

RELIEVING THE TRUSTEE-SOLICITOR: A MODERN PERSPECTIVE ON
SECTION 61 of the Trustee Act 1925?

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INTRODUCTION

In recent times the availability of relief for a trustee's personal liability for breach of trust has come to the fore in a spate of cases, which may be loosely termed "mortgage fraud" cases. We do not use this expression as a term of art. Broadly speaking mortgage fraud can be said to occur "where individuals defraud a financial institution or private lender through the mortgage process".¹ It takes an increasingly sophisticated and wide-ranging variety of forms, both small and large scale, encompassing opportunistic activity by individuals and organised crime.² Amongst its many guises, it may involve application fraud (for example, mortgage applicants inflating their income or suppressing their credit history) and identity fraud (impersonation of home owners or vendor's solicitors). It also includes valuation and registration fraud. Quite commonly fraudulent activity may depend upon the (active or unwitting) participation of professionals such as banks, estate agents, valuers, and solicitors.³ It therefore holds

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¹ *Mortgage Fraud*, Law Society (England and Wales) Practice Note (updated 31 July 2014) at para. 2.1, available at <<http://www.lawsociety.org.uk/support-services/advice/practice-notes/mortgage-fraud/>> (accessed 14 April 2016); see also guidance addressed to banks and lenders to help them better assess and address risks of fraud in the lending process: *Mortgage Fraud Good Practice Guidance Note* (2012) BBA <<https://www.bba.org.uk/policy/financial-crime/counter-fraud/mortgage-fraud-good-practice-guidance-note/>> (accessed 14 February 2016). See also, D. Middleton and M. Levi, "Let Sleeping Lawyers Lie: Organised Crime, Lawyers and the Regulation of Legal Services" [2015] B.J.C. 647 at 652-3.

² In 2010 the National Fraud Agency reported a tentative industry estimate of the annual value of mortgage fraud as £1 billion at a time when the Council of Mortgage Lenders concerned were lending an average of £11.9 billion a month: National Fraud Agency, Working together to stop mortgage fraud (March 2010) at p 5. Two years later they maintained this estimate whilst recognising the challenges facing it and the lending community in making a calculation: National Fraud Agency, *Annual Fraud Indicator* (June 2013) at 42.

³ Case law about solicitors' potential liability to other parties in the transaction is not uncommon in the UK courts: see, for instance: *Penn v Bristol & West Building Society* [1997] 1 W.L.R. 1356; [1997] 3

the potential for the engagement of both civil and criminal liability (under the Fraud Act 2006). In this article, however, the expression “mortgage fraud” is used less strictly and relatively narrowly. It is essentially meant to be a convenient shorthand way of referring to cases in which fraudulent dealings have come to light during what ostensibly appears to be standard house purchases. Although each of the mortgage fraud cases we consider differ in detail, there are some common denominators in the factual matrix that are worth highlighting at the outset. Having instructed its solicitor, the lender advances purchase money for it to hold in its client account pending completion and subject to the lender’s instructions. Unbeknown to both lender and solicitor, the purchase is, in fact, a sham. When the solicitor releases the money expecting to obtain the lender’s security by way of a mortgage on completion, this is not forthcoming. Not only is the solicitor thereby in breach of trust,⁴ the lender’s funds have disappeared. As a result the lender looks to the “innocent” solicitor to recoup its loss, preferring breach of trust as opposed to alternative causes of action, such as, for example, breach of undertaking or a claim in negligence. One factor influencing the choice of action is the absence of the need to establish fault, a boon for a lender who may face difficulty in establishing that a solicitor is careless when there are no clear indications of the fraud. In this respect, it is also relevant that liability for breach of trust is unaffected by defences, including that of contributory negligence, thereby maximising the lender’s margins of recovery.

In these mortgage fraud cases, although the question of the solicitor’s liability

All E.R. 470; *Midland Bank v Cox McQueen* [1999] E.W.C.A. Civ. 656; [1999] Lloyd’s Rep. Bank. 78; *Excel Securities Plc v Massod* [2010] Lloyd’s Rep. P.N. 165; and the Scottish decisions in *Cheshire Mortgage Corporation Ltd v Grandison* [2012] C.S.I.H. 66; [2013] P.N.L.R. 3; and *Frank Houlgate Investment Company Ltd v Biggart Baillie LLP* [2014] C.S.I.H. 79; 2014 S.L.T. 1001. See R. Low and L. Griggs, “Identity verification in conveyancing: the failure of current legislative and regulatory measures, and recommendations for change” [2012] Conv. 363.

