Neutral Citation Number: [2023] EWCA Civ 4

Case No: CA-2022-001389

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr Justice Edwin Johnson
[2022] EWHC 621 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 January 2023

Before :

LORD JUSTICE ARNOLD
LORD JUSTICE NUGEE
and
SIR CHRISTOPHER FLOYD

- -

Between :

SEEMA ASHRAF (the personal representative of the estate of SYED UL HAQ deceased)	**Claimant and Appellant**
- and –	
(1) LESTER DOMINIC SOLICITORS (a firm) **(2) Mr L KAN** **(3) Mr ATTARIAN** ~~**(4) Mr BAVINDER SINGH NIJJAR and Mrs SONIA NIJJAR**~~ **(5) THE CHIEF LAND REGISTRAR** **(6) THE BANK OF SCOTLAND plc**	**Defendants**
(7) REES PAGE (a firm)	**Defendant and Respondent**

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Edward Brown KC (instructed by **Tanners Solicitors LLP**) for the **Appellant**
Jeremy Cousins KC and Peter Dodge (instructed by **Mills & Reeve LLP**) for the **Respondent**

Hearing date : 1 December 2022

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Approved Judgment

This judgment was handed down remotely at 11.30am on Friday 13 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lord Justice Nugee:

Introduction

1. The claimant in this action, Mrs Seema Ashraf, is the executrix of Mr Syed Ul Haq. Mr Ul Haq had the singular misfortune to be the victim of what appear to have been two successive frauds in relation to the same property. In this action, commenced in 2016, he sought a miscellany of relief arising out of these frauds against a range of defendants. He died in 2017, and Mrs Ashraf was in due course substituted as claimant and pursued the action on behalf of his estate (**"the Estate"**). We are only concerned with one of the pleaded claims, a claim for damages brought by the Estate against the 7th Defendant Rees Page, a firm of solicitors, for alleged breach of a duty of care said to have been owed by Rees Page to Mr Ul Haq.

2. Mr Ul Haq was never a client of Rees Page. It is well established that in general solicitors owe their duties to their clients alone, and do not ordinarily owe any duties of care to those on the other side of the transactions in which they are acting. But there are exceptional cases where solicitors have been held to owe a duty of care to someone who is not their client. The question raised in this second appeal is whether the circumstances here are, or may be, one of those exceptional cases.

3. Rees Page applied for summary judgment on the grounds that the Estate had no real prospect of succeeding on the claim. The application came before Deputy Master Lloyd, who handed down judgment on 13 December 2019 granting summary judgment on the basis that on the facts as they appeared from the evidence before him no duty of care was owed by Rees Page to Mr Ul Haq. He also granted summary judgment on a separate application brought by the 1st and 2nd Defendants. The Estate appealed both decisions. The appeal was heard by Edwin Johnson J, who handed down a long and careful judgment on 21 March 2022 at [2022] EWHC 621 (Ch), in which he not only dismissed the appeal in respect of both summary judgment applications but also dealt with applications by the 5th and 6th Defendants, with which we are not concerned. So far as the judgment in favour of Rees Page is concerned he dismissed the Estate's appeal on the basis that there was nothing in the evidence that the Estate could point to which put the case into that category of case where, contrary to the usual rule, a solicitor owes a duty of care to a third party (at [119]).

4. The Estate now appeals to this Court on two grounds with permission granted by Arnold LJ on 21 September 2022, limited to an appeal against the summary judgment in favour of Rees Page.

Facts

5. Since this appeal arises out of an application for summary judgment, there has been no trial and no facts have been found. They are, as appears below, to some extent either unclear or disputed. But there was a certain amount of evidence before the Court in the shape of a witness statement from Mr Michael Kilvert, the solicitor concerned at Rees Page, who exhibited a considerable number of documents from his file. There was no evidence in answer: Mr Ul Haq had died, and one assumes Mrs Ashraf had little personal knowledge of the facts. There was also before the Court an expert handwriting report already obtained for the Estate from Ms Ellen Radley to the effect that Mr Ul Haq's purported signature on a particular document (a transfer in form TR1) was highly

unlikely to be genuine.

6. On the basis of this material the facts, so far as they can be identified at this stage, appear to have been as follows.

7. The story starts in 2008. Mr Ul Haq was then the registered proprietor of a freehold house at 91 Argyle Road, Ealing, London W13, subject to a registered charge dated 5 April 2007 in favour of the Bank of Scotland plc (**"the Bank"**). I will call this charge **"the Ul Haq charge"**.

8. Mr Ul Haq instructed solicitors, FLP Solicitors (**"FLP"**), to act for him in the proposed sale of the property to a Mr Bijan Attarian. On 7 March 2008 contracts were exchanged for the sale of the property. No copy of the contract signed by Mr Ul Haq was in evidence, and the Estate's pleaded case made no admissions as to whether a valid contract was ever entered into. But there was in evidence a copy of the contract signed by Mr Attarian, providing for Mr Ul Haq to sell 91 Argyle Road to Mr Attarian at a price of £1,250,000 with a completion date of 7 March 2008, and bearing an endorsement to the effect that it was exchanged on that day at 4 pm; and before us Mr Edward Brown KC, who appeared for the Estate, expressly accepted that this contract was duly exchanged.

9. It was not however completed as intended. Mr Attarian was proposing to buy the property with the assistance of a mortgage, and had an offer of a mortgage of £1,125,000, coincidentally also from the Bank. At some stage (it is not clear precisely when, but it does not matter for present purposes) he instructed FLP to act for him as well so that FLP was, unusually, acting for both vendor and purchaser. The Bank in the usual way transferred the mortgage advance to FLP in anticipation of completion. It would of course normally expect FLP (acting as its solicitors for this purpose) to hold the money to its order and only release it to the vendor in return for a duly executed transfer by the vendor together with a discharge of the vendor's mortgage, thereby enabling the purchaser to be registered as proprietor, and its own mortgage to be registered as a legal charge. Some steps were taken in anticipation of completion, including the execution by Mr Attarian of a charge by way of mortgage in favour of the Bank (**"the Attarian charge"**), and the signing of a transfer by Mr Ul Haq. But it appears that, apart from a sum of under £100,000 which the Estate admits in its pleading was paid to Mr Ul Haq, the bulk of the money was stolen by FLP's office manager, a Mr Misba Uddin. (We were told by Mr Brown in his written submissions that Mr Uddin subsequently received a substantial custodial sentence for his offence.) The result was that no money was paid to the Bank in discharge of the Ul Haq charge, which remained on the register. In addition the transfer signed by Mr Ul Haq was not witnessed, so that Mr Attarian could not be registered as proprietor, and the Attarian charge could not therefore be registered either.

10. We were not addressed on the legal consequences of this series of events. It is not suggested that the money stolen from FLP was FLP's own money; it was client account money and must have been held at the time of the theft for someone. But because FLP was acting for both vendor and purchaser, it is not clear at this stage whether they were still holding it at the relevant time as solicitors for the Bank (as lender to Mr Attarian), or whether they were holding it as solicitors for the vendor (that is for Mr Ul Haq, subject to paying the Bank what was needed to redeem the Ul Haq charge). Mr Ul Haq's position would have been rather different depending on the answer to that

question. But FLP's conveyancing files and ledgers (which might help to answer this question) were not in evidence and in those circumstances the question could not sensibly be resolved on this application, and neither Mr Brown nor Mr Jeremy Cousins KC, who appeared with Mr Peter Dodge for Rees Page, invited us to form any view one way or the other. But what is clear is that Mr Ul Haq remained on the register as registered proprietor, subject to the Ul Haq charge.

