud by investigating a client's identity and funding

arrangements can in any way be relied on by the client against her own solicitor where those checks are overlooked.

83. In this case in any event I find that even if Ms Bourne had realised that the appropriate checks had not been carried out she would have insisted that they should be. Michelle would then have been asked for the identity documents again and no doubt told that the sale could not proceed without them. She would then have produced the identity documents and the sale would have proceeded in exactly the same manner.

84. **Undue influence**

It is alleged in the Re-Amended Particulars of Claim that the Solicitor Defendants failed to take any or any sufficient steps to satisfy themselves that the First and/or Second Defendants were not exerting undue influence on the First Claimant in circumstances in which the relationship giving rise to the influence and the manifest disadvantage of the transaction were or ought reasonably to have been apparent to them. The leading case on undue influence is *Royal Bank of Scotland v Etridge* (no 2) [2001] UKHL 44 where Lord Nicholls gave the leading judgment and opined:

Manifest disadvantage

> *"21.As already noted, there are two prerequisites to the evidential shift in the burden of proof from the complainant to the other party. First, that the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant. Second, that the transaction is not readily explicable by the relationship of the parties.*
>
> *22. Lindley LJ summarised this second prerequisite in the leading authority of Allcard v Skinner, 36 Ch D 145, where the donor parted with almost all her property. Lindley LJ pointed out that where a gift of a small amount is made to a person standing in a confidential relationship to the donor, some proof of the exercise of the influence of the donee must be given. The mere existence of the influence is not enough. He continued, at p 185:*
>
> *'But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift.'*
>
> *In Bank of Montreal v Stuart [1911] AC 120, 137 Lord Macnaghten used the phrase 'immoderate and irrational' to describe this concept*."

> *25. This was the approach adopted by Lord Scarman in National Westminster Bank Plc v Morgan [1985] AC 686, 703-707. He cited Lindley LJ's observations in Allcard v Skinner, 36 Ch D 145, 185, which I have set out above. He noted that whatever the legal character of the transaction, it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the parties' relationship, it was procured by the exercise of undue influence. Lord Scarman concluded, at p 704:*
>
> *'The Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it.'*

85. In this claim both counsel agree that as Mr Englefield was acting qua Solicitor for Michelle the first limb of the test for undue influence was satisfied. The manifest disadvantage of the transaction according to the Claimant is the instruction to pay the proceeds of sale to Mr Englefield rather than directly to Michelle. The letter of 2nd May 2013 merely instructs the Solicitor Defendants to pay the proceeds of sale after completion into Grace Associates' client account. The implication here is that the money is to be held by Grace Associates to the order of their client, otherwise the letter would not have mentioned the client account. If the money was to be paid to Mr Englefield as a gift then it would clearly constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that it was procured by undue influence. There was no indication however that Mr Englefield was being given any of the money and, on my assessment, as he was acting as agent for or facilitator to the Lennon family, a request that the proceeds of sale should be paid into his client account would not raise the presumption of manifest disadvantage referred to by Lord Nicholls above.

86. **Have the Solicitor Defendants breached their duty of care to the First Claimant**

The pleaded particulars of negligence against the Solicitor Defendants are set out in paragraph 41 of the Re-Amended Particulars of Claim. They are extensive and there are many overlapping allegations. In my view they fall into four broad categories:

a) Failure to carry out identity checks and exercise due diligence and enhanced due diligence in doing so. Connected to this is the failure to discover through these checks the fact that Kathleen was the beneficial owner;

b) Failure to speak directly to Michelle to clarify the retainer and her specific instructions in relation to the payment of the proceeds of sale to Mr Englefield bearing in mind that he was not a Solicitor , his client account was not regulated and Grace Associates were balance sheet insolvent;

c) Failing to make enquiries with Michelle and/ or Kathleen in the light of the fact that the transaction appeared to be tainted with undue influence;

d) Failing to investigate Mr Englefield and Grace Associates which would have revealed that there was a significant risk of loss of the Claimant's assets.