⁴ Lord Browne-Wilkinson of Camden gives the following fuller explanation of the position in *Target Holdings Ltd v Redferns* [1996] 1 A.C. 421 at 436; [1995] 3 W.L.R. 352 at 367: “In the case of moneys paid to a solicitor by a client as part of a conveyancing transaction, the purpose of that transaction is to achieve the commercial objective of the client, be it the acquisition of property or the lending of money on security. The depositing of money with the solicitor is but one aspect of the arrangements between the parties, such arrangements being for the most part contractual. Thus, the circumstances under which the solicitor can part with money from client account are regulated by the instructions given by the client: they are not part of the trusts on which the property is held. I do not intend to cast any doubt on the fact that moneys held by solicitors on client account are trust moneys or that the basic equitable principles apply to any breach of such trust by solicitors.”

has raised some intricate arguments,⁵ ultimately it has not proved to be the focal point for adjudication. This is because the solicitor's unauthorised payment of the money it holds on trust and the consequential failure to complete the transaction has invariably been found to be a breach of trust, liability for which is strict. Rather, the principal anxiety in the litigation, which prompts the line of enquiry pursued in this article, revolves around the key considerations that govern the operation of a court's discretion to absolve the solicitor of liability. The trust law mechanism available for this purpose is found in s. 61 of the Trustee Act 1925.⁶ Most recently, in *Santander UK Plc v RA Legal Solicitors*,⁷ Briggs L.J. subjected this statutory relieving provision to detailed analysis and confirmed a role, already canvassed in earlier mortgage fraud cases, for causation to play in its operation.⁸ He also emphasised the need to interpret the legislative terms free from the influence of the equivalent company law jurisdiction and its associated jurisprudence. Putting to one side these issues of statutory interpretation, the recent case law stands as a testament to the versatility and continuing vitality of a judicial relieving power that owes its origins to a Victorian statutory provision that conferred discretion on the court to relieve trustees from liability. At the same time these cases suggest refinements to the operative terms of the legislation. It can be maintained that mortgage fraud disputes present the courts with novel and distinctive factual and policy challenges. However, it is questionable how far introducing consideration of causation assists them in their task of interpreting the statute.

The judicial texture of trustee relief: origins and orthodoxy

The genesis of the current power to relieve trustees who are in breach of trust derives

⁵ The existence and nature of the breach (or breaches) can sometimes be contentious, turning in part on the application of the agreed terms about completion and how the trust money is to be held (which commonly depend on standard protocols such as the Council of Mortgage Lender's Handbook for Conveyancers): see, for instance, the discussion in *Santander UK Plc v RA Legal Solicitors* [2014] E.W.C.A. Civ. 183 at [10]-[19]; [2014] Lloyd's Rep. F.C. 282. See, also, J. Hall, "Breach of trust by conveyancing solicitors- the strongest of all lender claims" (2012) 26 T.L.I. 206.

⁶ See *AIB Group (UK) Plc v Mark Redler & Co* [2014] U.K.S.C. 58 at [50] and [69]; [2014] 3 W.L.R. 1367.

⁷ [2014] E.W.C.A. Civ. 183. Hereafter referred to as *Santander*.

⁸ See *Lloyd's TSB Bank Plc v Markandan & Uddin* [2012] E.W.C.A. Civ. 65; *Davisons Solicitors v Nationwide Building Society* [2012] E.W.C.A. Civ. 1626; [2013] P.N.L.R. 12; and *Ikbal v Sterling Law* [2013] E.W.H.C. 3291 (Ch); [2014] P.N.L.R. 9; and *Mortgage Express v Iqbal Hafeez Solicitors* [2011] E.W.H.C. 3037 (Ch). See Paul S. Davies, "Section 61 of the Trustee Act 1925: Deus Ex Machina?" [2015] Conv. 379.