11. It was at this stage that the Bank instructed Mr Kilvert of Rees Page to act for it. He was an experienced solicitor and by then a consultant, having retired from the partnership after over 30 years as a partner. His instructions came from the legal department of HBOS plc. This is a separate corporate entity to the Bank, but its correspondence describes itself as a holding company, and it can I think be assumed that it is the parent, directly or indirectly, of the Bank, and for present purposes nothing turns on the distinction between them. I will therefore use "the Bank" to include HBOS. Mr Kilvert's evidence is that the Bank instructed him in respect of various mortgage advances which had been made to FLP and misappropriated, something which FLP blamed on Mr Uddin. Initially these did not include the mortgage advance to Mr Attarian in respect of 91 Argyle Road, but in a letter of 14 May 2008 Ms Linda Hind of the Bank's legal department sent Mr Kilvert a copy of a letter dated 6 May 2008 from solicitors called Chequers Solicitors who were acting for Mr Attarian and who told the Bank that "after the transaction had completed, on or about 7 March 2008" Mr Attarian realised that the property had not been registered in his name, and that FLP then told him that they had not redeemed the mortgage (ie the Ul Haq charge) as the mortgage advance had gone missing, with the result that the property was not registered in Mr Attarian's name, the vendor's mortgage was not redeemed and the mortgage advance was missing.

12. On 14 May 2008 Mr Kilvert wrote to FLP asking for information about the case (as well as a number of other cases which were believed to have involved potential mortgage frauds by Mr Uddin) and putting FLP on notice of potential claims. On 15 May he spoke to a Mr Kapoor of Chequers and told him that he had spoken to Mr Mills of FLP who had admitted that this was a case of fraud by Mr Uddin who had been a conveyancer with his firm but had fled to Bangladesh; Mr Kapoor said that Mr Attarian would still like to purchase the property if possible. On the same day Ms Hind wrote to Mr Kilvert referring to the sale having been purportedly completed on 7 March 2008, adding that "it would seem that the borrower is perhaps genuine". On 4 June 2008 Mr Kilvert wrote placing the Solicitors' Compensation Fund on notice of this and other cases.

13. On 3 July 2008 Mr Kilvert wrote a report on this and other cases to Ms Hind, saying that Mr Attarian did appear on the face of it to be genuine. Ms Hind replied on 14 July 2008 agreeing that she believed Mr Attarian not to be a fraudulent borrower but an innocent victim. At that stage her position was that it was the Bank's money (as potential lender to Mr Attarian) that had been stolen. On 18 September 2008 Mr Kilvert made formal claims on the Compensation Fund on behalf of the Bank.

14. On 9 January 2009 another firm of solicitors, J R Jones Solicitors, wrote to Mr Kilvert indicating that they acted for Mr Attarian. They asked for consent to the registration of his interest in the property whereupon they would make the appropriate application to the Land Registry. Mr Kilvert replied that he was waiting to hear from FLP's indemnity insurers. In the event it turned out that the claims against FLP exceeded their limit of

cover; the Bank received certain sums, of which a proportion was credited to Mr Attarian's mortgage account.

15. On 7 May 2009 J R Jones wrote again pressing for the Bank's consent to registration of the property in Mr Attarian's name. On 14 May 2009 Mr Kilvert spoke to a Ms Maki of J R Jones, telling her that his understanding was that the purchase by Mr Attarian had never been perfected. On 2 June 2009 he received a call from a Ms Popat of J R Jones. She said that she thought the transaction had actually been completed which was why Mr Attarian was maintaining mortgage repayments. Mr Kilvert's file note records him as saying that this was something of a surprise but he would follow it through, and noted that this was the first intimation they had had that Mr Attarian had bought the property. Mr Kilvert followed up the suggestion by asking Ms Popat various questions including "If necessary, would Mr Ul Haq be prepared to co-operate for the purpose of executing replacement documentation?" to which the answer from Ms Popat was that they did not believe that their client was in communication with Mr Ul Haq but would make inquiries. So far as the evidence before the Court is concerned, this appears to be the first indication that Mr Kilvert was now thinking that a possible solution for the Bank (and indeed for Mr Attarian) would be to get Mr Ul Haq to execute a new transfer if one were needed so that Mr Attarian and the Bank could be registered.

16. Ms Popat also confirmed that Mr Attarian was living in the property and enclosed a number of copy documents. In September 2009 Mr Kilvert received further copy documents both from FLP and from the Bank itself. Taken together these documents included copies of the following: Mr Attarian's mortgage statement from the Bank showing the advance of £1,125,000 as having been debited to the account on 7 March 2008; three undated transfers of the property in form TR1, all signed by Mr Ul Haq and the third also by Mr Attarian, but none of them witnessed; a promissory note dated 10 March 2008 and executed by Mr Attarian in which he promised to pay Mr Ul Haq £19,000 together with a legal charge in form CH1 (the copy in evidence is incomplete but Mr Kilvert's later file note indicates he had a copy which was signed by Mr Attarian although not witnessed); a mortgage deed undated but executed by Mr Attarian charging the property in favour of the Bank; and a Land Transaction Return for Stamp Duty Land Tax purposes giving the effective date of the transaction as 7 March 2008 and calculating the SDLT due as £50,000, together with a cheque and paying in slip for that amount. There was also a letter from Mr Mills of FLP to Mr Attarian dated 15 April 2008 (after the fraud had come to light) with a PS as follows: "I confirm the stamp duty is paid and we will register with HMLR".

17. On 21 November 2009 Mr Kilvert made a file note in which he recorded that he had spent some time going through these documents and had concluded from them that the sale by Mr Ul Haq to Mr Attarian did take place. He corresponded with the Compensation Fund on this basis, indicating that although the documentation was incomplete it did tend to suggest that any fraud perpetrated through FLP was in relation to misappropriating that part of the sale proceeds which should have been applied to the discharge of the Ul Haq charge.

18. On 15 April 2010 he spoke to Ms Popat of J R Jones. His file note indicates that he spoke to her about "the issue of tracing Mr Ul Haq to obtain his execution to a Transfer Deed", the copy transfer he had being signed but not witnessed and only a photocopy. It also indicates that he gave her Mr Ul Haq's address (which he could have taken from the promissory note or form CH1, both of which gave his address as 35 Inglis Road,

London W5), and she said she would contact Mr Attarian to see if Mr Ul Haq could be traced.

19. On 7 May 2010 Mr Attarian himself sent an e-mail to Mr Kilvert telling him that J R Jones had closed down and the file had been transferred to a Mr Guy Osborne, and asking what forms needed to be filled in. Mr Kilvert spoke to Mr Attarian on 11 May and told him that what was needed was a replacement of the mortgage in favour of the Bank (ie the Attarian charge), and a replacement of the transfer from Mr Ul Haq. Mr Attarian said that he would sign the replacement charge and use endeavours to obtain the replacement transfer. Mr Kilvert's file note continues "Any correspondence should be sent to him at the property."

20. On 25 May 2010, Mr Kilvert spoke again to Mr Attarian and told him that a replacement charge and transfer would be in the post. Mr Attarian said there would be no problem with Mr Ul Haq because he had already made contact with him at the address Mr Kilvert had for him of 35 Inglis Road. Mr Attarian also told him that Mr Ul Haq was perfectly happy to sign the replacement deed. Mr Kilvert told Mr Attarian that the deeds (ie transfer and charge) would need to be signed in the presence of a solicitor; Mr Attarian said that Ms Popat had now joined another firm and he would provide details.

21. On 26 May 2010 Mr Kilvert sent Mr Attarian, as he had said he would, a replacement transfer and a replacement mortgage deed, telling him that it was essential that they should be signed by him and Mr Ul Haq respectively in the presence of solicitors instructed by them. He explained that he had dated the enclosed transfer and charge for the date of actual completion (ie 7 March 2008).