87. I have already determined that the failure to properly carry out identity checks in relation to Michelle cannot found a cause of action in negligence. This is because the duties are owed pursuant to regulations which are intended to protect the general public, not clients of solicitors. In my view, on the very limited material available to Ms Bourne at the outset of the transaction she should not have been put on notice that Kathleen had an interest in the property. Kathleen was mentioned by Mr Englefield in emails but this was not concerning because he had explained that he had acted for her since 2004 and that Michelle was her daughter. There is no reason to suspect that if Michelle had been obliged to fully comply with identity checks she would have independently volunteered that she was actually a trustee holding the Property on behalf of her mother. Even if she had, this would have meant that Kathleen would have been asked to provide evidence of identity and confirmation that she wanted the sale to proceed, which she clearly did. On my findings of fact Kathleen would also have confirmed that the proceeds of sale should be paid to Mr Englefield.

88. I have also determined that the Claimant cannot meet the second leg of the test for undue influence , namely manifest disadvantage. There was nothing about the 2nd May 2013 letter that suggested that Mr Englefield would be entitled to use or keep the proceeds of sale. The fact that it authorised payment into his client account suggested quite the reverse, that it was client's money to be held to the client's order and on her instructions. The fact that Mr Englefield was not a solicitor did not prevent him having a client account nor would it change the essential meaning of the phrase, namely a bank account in which client's money is held.

89. The fact that it was clear from Mr Englefield's letter head that he was a legal adviser and facilitator rather than a solicitor did not place the Solicitor Defendants under a duty to investigate him further. It would not be obvious from this document that he was a former solicitor who had been struck off for fraud. Ms Bourne had only one previous dealing with Mr Englefield in which he had acted as facilitator again and it had passed without incident. In my view her retainer was limited to carrying out the conveyancing connected with the sale of the Property and she was not asked to investigate Mr Englefield's background or financial history. She was entitled to accept that the client was entitled to choose her own facilitator. The investigation of Mr Englefield was not reasonably incidental to the work she was carrying out. For the same reasons she had no obligation or duty to make enquiries about the solvency of the Second Defendant company. It was not part of her retainer to conduct a due diligence enquiry about the organisation which, she was instructed, was to initially hold the proceeds of sale on behalf of their mutual client.

90. The Claimant's strongest argument is in relation to paragraph 85 (b) above. An issue emerged during the trial whether Ms Bourne had ever received formal instructions from Michelle that Mr Englefield was authorised to act as her agent. This allegation was not pleaded and so was not pursued with enthusiasm. The client care letter which

Michelle signed made no mention of Mr Englefield and so Ms Bourne did not in fact have formal confirmation from Michelle that she wanted Mr Englefield to act as her agent . I find as a fact however that he did have actual authority to so act from Kathleen and that Michelle was aware and consented to Kathleen giving him this authority. The fact that Ms Bourne did not receive formal confirmation of this does not therefore matter. It must have been obvious to her that Mr Englefield's confirmation that he was acting as "interface" between her and Michelle and the fact that he continued to provide information from her and documents duly signed by her would support an assumption on Ms Bourne's part that Mr Englefield was authorised to act as Michelle's agent.

91. In the light of this experience, in my view, she was entitled to accept the letter dated 2nd May 2013 as confirmation of her client's instructions that the proceeds of sale should be paid into the Second Defendant's client account. If this request had come directly from Mr Englefield alone then I find that she would have been obliged to contact her client to clarify her instructions on this issue as normally of course the proceeds of sale would be sent direct to the vendor. As Ms Bourne had however a letter from her client, signed by her client giving these direct instructions she would in my view only been obliged to contact her client for confirmation if the letter had been unclear. It was not unclear and so in my judgment, she was not obliged to contact her client for confirmation of something that was clear from the letter even though Ms Bourne had said in evidence she thought she should have done so.