from s. 3(1) of the Judicial Trustees Act 1896.⁹ That provision was conceived as part of the deliberations of the Select Committee on Trusts Administration,¹⁰ established in February 1895. It appears from the report of the Committee's proceedings that the momentum for alleviating trustees from the rigours of their legal duties had contemporary judicial endorsement,¹¹ and arose, in large measure, from a concern that the shortage of people ready and willing to assume the office was exacerbated by the harshness of the potential consequences that could result from a determination of liability. During the Committee's proceedings its Chairman observed:

“private trustees are exposed to a very rigorous rule of law; that is to say, things may be breaches of trust which nevertheless imply neither dishonesty, nor really unreasonable, conduct when looked at from a general point of view....”¹²

To which, Lindley L.J., in expressing his agreement added: “I think that Trustees have been very harshly dealt with by the Court of Chancery from time out of mind... .”¹³

The anxiety of the Committee, and its impetus, was largely, but not exclusively, prompted by the plight of the inexperienced lay trustee of a conventional Victorian trust - most likely a family affair - with duties of investment on behalf of beneficiaries. This is a far cry from the solicitor in the twenty first century “mortgage fraud” cases whose trusteeship is but an incident of his professional duties when acting for the purchaser or lender involved in the acquisition of real property, which is the commercial backdrop for the recent case law.

Section 61 of the Trustee Act 1925 reproduces virtually verbatim the language

⁹ Which provided: “If it appears to the court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve the trustee either wholly or partly from personal liability for the same.”

¹⁰ P.P. 1895 (248) XIII.

¹¹ P.P. 1895 (248) XIII at iv, where the Select Committee acknowledges the influence of judicial observations made by the House of Lords in *Speight v Gaunt* (1883) 9 App. Cas. 1.

¹² P.P. 1895 (248) XIII q. 596.

¹³ P.P. 1895 (248) XIII q.596.

of its 1896 predecessor.¹⁴ In essence, it invests the court with the power to exonerate a trustee from liability, either in whole or in part, provided the breach in question is both honest and reasonable and where the court believes it is fair to do so. One measure of the significance of the provision resides in the way it has proved to be an enduring template for the introduction of similarly worded legislative powers in a number of other Anglo-Commonwealth legal systems.¹⁵ A further indicator of its influence can be seen in its adoption by the comparable company law provisions applicable, amongst others, to directors.¹⁶ Theoretically, s. 61 offers rich potential as a tactical component in the defendant's armoury,¹⁷ so much so, it has come to be seen as occupying what may be termed a "belt and braces" role.¹⁸ In practice, however, it is striking how seldom the section has been subjected to close judicial scrutiny during the 120 or so years since its first enactment. The case law on the jurisdiction was most prevalent as the 19th century gave way to the 20th century. Thereafter it has been less commonly pleaded and judicially discussed, and when it has been, more often than not it has been disposed of quite swiftly and in a cursory fashion, even where the defence has proved successful.¹⁹ That said it is entirely feasible that, by its very existence in the legal landscape, s. 61 has held, and continues to hold, considerable sway in determining out-of-court settlements for breach of trust. Equally, the inclusion of exemption clauses in trust instruments may also alleviate the need for trustees to seek relief. This will be particularly pertinent for professional trustees.²⁰ Notwithstanding

¹⁴ Section 61 provides: "If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same."

¹⁵ See, for example, s. 73 Trustee Act 1956 (NZ); s. 85 Trustee Act 1925 (NSW); s. 67 Trustee Act 1958 (Vic); and s. 35 of the Ontario Trustee Act 1970. The power is also found in Scottish law, see s. 32 (1) of the Trusts (Scotland Act) 1921.

¹⁶ See the Companies Act 1907, s. 32, which was substantially reproduced in the Companies (Consolidation) Act 1908, s. 279 which extended the availability of relief to any "person occupying the position of director." The current incarnation is to be found in s. 1157 of the Companies Act 2006.

¹⁷ There is also the separate but related matter of trustee liability insurance: see, R. Ham "Trustees' Liability" (1995) 9 T.L.I. 21.

¹⁸ *Joint Receivers and Managers of Niltan Carson Ltd v Hawthorne* (1987) 3 B.C.C. 454 at 477; [1988] B.C.L.C. 298 at 328, per Hodgson J., describing its company law counterpart, then s. 727 of the Companies Act 1985.