22. By 10 June 2010 Mr Kilvert had neither received back the documents nor Ms Popat's details and he sent Mr Attarian a chasing e-mail. On 24 June 2010 he spoke to Ms Popat from which he understood that it was unclear whether she would be acting for Mr Attarian or not. On 1 July 2010 he therefore rang Mr Attarian direct, and left an urgent message. Mr Attarian rang back and said the documents had been executed.

23. On 13 July 2010 Mr Kilvert received back in the post, without any covering letter, the transfer in form TR1 and the mortgage deed in favour of the Bank, each apparently duly signed and witnessed. The TR1 was apparently signed by Mr Ul Haq, whose signature was witnessed by a Mr Lester Kan of Lester Dominic Solicitors in Finchley (London N3), and both documents were apparently signed by Mr Attarian, whose signatures were witnessed by a Ms Olga Marsh of Steven Dean-Magac Solicitors in Barnet. Mr Kilvert compared the signatures with those he had on file (on the undated and unwitnessed transfer) and noted that they appeared to be the same. But his file note indicates "I have to be careful about this case" and so he spoke to both Ms Marsh and to Mr Kan. Ms Marsh told him that they were satisfied of Mr Attarian's identity. Mr Kan confirmed that he had witnessed the signature of Mr Ul Haq but Mr Ul Haq was not known to him and he had not seen any evidence of identity.

24. Mr Kilvert also spoke to Mr Attarian, who told him that he had been to 35 Inglis Road. He said he had not seen Mr Ul Haq but had spoken to his wife and left the transfer with her. Mr Kilvert's file note indicates that he was "slightly concerned about this" and that he would therefore write to Mr Kan to see if he could obtain evidence from him "just in the event that the issue was raised by the Land Registry".

25. He then wrote a letter dated 14 July 2010 to Mr Ul Haq at 35 Inglis Road. This referred to him having completed a sale of 91 Argyle Road to Mr Attarian in March 2008, explained that he had prepared a replacement of "the Deed of 7 March 2008 by virtue of which you transferred the property to Mr Attarian and this has now been returned duly signed and witnessed by both of you with your signature witnessed by Mr Lester Kan…", explained that the Land Registry might require Mr Kan to have evidence of his identity, and asked him to contact Mr Kan to provide that evidence. Mr Brown accepted before us that Mr Ul Haq duly received that letter (as indeed is consistent with the Estate's pleaded case). Mr Kilvert also wrote to Mr Kan noting that he would attempt to obtain evidence of identity and enclosing a copy of his letter to Mr Ul Haq.

26. On 23 July 2010 Mr Kilvert's assistant spoke to Mr Kan. He told her that he had written to Mr Ul Haq but not received a reply. She also spoke to Mr Attarian and asked him to go to Mr Ul Haq's address and try and obtain a telephone number, which he said he would.

27. On 24 January 2011 Mr Kan wrote to Mr Kilvert saying that he had tried to contact Mr Ul Haq but had no success.

28. The next document in evidence is a file note of Mr Kilvert dated 9 March 2011. This records that he received "somewhat surprisingly, out of the blue" a telephone call from Mr Ul Haq. According to Mr Kilvert's note he explained the position and said that it was not for him to advise Mr Ul Haq but he had to know what his liabilities were and suggested that he might well need the services of a solicitor; he had previously seen Mr Kan who witnessed his signature on the replacement transfer, and he (Mr Kilvert) wanted him to see Mr Kan again and produce evidence of his identity. He also took Mr Ul Haq's details.

29. On 11 March 2011 Mr Kilvert wrote to Mr Ul Haq. This was to similar effect as the telephone call as noted in Mr Kilvert's file note: he explained the position, said that Mr Ul Haq had previously seen Mr Kan "who witnessed your signature on a replacement Transfer Deed", and asked him to make arrangements to see Mr Kan to produce evidence of identity. Again the Estate's pleaded case accepts that Mr Ul Haq received this letter.

30. On 13 June 2011 Ms Hind of the Bank's legal department e-mailed Mr Kilvert and asked him to take urgent steps to register their charge, especially as the Attarian account was then seriously in arrears.

31. On 21 June 2011 Mr Kilvert acted on this instruction by sending to the Land Registry an application for registration of the transfer and charge. This included lodging an application to change the register in form AP1. The AP1 form has a number of panels or boxes to fill in. As filled in by Mr Kilvert, Box 4 showed that the application was to register a transfer and a charge. Box 5 showed that the documents lodged with the form were the transfer and charge, certified copies of each, and an SDLT certificate. Box 6 showed that the applicant was the Bank.

32. Boxes 12 to 14 concern evidence of identity. Box 12 explains as follows:

> "When registering transfers, charges, leases and other dispositions of land, or giving effect to a discharge or release of a registered charge,

Land Registry relies on the steps that conveyancers take, where appropriate, to verify the identity of their clients. These checks reduce the risks of property fraud.

Where a person was not represented by a conveyancer, Land Registry requires 'evidence of identity' in respect of that person, except where the first alternative in panel 13(2) applies."

33. Box 13 applies where the application is made by a conveyancer and Box 14 where it is not. In this case the application was made by Rees Page on behalf of the Bank and Mr Kilvert therefore completed Box 13. Box 13(1) as filled in by Mr Kilvert was as follows:

(1) Details of conveyancer acting

If you are sending an application to register a transfer, lease or charge, for each party to each disposition that is to be registered state in the table below the details of the conveyancer (if any) who represented them.

Where a party is not represented by a conveyancer you must also complete (2) below.

Name of transferor, landlord, transferee, tenant, borrower or lender		Conveyancer's name, address and reference
Syed Ahtram Ul Haq		FLP Solicitors, 21 Hessel Street, London, E1 2LR Reference: M.J.Mills
Bijan Attarian		Formerly FLP Solicitors as above and subsequently Steven Dean-Magac & Co. 159 High Street, Barnet, EN5 5SU Reference: TR.Attarian
Bank of Scotland plc		Formerly FLP (now intervened) and subsequently Rees Page, 8/12 Waterloo Road, Wolverhampton WV1 4BL DX: 10405 Wolverhampton Reference: MJK/BOS/ATTARIAN /119968

Box 13(2) was as follows:

(2) Evidence of identity

Where any transferor, landlord, transferee, tenant, borrower or lender listed in (1) was not represented by a conveyancer

☐ I confirm that I am satisfied that sufficient steps have been taken to verify the identity of

and that they are the registered proprietor or have the right to be registered as the registered proprietor

☐ I enclose evidence of identity in respect of each unrepresented transferor, landlord, transferee, tenant, borrower or lender for whom I have not provided the confirmation above

Since he had filled in Box 13(1) with the name of a conveyancer for each party Mr Kilvert left Box 13(2) blank.

34. On 23 June 2011 the Land Registry confirmed that the application had been completed. In this way Mr Attarian was registered as proprietor, and the Bank as chargee in respect of the Attarian charge (as well as in respect of the Ul Haq charge which had never been discharged). Mr Ul Haq ceased to be proprietor but he (and now the Estate) are said to be still liable on the Ul Haq charge.