92. What difference if any does it make that Mr Englefield was not a solicitor? Ms Bourne of course would have been aware that he was not a solicitor from his letterhead but she had no way of knowing whether Michelle Lennon mistakenly believed he was a solicitor or whether she knew he was merely an unqualified legal advisor. As far as she was concerned Mr Englefield was the Lennon family's choice as legal adviser and facilitator and Ms Bourne was not asked to comment on or evaluate his commercial worth in this transaction. At this point in time none of the interested parties apart from Mr Englefield knew that he had been previously struck off and served a prison sentence for fraud. The court must be careful not to invest the witnesses with this information at a point in time when they did not have it.

93. In most conveyancing transactions where a solicitor acts for the vendor the proceeds of sale are used on a concurrent purchase. Where there is no concurrent purchase the proceeds are disbursed to the order of the vendor , often to their own bank account. There are however occasions when the vendor's solicitor is instructed to pay some or part of the proceeds to a third party like a creditor , a relative , a friend or some sort of financial adviser. If the vendor's solicitor is given clear instructions where to send the proceeds of sale in my judgment it is not part of her retainer to proffer advice to the client about the commercial wisdom of the step they have instructed her to take.

94. I accept that Ms Bourne would have probably known that the Second Defendant's client account was unlikely to have the same security as a solicitor's client account including the potential cover available through professional indemnity insurance. I do not however accept that this triggered a duty on her to advise her client that as Mr Englefield was not a qualified solicitor his client account would not be as secure as a solicitor's client account. A payment to a creditor , friend or relative would be less secure also as would a financial advisor who was not FCA registered . In my view it was outside Ms Bourne's retainer to ask her to advise about the commercial wisdom

of paying the proceeds of sale into Mr Englefield's client account. There would have course have been virtually no risk in doing this if Mr Englefield had been an honest man and Michelle and or Kathleen had asked for the proceeds of sale shortly after completion. It is unfair to invest Ms Bourne with the hindsight of what happened after the money was paid where it was directed to be paid.

95. As Lord Jauncey said in *Clark Boyce v Mouat* [1994] 1 AC 173:

> "*When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors."*

96. Sadly in this case, Michelle, through Kathleen, trusted Mr Englefield so completely she did not consider the wisdom of the transaction nor even the possibility that he might appropriate any of her money. In my judgment Ms Bourne was not obliged to question that wisdom nor to advise on additional matters beyond the scope of her retainer. It follows from this and previous findings that the claim must be dismissed against the Solicitor Defendants. In case of a successful appeal I will deal with the other issues in the case albeit more briefly than I would have done if the claim had succeeded.

97. **Causation**

The Claimant deals with causation in paragraphs 42A to 42D of the Re-Amended Particulars of Claim. It is claimed that the Solicitor Defendants should have advised the Claimant that Mr Englefield and Grace Associates Limited were not solicitors and were not regulated by any professional body. She also should have been advised that the Second Defendant was insolvent. If the Claimant and her mother had been given such advice they would not have used Mr Englefield as their agent and would not have agreed to the proceeds of sale being held by him after completion. It was also submitted that if Ms Bourne had exercised enhanced due diligence she would have discovered that Kathleen was the beneficial owner and that Mr Englefield had concealed this. This would and should have led to the Solicitor Defendants refusing to accept instructions through Mr Englefield.