¹⁹ For two modern examples, see: *Iles v Iles* [2012] E.W.H.C. 919 at [46]-[48]; [2013] W.T.L.R. 493; and *Re ST Andrew's (Cheam) Lawn Tennis Club Trust* [2012] E.W.H.C. 1040 at [66]-[67]; [2012] All ER (D) 223 (May).

²⁰ See J.E. Penner, "Exemptions" in P. Birks and A. Pretto (eds.) *Breach of Trust* (Oxford, Hart Publishing, 2002). An appropriately drafted exemption clause may allow a grossly negligent lay trustee

these factors, the provision nevertheless continues to represent what is regarded as a longstop defence for the errant trustee.

Since its inception, whenever the courts have engaged in considering the application of the legislative language there has been a judicial reticence to set precise guidelines for the exercise of the discretion. This was recognised early on in the lifetime of the provision's predecessor. As Byrne J. observed in *Re Turner*:²¹

“It would be impossible to lay down any general rules or principles to be acted on in carrying out the provisions of the section, and I think that each case must depend upon its own circumstances.”²²

This preference for keeping the availability of relief as fluid as possible, one that envisages it to be a broadly based power of exoneration,²³ is not without merit. Over the years fluidity has been recognised as a hallmark of the enduring resilience and vitality of the power. This has enabled it to adapt to the context of the application and the changing context in which trusteeship operates. Admittedly this feature does, however, bring in its train a measure of unpredictability. While perhaps this is inevitable, it is nonetheless challenging, both in terms of applying the provision and in grasping its true rationale and proper function. From the outset, commentators on s. 61's predecessor appreciated that the elliptical draftsmanship produced an uncertain solution to the problem that its architects sought to address. For instance, one leading lawyer, F. H. Maugham, writing about s. 3(1) of the Judicial Trustees Act 1896 in the *Law Quarterly Review* in 1898, observed:

to escape liability even where relief under s. 61 would not have been granted because the trustee's behaviour would not have satisfied the requirement of reasonableness: *Re Leonard Clapham's Estate* [2005] E.W.H.C. 3387 at [98]; [2006] W.T.L.R. 203.

²¹ [1897] 1 Ch. 536.

²² [1897] 1 Ch. 536 at 542. For similar sentiments, see also, the remarks of Romer J. in *Re Kay* [1897] 2 Ch. 518, at 524. In *Re Pauling's Settlement Trusts* [1964] Ch. 303 at 359; [1963] 3 All E.R. 1 at 55, Upjohn L.J. observed: “Section 61 is purely discretionary, and its application necessarily depends on the particular facts of the case.”

²³ *In Re Allsop* [1914] 1 Ch. 1 at 11, Lord Cozens-Hardy M.R. preferred a broad approach to the jurisdiction conferred by s. 3 of the 1896 Act: “Approaching the matter apart from authority I can see no ground for narrowing or limiting the application of wide words of the section. ‘Any breach of trust’ are emphatic words. The statute was obviously designed to protect honest trustees, and it ought not to be construed in a narrow sense.” In his judgment in the same case, Hamilton L.J. noted, at 14, “the section is expressed in terms which are comprehensive and unrestricted.”

Only the peremptory plea of necessity could be held to excuse such a curious mode of legislation. If a law is repugnant to the public conscience, it should be altered in a definite manner: the method adopted by this s. is likely to lead, not only to doubt as to its scope, but also to different practical applications of it in different courts... .²⁴

At first sight the criticism seems to be compelling. True the provision confers a very broadly drafted discretion to excuse trustees, not least in its central requirement of fairness. Yet, Parliament can be said to have acted deliberately in eschewing a more “definite manner”, opting instead for its chosen method of instituting an open-textured discretionary power to exonerate. Besides, Maugham’s assessment has proved far from prescient in the way in which the judicial discretion has operated throughout its lifetime. The courts do not seem to have encountered any great difficulty in applying the legislative language, and it continues to be routinely pleaded.

The judicial texture of trustee relief: causation - a modern heresy?