The disputed factual allegations – Ground 2 of the Grounds of Appeal

35. This account of the facts is almost entirely taken from the documents exhibited to Mr Kilvert's witness statement. To that should be added two further matters. First the Estate's case is that Mr Ul Haq's purported signature on the TR1 witnessed by Mr Kan was not his and was a forgery. There was certainly evidence before the Court in support of that allegation in the form of Ms Radley's report, in which she concluded that there was very strong evidence that the disputed signature on the TR1, although bearing a pictorial resemblance to his general signature style, had not been written by Mr Ul Haq but was a simulation or crude tracing of his signature. At common law a forged conveyance could not of course confer any right to property and in unregistered conveyancing Mr Ul Haq would have remained the owner, but the position is different in registered conveyancing where the registered proprietor of the property or of a registered charge has a statutory title and a statutory power of sale. In the present case it appears that the Bank subsequently exercised its powers under the Attarian charge and sold the property to the 4th Defendants, a Mr and Mrs Nijjar, who were registered as proprietors in 2013. Mr Ul Haq originally brought a claim against them for alteration or rectification of the register but they successfully applied for summary judgment on that claim and have ceased to be parties to the action. It is therefore now established that the Estate cannot recover the property even if it establishes that the TR1 was forged.

36. The other matter is that the Estate pleads a version of the facts that is at odds with Mr Kilvert's account. At paragraph 24 of the Amended Particulars of Claim it is alleged that Mr Kilvert contacted Mr Ul Haq in the spring of 2010 and told him that his

clients wanted him to sign a fresh or replacement transfer document and that he should attend the offices of Lester Dominic to see Mr Kan and take identification evidence with him; at paragraph 25 it is alleged that Mr Ul Haq told Mr Kilvert that he did not know Lester Dominic or Mr Kan, did not wish to go to their offices and refused to do so. At paragraph 32 the telephone conversation with Mr Kilvert on 9 March 2011 (paragraph 28 above) is pleaded, but it is alleged that in the course of this conversation Mr Ul Haq told Mr Kilvert that he had never been to Lester Dominic's offices and that he had not signed the replacement TR1.

37. In his witness statement Mr Kilvert specifically denies these allegations. He says that it is completely untrue that any conversation took place between him and Mr Ul Haq in the spring of 2010: the only time he spoke to him was on 9 March 2011. He also denies that in that conversation Mr Ul Haq told him he had never been to Lester Dominic's offices and had not signed the replacement transfer; if he had, Mr Kilvert would have recorded these matters in his file note and raised the issue with the Bank.

38. Edwin Johnson J dealt with this question in detail in his Judgment at [106] to [115] where he concluded that it was possible to say, in advance of a trial, that the Estate had no real prospect of establishing its factual case as pleaded at paragraphs 24, 25 and 32 of the Amended Statement of Claim. He reverted to the point at [120] to [125] when considering the particular grounds of appeal advanced against the decision of Deputy Master Lloyd. His conclusions are the subject of Ground 2 of the Grounds of Appeal to this Court, which is to the effect that it was inappropriate to grant summary judgment where there were factual disputes.

39. It is convenient to deal with this point now. I entirely agree with Edwin Johnson J, essentially for the reasons he gives. The principles applicable to a summary judgment application are well established and very familiar and were not disputed before us. The relevant principles were cited by Edwin Johnson J as follows:

(1) The criterion is not probability but absence of reality: *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 at [158] per Lord Hobhouse.

(2) It is not generally open to the Court to resolve disputed questions of fact on such an application, and it should not be allowed to develop into a mini-trial. But that does not mean that the Court has to accept without analysis everything said by a party in his statements before the Court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents: *Optaglio v Tethal* [2015] EWCA Civ 1002 at [31] per Floyd LJ (citing *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [10]).

(3) The Court must take account not only of evidence actually placed before it but evidence that can reasonably be expected to be available at trial: *Royal Brompton NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550 at [19] per Aldous LJ.

40. On this last point I would draw particular attention to the words "can reasonably be expected". It is well established that a respondent to a summary judgment application cannot defeat it simply by asserting that he hopes that something might turn up: see the well-known dictum of Megarry V-C in *Lady Anne Tennant v Associated Newspapers*

Group Ltd [1979] FSR 298 on RSC Ord 14 (cited by Deputy Master Lloyd) that "You do not get leave to defend by putting forward a case that is all hope and Micawberism". This is equally applicable to an application under CPR Part 24. There needs to be some reason for expecting that evidence in support of the respondent's case will, or at least reasonably might, be available at trial. This was a point which Edwin Johnson J had well in mind, and referred to in his Judgment at [120] where he said:

> "References to what might turn up in disclosure or in subsequent evidence seem to me to be of no assistance to the Estate, unless the court is given some reason for thinking that something is going to turn up, either in disclosure or in evidence, which will change the position."

I agree.

41. In the present case it seems to me that the relevant allegations are indeed fanciful and that the Estate can be seen now to have no real prospect of establishing them. Strictly speaking there was not even any evidence before the Court in support of them, there being no witness statement from Mr Ul Haq or anyone else on behalf of the Estate. Mr Brown said that these allegations (which were in the original unamended Particulars of Claim) had been pleaded by counsel then instructed and were supported by a statement of truth signed by the solicitors then acting, and that there must have been some basis for making them. I am willing to assume that they were based on Mr Ul Haq's instructions before he died, although this does not by itself get over the problem that, as Mr Brown accepted, he currently has no evidence to prove them, and there would seem to me to be no realistic possibility of him obtaining such evidence for trial.

42. But even on the assumption that this is what Mr Ul Haq told his solicitors and counsel, the more fundamental difficulty is that these allegations are completely at odds with the contemporaneous documents from Mr Kilvert. The documents he has disclosed tell a coherent and comprehensible story. If, however, the Estate's allegations are correct, Mr Kilvert's actions as recorded in his documents make no sense. So far as the supposed telephone conversation in spring 2010 is concerned, there is no documentary evidence that it took place at all. And its supposed content is flatly inconsistent with the letter Mr Kilvert wrote in July 2010 to Mr Ul Haq, and the one that he wrote to Mr Kan which enclosed a copy (see paragraph 25 above). If Mr Ul Haq had really told Mr Kilvert in spring 2010 that he refused to go to Lester Dominic's offices, it seems to me impossible to suppose that Mr Kilvert would have written those letters or gone to the lengths he did to try and get Mr Ul Haq to contact Mr Kan to provide proof of identity. That is only rationally explicable on the basis that Mr Kilvert understood that Mr Ul Haq had been to Lester Dominic's offices and signed the TR1.

43. The position is even clearer with the telephone conversation on 9 March 2011. If Mr Ul Haq had really told Mr Kilvert that he had not signed the transfer, Mr Kilvert could not sensibly have written the file note of the call that he did, nor indeed the letter of 11 March 2011, both of which referred in terms to Mr Ul Haq having signed the transfer and his signature having been witnessed by Mr Kan (see paragraphs 28 and 29 above). Indeed one can go further, as Mr Cousins said in his succinct but compelling submissions on the point. He said that there were really only two possibilities. One was that the Estate's allegations were correct, in which case Mr Kilvert deliberately created a misleading file note and sent off for registration a document which he knew was, at the lowest, one whose genuineness had been queried. That would mean he had

not only lied about it but was basically a crook. But the Estate had no material to establish this and it was quite unclear where the supposed rescue of their case might come from at trial. It could not seriously be supposed that Mr Kilvert had made (and would disclose) a second file note admitting that he had been told that Mr Ul Haq had not signed the transfer. Indeed the case had only ever been framed in negligence; there had been no suggestion of fraud, dishonesty or professional misconduct. There was in those circumstances no real prospect of the Estate's factual allegations being established at trial. The only other possibility was that Mr Ul Haq had not told Mr Kilvert that he had not signed the transfer. I accept these submissions which seem to me well founded.