98. The Solicitor Defendants' case on causation is legally more complex. Mr Patten QC submits that any claimant seeking to recover a loss which results from a decision taken on the basis of advice provided by a professional person must demonstrate that the loss sought to be recovered falls within the professional's scope of duty. This gloss on the usually simple "but for" test of causation arose historically from the decision of the House of Lords in *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191. The seminal speech of Lord Hoffman in this case has caused much legal debate but in *Aneco Reinsurance Underwriting Ltd v Johnson & Higgs Ltd* [2001] UKHL 51 Lord Millet (in a dissenting judgment) provided a very helpful summary of the principles involved:

"45. This is another case which is concerned with the extent of a defendant's liability for the consequences of a breach of duty on his part which has resulted in the plaintiffs entering into a loss-making transaction. It is established by the decisions of this House in Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1991] 2 AC 249 ("Skandia") and Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] AC 191, known as South Australia Asset Management Corporation v York Montague Ltd ("SAAMCO"), that the plaintiff is not entitled to recover damages for the full extent of his loss merely because the defendant knew that he would not have entered into the transaction but for his own breach of duty. There must be a sufficient causal connection between the particular feature of the transaction which occasioned the loss and the subject matter of the defendant's duty of care. The amount of damages which the plaintiff is entitled to recover is limited to the amount of the loss which is attributable to the defendant's breach of duty, and this depends upon the scope of the duty in question. None of this is in dispute; the issue in the present case turns primarily on the correct identification of the scope of the defendant's duty, which is a question of fact.

54. The law has never imposed liability for all the consequences of a defendant's negligence. It has formulated general rules to restrict the scope of liability within acceptable limits by reference to concepts such as foreseeability and remoteness of damage. In traditional cases of negligent conduct which causes physical injury, it has seldom been found necessary to place limits on the scope of the duty of care or the extent of the defendant's liability for the foreseeable consequences of his acts. Claims for damages for economic loss which is the result of negligent statements or advice, however, are very different. There is a potential for foreseeable but indeterminate and possibly ruinous loss by a large and indeterminate class of plaintiffs. Foreseeability of reliance alone is not a sufficient limiting factor.

66. The law can be summarised as follows:

(1). Where a plaintiff enters into a loss-making transaction in reliance on the defendant's negligent advice, he is not entitled to recover the whole of the loss on the transaction merely because the defendant was aware that he would not have entered into it but for the advice he received. He is liable only for the loss which is due to the advice being wrong. As Lord Nicholls of Birkenhead said in Nyekredit Mortgage Bank Plc v Edward Erdman Group Ltd (No 2) [1997] 1 WLR 1627, 1631, the defendant "is not liable for all the consequences which flow from [the plaintiff] entering into the transaction. He is not even liable for all the foreseeable consequences. He is not liable for

> *consequences which would have arisen even if the advice had been correct. He is not liable for these because they are the consequence of the risks [the plaintiff] would have taken upon himself even if the … advice had been sound. As such they are not within the scope of the duty owed to [the plaintiff] by [the defendant]".*
>
> *(2). The court does not ask what would have happened if the defendant had performed his duty and stated the true facts (in which event the transaction would not have gone ahead at all). This is not the basis of the defendant's liability.*
>
> *(3). The correct measure of damages is not the difference between the loss which has in fact occurred (the loss on the transaction) and the loss which would have occurred if the defendant had performed his duty and stated the facts correctly (which would have been zero since the transaction would not have gone ahead). This would not exclude the loss which ought to be irrecoverable. They are measured by the difference between the loss on the transaction and the loss which would have been sustained if the facts had been as the defendant represented them to be (when the transaction would still have gone ahead).*
>
> *(4) The case is different where the defendant assumed responsibility for advising generally what course of action to take in relation to a particular transaction. But it is necessary to identify the transaction in question, for he is not liable for loss arising from some other transaction even though it may be linked with it, particularly if it called for the exercise of a different professional judgment. A broker should not lightly be assumed to undertake responsibility for an underwriting decision.*
>
> *(5) The defendant's liability is measured by the scope of his duty. Accordingly, where the complaint is that he failed to report or give any advice at all on a particular matter, the plaintiff must prove that he was under a legal obligation to do so. It is not enough that he would probably have volunteered the information if asked."*

99. It is clear from these passages that the traditional "but for" test of causation does not apply unfettered in cases involving negligent advice or information. In *Aneco* the brokers were found to be liable for the losses because they had advised the claimant whether to enter into to the transaction as opposed to merely providing information to the client to assist him in making the decision. In the current claim the Solicitor Defendants submit that they are criticised for failing to provide accurate information to the Claimant whereas the Claimant submits that the Solicitor Defendants were providing advice. The distinction is clearly important.