Against this backdrop, the recent line of mortgage fraud cases with which this article is concerned seeks to inject a veneer of certainty surrounding the judicial relieving power, now to be found in s. 61. The desirability of this development serves to raise more questions than it solves. This trend finds its most recent and most pronounced expression in Briggs L.J.’s reasoning in the *Santander* decision. Drawing upon earlier judicial discussion, he confirmed causation as part and parcel of the court’s determination of whether or not the statutory discretion should be exercised. This is strikingly novel shift in direction. We argue that its desirability is problematic for a number of reasons. First, it is far from easy to see how it is justifiable in terms of either the legislative language or its accumulated case law. Second, it is not clear what value causation brings to the process of exoneration and, in any case, there is an inherent ambiguity in its proposed formulation. Third, one effect of examining issues of causation is to place an undue accent on the unreasonableness of the conduct in question. In our view, this turns the pre-condition for the exercise of discretion on its head. The court should be evaluating whether or not the conduct of the trustee is

reasonable before it goes on to consider whether in the circumstances it is fair to exercise its discretion and excuse the breach. It is hard to see how matters of causation help in pinpointing if the trustee has or has not behaved reasonably. However, this is not to deny the place causation may conceivably hold in the judicial evaluation of whether or not it is fair to relieve the trustee from liability. In this sense there is a real danger that the courts are perpetrating what may be termed a “category error” in relation to the construction of the statutory language. It is our contention that if causation has any place in the application of s. 61 it should be confined to the determination of fairness rather than form part of the prior investigation of the reasonableness of the trustee’s conduct. Finally, there is one further dimension of Briggs L.J.’s approach that merits exploration. His preference is for a firm demarcation between the almost identical wording of the statutory power to excuse trustees, on the one hand, and company directors, on the other. A persistent drafting challenge that s. 61, but more particularly its company law equivalent in the form of s. 1157 of the Companies Act 2006, has presented to the courts is the apparent illogicality that negligent behaviour on the part of the trustee or director can ever be regarded as reasonable. Although in respect of the company law relieving jurisdiction the courts have managed to square this circle,²⁵ the recent mortgage fraud cases such as *Santander* have found it less easy to follow suit. To this end, Briggs L.J. thought it wrong to interpret s. 61 by reference to decisions on its company law counterpart. We explore the wisdom of this line of thinking further, below.

THE ANATOMY OF RELIEF

Before turning to these specific concerns, and to set these modern judicial developments in context, it is valuable to begin by briefly dissecting the detailed terms of s. 61.²⁶ At the outset what must be appreciated is that the granting of relief involves two distinct stages which serve as a sensible and worthwhile sequential way to

²⁴ F. H. Maughan, “Excusable Breaches of Trust” (1898) 14 L.Q.R. 159.

²⁵ See, for example, *Barings Plc v Cooper & Lybrand* [2003] E.W.H.C. 1319 (Ch.); [2003] Lloyd’s Rep. I.R. 566; *Re D’Jan of London Ltd* [1993] B.C.C. 646; [1994] 1 B.C.L.C. 561; and *Maelor-Jones v Heywood-Smith* (1989) 54 S.A.S.R. 285. We return to the issue below.

²⁶ See, generally, J. Lowry and R. Edmunds, “Excuses” in P. Birks and A. Pretto (eds.) in P. Birks and A. Pretto (eds) *Breach of Trust* (Oxford, Hart Publishing, 2002); and L.A. Sheridan, “Excusable Breaches of Trust” [1955] Conv. 420.

approach the application of the statutory power of relief.²⁷ The first stage depends upon the trustee having acted both “honestly and reasonably” - the burden of proof in establishing each lying with the trustee.²⁸ Cumulatively, these two considerations represent a gateway through which the trustee must pass before the court can begin to contemplate whether or not to exercise the discretion to grant total or partial relief – which is the second stage contemplated by the provision. This discretionary stage depends upon the judge finding that it is fair to excuse the breach.²⁹ Yet, even if the court concludes that fairness points in favour of the trustee in this respect, the inclusion of the word “may” in the drafting of s. 61 suggests that relief need not necessarily follow automatically.