44. Mr Brown said in his written submissions that for the purposes of the summary judgment application the Court was required to assume the Estate's factual position to be correct. That I think significantly overstates the position and does not represent the law which is as I have set out above. In his oral submissions, he said that where an issue depended on a clash of oral recollection, it was wholly unsuitable for summary determination; it was wrong in principle for Mr Kilvert's account to be preferred before it had been subjected to cross-examination. Had this been simply a case of which of two parties' differing recollections should be preferred, there would no doubt have been force in these submissions. But to describe the disputed issues in the present case as turning on the resolution of competing recollections seems to me a wholly inadequate account of the difficulties in the Estate's case.

45. For these reasons I would dismiss this ground of appeal. In my judgment Edwin Johnson J was right to conclude that the Estate's factual case as pleaded at paragraphs 24, 25 and 32 of the Amended Statement of Claim had no real prospect of success.

Duty of care – Ground 1 of the Grounds of Appeal

46. The more difficult question (and the one which justified a second appeal) is that raised by Ground 1 of the Grounds of Appeal. This is that the lower Courts were wrong to hold that there was no arguable duty of care owed by Rees Page to Mr Ul Haq.

47. It is not pleaded or suggested that Rees Page ever agreed to act for Mr Ul Haq or that he was ever their client. The Estate's pleaded case is squarely placed on the basis that Rees Page owed him a duty of care in tort.

48. The current pleading of the Estate's case is in its Amended Particulars of Claim. This pleads that at the time that Rees Page submitted the replacement transfer and mortgage for registration it owed Mr Ul Haq as the then registered proprietor a duty to take reasonable care to establish that the transfer had been properly executed by Mr Ul Haq. A number of facts and matters are pleaded in support of this case. Some depend on the allegations that Mr Ul Haq told Mr Kilvert in spring 2010 that he refused to go to Lester Dominic, and on 9 March 2011 that he had not signed the transfer; these can be put to one side as I have accepted that this factual case has no real prospect of being established. I think the other matters relied on can be summarised as follows:

(1) Mr Kilvert knew or ought to have known that Mr Ul Haq had not been paid or received the benefit of a substantial part of the purchase price on the sale to Mr Attarian; that he therefore would have a vendor's lien; and that completion of the registration of Mr Attarian as the registered proprietor and of the Attarian

charge would result in the latter taking priority over the lien and Mr Ul Haq losing the value of his interest in the property and the lien.

(2) There was no conflict between the interest of the Bank and that of Mr Ul Haq as the Bank should have had no interest in the registration of a forged transfer.

(3) In attending to registration requirements following completion of a sale a solicitor is acting in a ministerial capacity in completing the formalities of a transaction for the benefit of both sides.

It is said that in those circumstances it was reasonably foreseeable that Mr Ul Haq would suffer loss if an application for registration were made without first taking adequate steps to verify the identity of the person who had signed the document; there was a sufficient relationship of proximity between Rees Page and Mr Ul Haq; and it was fair and just and reasonable to impose a duty of care on Rees Page.

49. There were also before the Court draft Re-amended Particulars of Claim. These plead a rather different basis for Rees Page owing a duty of care to Mr Ul Haq. The Estate had made no application to re-amend in these terms, and indeed before Edwin Johnson J Mr Brown indicated that that was for a future occasion and that he would be unlikely to be applying to amend in precisely those terms. There was a dispute before Edwin Johnson J as to what reliance, if any, the Estate could place on the draft pleading in those circumstances. We heard very little argument on this point and I do not propose to consider the technical position; I will assume, as Mr Brown invited us to, that the draft represents the case that he would now wish to make.

50. The draft Re-amended Particulars of Claim re-frame the duty of care as one based on an assumption of responsibility. Summarising what is a lengthy pleading, the essential elements of this case are as follows:

(1) Mr Kilvert knew or ought to have known that there had already been a fraud (the theft by Mr Uddin); that the rights of the parties (Mr Ul Haq, the Bank and Mr Attarian) arising out of this were likely to be complex and unclear; that the identities of the fraudsters other than Mr Uddin were unknown and might include Mr Attarian himself; and that any transaction might materially affect the rights of Mr Ul Haq, the Bank and Mr Attarian.

(2) Mr Kilvert therefore knew that reasonable care would be required to ensure that any transaction took account of the rights of all parties and not just those of the Bank *qua* client.

(3) Rees Page therefore assumed direct responsibility to Mr Ul Haq that such reasonable care would be taken. That included taking reasonable steps to ensure that any transaction was genuine.

(4) A number of further factors are relied on in support of the asserted assumption of responsibility. Leaving aside the disputed allegations of fact, these include the fact that Mr Ul Haq was a victim of fraud, was unrepresented, not a native English speaker, and unlikely to have any technical or legal knowledge; ordinary and reasonable standards of commercial morality as applied to solicitors by virtue of their standing in society; and the importance to society of

promoting *bona fide* transactions and not facilitating fraudulent transactions.

The law

51. It appears that in both courts below the parties were agreed that the relevant legal principles were set out in the decision of this Court in *P & P Property Ltd v Owen, White & Catlin LLP* [2018] EWCA 1082 (***"P&P"***), and the argument was over the correct application of those principles. In *P&P* the Court held that a vendor's solicitor did not owe a duty to the purchaser to take reasonable care to establish the identity of his client. Both judges below held that this was determinative of the present case. Deputy Master Lloyd at [41] referred to the argument founded on *P&P* as Mr Cousins' "clinching argument" and accepted the submission that "if a [solicitor] is not under a duty to another to establish his own client's true identity, he can hardly owe a duty to that other to establish the identity of a third party." Similarly Edwin Johnson J said at [105] that *P&P* "seems to me to be decisive against the Estate's case that Rees Page owed a duty of care to [Mr Ul Haq]".

52. I consider *P&P* below, but in this Court the focus of the oral argument was different, and I prefer to start with the general principles.

53. It is well established that the general rule is that a solicitor acting on behalf of his client owes a duty of care only to his client. A convenient statement to this effect can be found in *White v Jones* [1995] 2 AC 207 at 256B per Lord Goff. As he there points out, it has accordingly been held that in normal conveyancing transactions a solicitor acting for the seller does not generally owe a duty of care to the buyer (*Gran Gelato Ltd v Richcliff Group Ltd* [1992] Ch 560 (***"Gran Gelato"***) per Sir Donald Nicholls V-C); and that a solicitor acting for a party in adversarial litigation does not as a general rule owe a duty of care to his opponent (*Al-Kandari v J R Brown & Co* [1988] QB 665 (***"Al-Kandari"***) at 672 per Lord Donaldson MR). A more recent statement to very similar effect can be found in the judgment of Lord Wilson JSC in *NRAM Ltd v Steel* [2018] UKSC 13 (***"NRAM"***) at [25], referring to *Ross v Caunters* [1980] Ch 297 at 322 per Megarry V-C for the proposition that a solicitor generally owes no duty to the opposite party, and to *Jain v Trent Strategic Health Authority* [2009] AC 853 for the proposition that a litigant does not owe a general duty of care to his opponent. (*NRAM* was a Scottish appeal but it is not suggested that there is any relevant difference between the law of Scotland and that of England and Wales).