100. Some assistance on how to make the distinction in individual cases was given by Lord Sumption in *Hughes-Holland v BPE Solicitors and another* [2017] UKSC 21 where having dealt with "*advice*" cases he said he following about "*information*" cases:

> *"41. By comparison, in the "information" category, a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client (or possibly his other advisers). In such a case, as Lord Hoffmann explained in Nykredit, the defendant's legal responsibility does not extend to the decision itself. It follows that even if the material which the defendant supplied is known to be critical to the decision to enter into the transaction, he is liable only for the financial consequences of its being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater. Otherwise the defendant would become the underwriter of the financial fortunes of the whole transaction by virtue of having assumed a duty of care in relation to just one element of someone else's decision."*

101. Later in his judgment he commented on the role of a conveyancer:

> *"44. .....A valuer or a conveyancer, for example, will rarely supply more than a specific part of the material on which his client's decision is based. He is generally no more than a provider of what Lord Hoffmann called "information". At the opposite end of the spectrum, an investment adviser advising a client whether to buy a particular stock, or a financial adviser advising whether to invest self-invested pension fund in an annuity are likely, in Lord Hoffmann's terminology, to be regarded as giving "advice". Between these extremes, every case is likely to depend on the range of matters for which the defendant assumed responsibility and no more exact rule can be stated"*

102. In my judgment the transaction this court is concerned with is not the decision to sell the Property for £1,250,000 because this was a decision made by Kathleen and put into effect by the Claimant about which no complaint is made. The transaction which is at the root of the Claimant's pleaded case on causation is the decision to place the proceeds of sale in the care of Mr Englefield. The Claimant complains that the Solicitor Defendants failed to give advice about Mr Englefield's status as a non-solicitor , the fact that his client account was not regulated and the financial status of Grace Associates Limited. Whilst this is couched by the Claimant in the cloak of "advice" it was clearly factual information which the Claimant in hindsight feels she was entitled to receive in helping her decide whether to place the proceeds of sale with Mr Englefield. The Solicitor Defendants did not advise her whether or not to enter into the transaction in the sense of generally advising what she should do with regard to the proceeds of sale and it does not appear to be the Claimant's case that the

Solicitor Defendants ought to have advised her as such because this was specifically within the scope of their retainer. Their retainer clearly involved dealing with the conveyancing aspects of the sale and if the Claimant's case had succeeded on breach of duty I find that the criticism of the Solicitor Defendants amounts to a failure to provide information to the Claimant in circumstances where they were obliged to provide it. The fact that if she had received information the transaction would not have proceeded does not change the fact that this is still an information case.

103. As Lord Sumption said in *BPE Solicitors* :

> *" 52…….This involves the same error as affected Chadwick J's analysis in Steggles Palmer, namely that the mere fact that the breach of duty caused the lender to proceed when he would otherwise have withdrawn was enough to make the solicitors legally responsible for the lender's decision and all its financial consequences. All "no transaction" cases have this characteristic, whether or not the fact withheld or misrepresented goes to the viability of the transaction or the honesty of the counterparty, because in all of them the fact withheld or misrepresented is ex hypothesi sufficiently fundamental to have caused the lender to walk away had he known the truth.*

The fact therefore that the Claimant said had she known about the facts which Ms Bourne should have supplied she would not have placed the money with Mr Englefield does not change the principle that the loss sought to be recovered has to fall within the professional's scope of duty.