54. None of this is surprising. Where a solicitor is acting for a client, there will almost always be a contract of retainer under which the solicitor agrees to act for the client in pursuit of some end for the client, whether it be non-contentious business such as conveyancing or making a will, or contentious business such as litigation. Like anyone else providing a professional service, the solicitor *prima facie* impliedly agrees to carry out that service with reasonable care and skill. (This implication is now, and has for a long time been, statutory: see s. 12 of the Supply of Goods and Services Act 1982 ("there is an implied term that the supplier will carry out the service with reasonable care and skill") and s. 49 of the Consumer Rights Act 2015 for consumer contracts ("… treated as including a term that the trader must perform the service with reasonable care and skill"). Although a solicitor generally owes his client a concurrent liability in tort, it therefore remains the case that the source of the duty of care owed by a solicitor to a client is the contract of retainer, and as the statutory formulations show, the core content of the duty of care is to carry out the service he has agreed to carry out with

skill and care. Indeed I find it helpful to regard the core content of the duty of care owed to a client as a duty of *competence*: a solicitor who has agreed to do something for a client has to attain a minimum level of competence in doing what he has agreed to do. I should make it clear that I am not seeking to define the outer limits of a solicitor's duty to his client: there may be cases where his obligation to promote and safeguard his client's interests (cf *Ross v Caunters* at 322A per Megarry V-C: "a solicitor's duty to his client is to do for him all he properly can") requires him to do things that he has not been specifically instructed to do. But the core duty owed by a solicitor to his client is to carry out the services he has agreed to carry out with reasonable care and skill, that is reasonable competence.

55. Seen in this light it is obvious why in general the solicitor owes no similar duty to those who are not his clients. He does not owe them any obligation to perform his services with competence for the simple reason that he has not agreed to provide any service to them at all. It is sometimes said that one of the reasons why a solicitor does not owe duties to the other party to a conveyancing transaction, or the other party to litigation, is because their interests diverge from those of his client. This may very often be the case, and is a good illustration of the practical difficulties that can arise if such a duty is held to be owed, but I do not myself think this is the main reason why no such duty is owed. In my view the main reason is because a solicitor acting for a seller is not providing a service to the buyer, and this is so even if it is in the buyer's interests as much as the seller's for the transaction to be completed competently. Equally a solicitor acting for a party in litigation has not agreed to provide a service to any other party in the litigation (and this includes not only those on the other side but also those whose interests are aligned with his client but for whom he does not act). In each case the solicitor has not agreed to act for other parties, and has not agreed to provide a service to them, and it follows that he owes them no obligation to perform his services with care and skill.

56. But it is recognised that there are special cases which are exceptions to the general rule. They seem to me to fall into a number of different groups, and I think it is helpful to keep them distinct. One group of cases is where the very purpose of the solicitor's retainer by his client A is to confer a benefit on a particular third party B, the classic example being where a testator engages a solicitor to make a will in favour of a beneficiary. Here the solicitor by agreeing to act for A is agreeing to provide a service for the benefit of B, and there seems to me little conceptual difficulty in the conclusion that the solicitor owes a duty not only to the client A who retains him to provide that service but also to the intended beneficiary B for whose benefit he has agreed to provide the service. That that is indeed the law was finally established by the decision of the House of Lords in *White v Jones* (approving the decision of Megarry V-C in *Ross v Caunters*), although the speeches in that case, which was only decided by a majority of three to two, show that even this modest extension of the law was regarded as far from straightforward. This type of case plainly has no relevance here: the Bank did not on any view engage Mr Kilvert to confer a benefit on Mr Ul Haq.

57. A second group of cases is where the solicitor for one party makes representations to the other party on which the other party relies. Here the general principle that no duty of care is owed usually applies. That was decided by Sir Donald Nicholls V-C in *Gran Gelato* in relation to ordinary conveyancing transactions, and the whole question was re-examined more recently by the Supreme Court in *NRAM*. Lord Wilson identified

the general principle at [25], considered six particular cases, including *Gran Gelato*, at [26]-[31], and concluded at [32] that they demonstrated that a solicitor will not assume responsibility towards the opposing party unless it was reasonable for the latter to rely on what the solicitor said, and reasonably foreseeable by the solicitor that he would do so. This will not normally be the case as such reliance by an opposing party is "presumptively inappropriate". In *NRAM* itself the solicitor for a borrower who was selling part of a charged property and intending to use the proceeds to redeem a part of the loan secured on it sent an e-mail to the lender, who was unrepresented, saying (quite inaccurately) that the whole loan was being discharged. The Supreme Court held that no duty was owed.

58. But Lord Wilson recognised that there were cases where it was reasonable and foreseeable that representations would be relied on by the other party. One example was *Allied Finance and Investments Ltd & Haddow & Co* [1983] NZLR 22. Here the solicitor for a borrower certified to the lender that an instrument of security over the borrower's yacht was binding on him. It was the giving of the certificate that made it foreseeable that the lender would be likely to rely on it. To similar effect are *Connell v Odlum* [1993] 2 NZLR 257 where a solicitor certified that he had explained a pre-nuptial agreement to an intending wife, and it was held to be highly arguable that in giving the certificate the solicitor owed a duty of care to her future husband; and *Dean v Allin & Watts* [2001] 2 Ll Rep 249 where solicitors acting for borrowers were held to owe a duty of care to the lender in relation to third party security, where the solicitors knew or should have known that the lender was relying on them in that regard. (*Dean v Allin* is a bit different as it was not a representation case, but it was one of reliance: see per Robert Walker LJ at [69]). Again I do not think that this group of cases has any relevance to the present case. Mr Kilvert did not give any certificates, or make any other representations, to Mr Ul Haq on which Mr Ul Haq relied, nor is this pleaded as a reliance case.

59. A third type of case is exemplified by another of Lord Wilson's six cases, namely *Al-Kandari*. Here in litigation between wife and husband a consent order was agreed under which the husband surrendered his passport (which also included the children on it) to his solicitors. They agreed that their London agents could take it to the Kuwaiti embassy to have the children's names removed, where the husband succeeded in deceiving the embassy into letting it into his possession. This Court, upholding French J although for slightly different reasons, held that the husband's solicitors were in breach of a duty of care to the wife. On the question of whether a duty of care was owed, Lord Donaldson MR said this (at 672D):

> "In voluntarily agreeing to hold the passport to the order of the court, the solicitors had stepped outside their role as solicitors for their client and accepted responsibilities towards both their client and Mrs Al-Kandari and the children."

60. Bingham LJ gave a concurring judgment in which he also referred to the solicitors stepping aside from their role as solicitor for one party, as follows (at 675H to 676D):

> "Ordinarily … in contested civil litigation a solicitor's proper concern is to do what is best for his client without regard to the interests of his opponent.

> It may nevertheless happen, even in the course of contested civil litigation, that a solicitor for a limited purpose steps aside from his role as solicitor and agent of one party and assumes a different role, either independent of both parties or as agent of both. The most common example is where he is deputed to hold a fund pending a decision on its ownership or application. The solicitor is selected for such a role, not because he is one party's solicitor, but despite that fact; he is selected because the parties know they can rely on him as a solicitor to act with probity and in accordance with the terms of the trust he has undertaken.
>
> … It was not necessary for the plaintiff's protection that it should have been the defendants who held the passport. The court or a bank or an entirely independent firm of solicitors could have done it. But the plaintiff and her advisers were content that the defendants should hold the passport because they were confident that the passport would be as safe with them as in any other independent hands.
>
> In so holding the passport the defendants were not acting as solicitors and agents of Mr Al-Kandari, their client, but as independent custodians subject to the directions of the court and the joint directions of the parties. I have no doubt that in this situation the defendants owed the plaintiff a duty of care, since the purpose of holding the passport at all was to protect her lawful rights."

61. The principle that solicitors can owe a duty of care when they have stepped outside their normal role (which I will call the *Al-Kandari* principle) was accepted by Lord Wilson in *NRAM* at [32]. There is a question in the present case whether it applies to the filling in and lodging of the AP1 form by Mr Kilvert on 21 June 2011. That is a point I will come back to below. But up until that date I do not see that the *Al-Kandari* principle has any arguable application to the present case. Mr Kilvert did nothing between being first instructed and 21 June 2011 which could arguably be regarded as stepping outside his role as solicitor for the Bank, and taking on a role as acting for all parties or as acting also for Mr Ul Haq.

62. It can be seen that the circumstances that generate the duty of care in these three types of case (instructions to solicitors by A to confer a benefit on B, representations or actions by solicitors reasonably and foreseeably relied on by other parties, and solicitors stepping outside their role) are all rather different. Beyond these three types of case there is scant authority for solicitors owing duties of care to those that are not their clients.

63. That brings me to *P&P* where appeals in two unrelated cases were heard together. In both cases solicitors had innocently acted for a fraudster who posed as the owner of a registered property and instructed the solicitors to act for him in a sale of the property to a genuine purchaser. The purchaser in each case paid the purchase money on completion, but the fraud was discovered before registration of title and they acquired no interest in the property. In each case the defrauded purchaser sought to make the solicitors liable for, among other things, breach of a duty of care owed to them. The suggested duty was a duty to take reasonable care to carry out anti-money laundering (AML) checks to verify their client's identity. Patten LJ (with whom Floyd and Gloster LJJ agreed) held that no such duty was owed.

64. At [72] Patten LJ pointed out that the claims in negligence were not based on misrepresentations. At [74] he said that the imposition of liability in negligence towards a third party who is not the solicitor's client clearly requires something more than it being foreseeable that loss will be caused to the third party by a lack of care in carrying out the relevant task. Nor is proximity sufficient. The incremental approach approved in *Caparo Industries plc v Dickman* [1990] 2 AC 605 required all these and any other relevant factors to be taken into account, including any relevant policy considerations. At [75] he said that the Supreme Court in *NRAM* had recently affirmed the assumption of responsibility as the foundation of liability in negligence in such cases, continuing at [76] as follows:

> "As Lord Wilson JSC explains in his judgment, the requirement that there should be an assumption of responsibility is to some extent a legal construct in the sense that in many cases the defendant solicitor or other professional will be treated as having assumed responsibility to the third party for his actions by virtue of the proximity between them and the obvious effect which any failure on his part would have on the third party. There will rarely be an actual, conscious and voluntary assumption of responsibility not least because the solicitor or other professional will have a client to whom he is contractually bound. But, on the basis that the court is deciding whether to treat the defendant as having assumed legal responsibility to the third party, non-client, for his actions, it will be necessary to balance the foreseeability that the third party will rely on the professional to perform their task in a competent manner against any other factors which would make such an imposition of liability unreasonable or unfair."

65. He then proceeded to consider the factors in the cases under appeal, namely: there was no actual assumption of responsibility [77]; the AML requirements were not imposed for the benefit of any particular class of persons, such as the purchasers, but for the benefit of society at large, the principal purpose being to deter money laundering and terrorism rather than to combat identity fraud [78]; unlike cases such as *White v Jones* and *Dean v Allin* where the instructions the solicitors received were intended to benefit both their clients and the third party, in the present cases the vendors and purchasers were very much at arm's length and the AML checks were carried out to satisfy the regulations and not as part of a transaction designed to benefit the purchasers [79]-[80]; the solicitors could have been asked for undertakings or assurances, but were not [81]; it was not objectively reasonable to assume that the AML checks would be complete and the solicitors legally accountable to the purchasers [81]; and Parliament had not intended breach of the regulations to confer a right of action on the purchasers [81]. Taking all these factors into account, it would not be fair and reasonable to treat the solicitors as having assumed responsibility to the purchasers for the adequacy of the due diligence performed in relation to their client's identity [82].

Application of the law to the present case

66. As already referred to, a particular question arises out of the completion and lodging by Mr Kilvert of the AP1 form on 21 June 2011 which I consider below. But leaving that aside for the moment, I have no doubt that the judges below were right to hold that the circumstances up to that date were not such as to impose a duty of care on Rees Page to Mr Ul Haq.

67. If one takes first the case as pleaded in the Amended Particulars of Claim (paragraph 48 above), three matters are relied on. The first is that Mr Kilvert knew or ought to known that Mr Ul Haq had an unpaid vendor's lien which would be lost by registration of the transaction. Ignoring for the moment the fact that it is currently quite unclear whether Mr Ul Haq was unpaid or had a lien at all (since this is likely to depend on whether the money was still held by FLP for the vendor or had come to be held for him at the time of the theft), and accepting that it was reasonably foreseeable that Mr Ul Haq *might* suffer loss if inadequate steps were taken to verify his identity, nevertheless neither this, nor any relationship of proximity, is enough by itself to generate a duty (*P&P* at [74]); whether a duty should be imposed depends instead on all relevant factors. I consider those below.

68. The second matter relied on is that the Bank's interest and Mr Ul Haq's interest were aligned as the Bank should have had no interest in registering a forged transaction. I agree that it was in the Bank's interest as well as Mr Ul Haq's to ensure that the replacement transfer was duly executed. But as I have already said I do not think the fact that the third party's interest and the client's interest are aligned on a particular point is enough to generate a duty of care to the third party, and overall the interests of Mr Ul Haq and the Bank were clearly divergent.

69. The third matter relied on relates to the process of registration and has no relevance to any earlier period.

70. Taking next the way in which the case is pleaded in the draft Re-amended Particulars of Claim (paragraph 50 above), this relies on the rights of the parties being complex and unclear and the consequent need for reasonable care to be taken to take account of the rights of all parties. It then asserts that as a result ("therefore") Rees Page assumed responsibility to all parties. That seems to me a simple non-sequitur. Accepting that the rights of the parties were unclear, that no doubt required Mr Kilvert to exercise skill and care in carrying out his instructions for his client the Bank. I do not see that it required him to assume any responsibility to anyone else. There is nothing to suggest that he ever agreed to act for Mr Ul Haq or to protect his interests, or gave him to believe that he was doing so, or indeed that Mr Ul Haq did believe that. The further factors relied on in the draft pleading (the vulnerability of Mr Ul Haq, the ordinary standards of commercial morality, and the importance to society of not facilitating fraudulent transactions) do not seem to me to suffice to impose a duty on Rees Page either. Mr Brown said that Mr Ul Haq was a victim of fraud and no-one was looking out for his interests. That may well be true, but that does not mean that it is fair, just or reasonable to expect Mr Kilvert to have done so.

71. It is established law that in assessing whether a duty of care is owed in tort, the Court should adopt the incremental approach: see *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 per Lord Reed JSC at [24]-[29], especially at [29] where he said that in cases where the question whether a duty of care arises has not previously been decided, the Courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions.

72. It is not suggested that there is any closer analogy to the present case than *P&P*. But if one considers the factors held to be relevant there, I agree with both judges below that the present case is even less promising for the imposition of a duty of care. Just as in

P&P, there was no express assumption of responsibility to Mr Ul Haq by Mr Kilvert – indeed according to Mr Kilvert's file note there was an express disclaimer of it. In *P&P* the solicitors were under a statutory duty to carry out AML checks but the duty was not imposed for the benefit of the purchasers; here Mr Kilvert was under no statutory obligation to verify the identity of Mr Ul Haq, but did so for the benefit of his client the Bank, not for the benefit of Mr Ul Haq. Just as in *P&P*, the instructions that Mr Kilvert received were not intended to benefit both his clients and the third party; the parties were at arm's length, and the actions Mr Kilvert took were not part of a transaction designed to benefit Mr Ul Haq. Just as in *P&P*, it was not objectively reasonable for Mr Ul Haq to assume that Mr Kilvert had done any particular checks or would be legally accountable to him, nor is it suggested that he did make any such assumption.

73. In those circumstances I would hold that the judges below were right to find that Rees Page did not owe any duty of care to Mr Ul Haq, at any rate up to the date when Mr Kilvert filled in and lodged the AP1 form.