104. The measure of damages in this case therefore should be the difference between the loss on the transaction and the loss which would have been sustained if the facts had been as the defendant represented them to be (when the transaction would still have gone ahead). If Mr Englefield had been a solicitor , had a solicitors client account but the account had been overdrawn at the relevant time would there still have been a loss, if so , was it the same as, or different from, the loss which actually occurred?

105. Sadly being a solicitor does not mean that it is impossible to be dishonest. Solicitors unfortunately sometimes misappropriate money from their clients, although I accept only a small minority do. Mr Englefield is a case in point. Being a solicitor did not prevent him stealing £900,000 from his clients account in 1991. The fact that the money was held in a Solicitor's client account at that time did not provide any additional obstacle. The fact that his business was balance sheet insolvent at the time only makes the theft more likely rather than less and again would not have prevented the theft which did in fact occur. The alleged insolvency of Grace Associates did not cause the loss because the point in time when the loss occurred was 2017 when Kathleen asked for the money back. If Mr Englefield had been a solicitor he may have held professional indemnity insurance but my understanding is that fraud and dishonesty are permitted to be excluded under SRA minimum terms and usually are. This is in accordance with the rest of the insurance market where an insurer will not insure the risk of the insured committing fraud.

106. On causation therefore I agree with the submission of Mr Patten QC that even if the Claimant had succeeded on liability the court would have to find that the loss incurred fell outside the scope of the solicitor's duty.

107. **Contributory Negligence**

The Solicitor Defendants say the Claimant has been negligent in signing the letter of authority dated 2nd May 2013 and then in failing to seek the money back from Mr Englefield immediately after completion and then issuing proceedings against him if necessary to recover the proceeds before he had dissipated them. Whilst it is accepted that the proceeds belonged to Kathleen it was submitted that Michelle was still the trustee of the funds and had an obligation to recover them for her mother. The Claimant denies any contributory fault. In signing the letter dated 2nd May 2013 she was acting on the advice of someone who she thought was a solicitor and she believed it to be a routine request. After completion it was contended that she had no reason to be believe anything untoward had happened until about October 2017 by which time it was too late it transpires.

108. I accept that by July 2013 the amount remaining in the Second Defendant's bank account was less than £500,000 and certainly by October 2017 it is likely that all the money had been taken by Mr Englefield. I do not accept that Michelle was negligent in signing the 2nd May 2013 letter. A man who she thought was a solicitor and trusted legal adviser had asked her to sign the letter and I suspect she just thought it was routine for the proceeds to be paid to the facilitator who had brokered the transaction. Once completion had taken place it was an odd decision taken by Kathleen to leave the money with Mr Englefield , even if she thought he was honest, but I cannot say it was negligent to do so. She genuinely believed he was a solicitor as did Michelle and they had no reason to believe that he would steal their money. In assessing two possibly negligent parties the court must look at the causal potency of their respective actions. In this case the money was lost because Mr Englefield stole it . Whilst it may have been wiser for Michelle , on behalf of Kathleen to ask for the money earlier or ask what had become of it earlier they were entitled to expect that Mr Englefield would hold it until such time as they asked for it . It was not actually negligent of them not to assume dishonesty and demand the money earlier if they did not feel it convenient to do so. I would therefore have made no finding of contributory negligence

109. **Interest**

There is a dispute between the parties as to the rate of interest which the Claimant would have been entitled to claim had she succeeded and for what period. The Claimant seeks interest at 8% for the entire period of loss and the Defendants submit that 2.5% is an appropriate recompense for loss of the money but only from service of the Particulars of Claim. Whilst the Claimant and Kathleen may not have been negligent in waiting until 2017 to demand the money back it would certainly have been unfair to ask the Solicitor Defendants to pay interest for all the period of delay between May 2013 and the issue of proceedings. In my view 2.5% represents a reasonable commercial rate as compensation for loss of the money and I would have been prepared to award it from a date one year before the issue of the claim form. As I have dismissed the claim I do not believe it is necessary to actually perform the calculation. This I believe concludes the various issues I was asked to determine.