The AP1 form

74. The remaining question is whether the position changed when Mr Kilvert filled in the AP1 form. I think that it is fair to say that this point received a focus in oral argument in this Court in a way which it had not before: certainly there is no trace of it being developed as a separate point in either of the judgments below. Mr Cousins indeed objected that it was very unfair for the point to have emerged only in the course of oral argument on a second appeal. He also objected that it was not clearly pleaded in either of the iterations of the Estate's case.

75. I will come back to these procedural objections after considering the substance of the point. With the benefit of interchanges between the Court (particularly Arnold LJ) and counsel, it emerged as follows. When Mr Kilvert filled in the form and lodged it he no doubt did so as solicitor for the Bank. But in filling in Box 13, he was giving confirmations to the Land Registry in relation not just to the Bank but to each of the other parties (Mr Ul Haq and Mr Attarian). The purpose of seeking such confirmations, as the rubric in Box 12 makes clear (paragraph 32 above), is to reduce the risks of property fraud. What Box 13 required him to do was one of three things in relation to each party involved in the transaction. The first (Box 13(1)) was to confirm that that party was represented by a conveyancer (that is, a professional). That enables the Land Registry to rely on the fact that such a conveyancer would have taken steps to verify the identity of their client. The second (Box 13(2) first bullet point) was for the conveyancer acting for the applicant himself to confirm that he was satisfied that sufficient steps had been taken to verify the identity of an unrepresented party; and the third (Box 13(2) second bullet point), if he could not give either of those confirmations, was to enclose evidence of identity. In the present case Mr Kilvert could not have completed Box 13(2) as he was neither himself satisfied that sufficient steps had been taken to verify Mr Ul Haq's identity, nor did he have evidence of his identity. That was no doubt why he completed Box 13(1) instead, but there is at the lowest a reasonable case to be made that in doing so he was confirming that FLP were acting for Mr Ul Haq at the time that he executed the transfer, which would of course have been inaccurate.

76. The argument is that in giving such confirmations the solicitor for the applicant is not acting for the applicant alone but stepping outside that role and acting for all parties such as to engage the *Al-Kandari* principle, and hence owes a duty to all such parties to

act with reasonable care in filling in the form accurately.

77. I have come to the conclusion that this is indeed arguable. It is not on all fours with *Al-Kandari* as there the third party (the wife) directly relied on the solicitors agreeing to hold the husband's passport whereas here Mr Ul Haq presumably knew nothing of the AP1 form and did not rely on Mr Kilvert at all. Mr Cousins also submitted that the purpose of the Land Registry insisting on such confirmation was for its own benefit (in that if it unwittingly processes a false instrument, it may have to pay out under its statutory indemnity), but it seems to me well arguable that it is also for the benefit of the true proprietor. The Land Registry is not a commercial business simply looking after its own interests but is a public body whose purpose is to provide a service to those who want to engage in land transactions. Identity fraud is a known problem in this area, and it is in the nature of things likely that the applicant will be acting for the transferee (or as in this case the chargee) seeking to have themselves registered, but the likely victim of any fraud will be the true registered proprietor. In those circumstances I am far from persuaded that the confirmation is only for the benefit of the Land Registry and not for the benefit of the other parties concerned.

78. Mr Cousins said that Mr Kilvert had thought that what had happened was that the contract had been completed in 2008 and that the replacement transfer was simply finalising the formalities which had not been observed. He also pointed out that when Mr Kilvert filled in Box 13(1) he indicated against the Bank's name that FLP had now been intervened on. Both these points may assist in explaining his thinking, but they seem to me to go more to the question of possible breach than the prior question whether filling in the form generated a duty of care at all.

79. Mr Cousins also submitted that filling in the AP1 form was analogous to the AML checks in *P&P*. But as pointed out by Arnold LJ in argument, there is a potentially significant difference. In *P&P* Patten LJ held that the statutory duty to carry out AML checks was imposed for the benefit of society at large and not for the benefit of any particular class of persons such as the purchasers in those cases, the principal purpose of the regulations being to deter money laundering and terrorism rather than to combat identity fraud (at [78]). By contrast the confirmations required by the AP1 form are expressly intended to reduce the risks of property fraud (see Box 12).

80. I have said that I consider this case arguable. Mr Brown did not invite us to conclude that such a duty *was* owed, only that the matter should be allowed to go to trial for the full facts to be found. I have nevertheless considered whether it would be better to reach a definite conclusion one way or the other. But I think it is preferable not to. This is not only because this is all that Mr Brown sought, but also because I am conscious of the point made by Mr Cousins that this argument was not clearly taken as a separate point in the Estate's pleadings and hence was not specifically addressed by Mr Kilvert in his evidence. Mr Brown protested that the point was not a new one and that it had been pleaded in the draft Re-amended Particulars of Claim. But I do not think that the argument that by filling in the AP1 form Mr Kilvert was giving confirmations for the benefit of all parties and thereby came under a duty of care to them to fill in the form accurately is to be found in the pleading, or was ever clearly articulated on behalf of the Estate until it emerged in the course of oral argument in this Court. There is a suggestion of such an argument in the third matter pleaded in the Amended Particulars of Claim (see paragraph 48(3) above), but in fact this is not followed up in the pleading. And even this disappears in the draft Re-amended Particulars of Claim.

81. I would not however accept Mr Cousins' submission that this makes it unfair for the point to be raised at all: it is a point of law that emerges from the facts and once identified seems to me one that it would be wrong to refuse to allow the Estate to rely on. Although, as Mr Cousins said, the proceedings have been running for many years, procedurally they are still at an early stage.

82. If my Lords agree I would therefore allow the appeal to the extent of setting aside the summary judgment and permitting the Estate's claim to go forward to trial on the limited basis that I have indicated. This will no doubt require an amendment to the Estate's pleaded case; I should make it clear that we have heard no argument, and I express no views, on whether such an amendment should be permitted, which will be a matter for whoever hears any application to amend. I only wish to add that it is no criticism of either of the judges below that they reached a different conclusion to that I have reached given that the focus of the argument appears to have been rather different in this Court.

Postscript

83. We circulated our draft judgments in the above form in the usual way. We received a note from Mr Brown to the effect that we had wrongly assumed that the AP1 point was not argued below, and enclosing extracts from the transcript of the hearing before Edwin Johnson J. It is clear from those transcripts that Mr Brown did make the point that on his case Mr Kilvert had filled in the AP1 form incorrectly, and that this was "a rather significant part of my criticism and complaint". Moreover the question was not specifically addressed in Mr Kilvert's evidence and Mr Brown submitted that this was one of the reasons why the Court should be hesitant about concluding that there was a sufficient evidential basis for granting the application for summary judgment in a complex case; and that it also went to the credibility of Mr Kilvert as a witness which was relevant to the factual disputes. He also submitted that this alone would be sufficient by itself to found a claim against Rees Page because Mr Kilvert had by filling in the form as he did removed a means of the fraud being discovered.

84. I accept that all this is shown on the transcript. But I do not think this means that it was wrong to say that the focus of the oral argument in this Court was rather different. Mr Brown's argument below was that the relevant law was found in *P&P* and that whether Rees Page should be treated as having assumed responsibility to Mr Ul Haq depended on all the relevant factors, of which the AP1 point was one. The argument which I have accepted however is that in filling in the AP1 form Mr Kilvert was arguably not acting just for the benefit of the Bank but for the benefit of all parties, and thereby stepping outside his role as solicitor for his client so as to engage what I have termed the *Al-Kandari* principle. I remain of the view that this is a rather different legal analysis which was neither pleaded in terms nor clearly advanced in this way below. Furthermore, as I have explained, it potentially leads to the duty of care arising at a different point in time.

Sir Christopher Floyd:

85. I agree.

Lord Justice Arnold:

86. I also agree.