Since the creation of the statutory discretion to grant relief the determination of honesty has seldom presented difficulty or received extensive judicial attention.³⁰ At its root it is more a matter of showing that the trustee has acted with the interests of

²⁷ Which is not to say courts always neatly observe a sharp demarcation between its discussion of the two stages. Moreover the interplay in the judicial handling of the same requirements contained in s 727 of the Companies Act 1985 (now s. 1157 of the 2006 Act) is complex and subtle: see R. Edmunds and J. Lowry, “The Continuing Value of Relief for Directors’ Breach of Duty” (2003) 66 M.L.R. 195, at 201-203.

²⁸ See, for example, *Santander UK Plc v RA Legal Solicitors* [2014] E.W.C.A. Civ. 183 at [20] (Briggs L.J.) and [111] (Sir Terence Etherton C.). In this regard, it is noteworthy that Briggs L.J. observed, at [56], that: “in order to discharge the burden of proving that he acted reasonably under s. 61, the solicitor will need to be able to provide a paper-trail demonstrating that the whole of his or his firm’s conduct sufficiently connected with the loss satisfied the reasonableness test.” For a mortgage fraud case where the judge found that s. 61 was “quite properly” claimed but the trustee-solicitor could not discharge the burden of establishing “all the requisite elements of the statutory defence”: see *LSC Finance Ltd v Abensons Law Ltd* [2015] E.W.H.C. 1163 (Ch.), at [105].

²⁹ Section 61 further provides that it must also be fair to excuse a trustee’s failure from “omitting to obtain the directions of the court in the matter in which he committed such breach.” This recognises that costs may sometimes justifiably mean that an application for directions of the court has not been made, where, for instance, “the fear of expense is apt to deter conscientious trustees from taking this course in a small estate”: see the Report of the Select Committee on Trusts Administration, P.P. 1895 (248) XIII at iv. For an example of the court finding that the relative costs of the failure to seek advance directions to be fair, see *Re Grindley* [1898] 2 Ch. 593 (C.A.).

³⁰ For a discussion of the dearth of judicial discussion on the requirement of “honesty” for the purposes of the equivalent company law statutory power to relieve, and the question of how far honesty is (and ought) to be assessed subjectively or objectively; see R. Edmunds and J. Lowry, “The Continuing Value of Relief for Directors’ Breach of Duty” (2003) 66 M.L.R. 195 at 203-207. The meaning of dishonesty, and whether it should be objectively or subjectively assessed, has, however, attracted intense judicial debate in the context of accessory liability. See such cases as *Royal Brunei Airlines v Tan* [1995] 2 A.C. 378; [1995] 3 All E.R. 97; *Twinsectra v Yardley* [2002] UKHL 12; [2002] A.C. 164; *Barlow Clowes v Eurotrust International* [2005] U.K.P.C. 37; [2006] 1 All E.R. 333; and *Abu-Rahmah v Abacha* [2006] E.W.C.A. Civ 149; [2007] 1 Lloyd’s Rep. 115. See further, J.E. Penner, *Law of Trusts* (Oxford, Oxford University Press, 2016), chapter 11.

the trust in mind rather than being concerned with a determination of his rectitude.³¹ As might be expected, the discretion will manifestly not be available in the face of a trustee's dishonesty. It is notable that the lenders in the mortgage cases have not sought to impugn the honesty of the defendant solicitors who from the facts presented to the court appear to be unwitting participants in the fraudulent schemes.³² Naturally had they in some way been implicated in the sham transaction then it seems impossible for them to claim that their liability should be relieved.

Arguably, the most formidable obstacle presented by s. 61 is the other gateway requirement that the defendant has acted reasonably.³³ This element has generated argument. One perennial anxiety about the interpretation of reasonableness that has surfaced in the case law can be expressed in the following paradox: if the trustee has acted negligently in committing the breach of duty in question, how can he be said to have acted reasonably so as to be eligible for relief? It appears that the architects of the forerunner to s. 61 were mindful of this apparent incongruity,³⁴ as were the judges who were first seized with its application in circumstances where the trustee's actions smacked of carelessness. The point emerges clearly in Kekewich J.'s approach in *Re Smith*,³⁵ a case decided within the first decade after the creation of the statutory relieving provision. There the judge considered whether a widow trustee, Mrs Thompson, had been reasonable in signing and completing cheques and returning them to her solicitor in circumstances where a solicitor's clerk was able to encash them before disappearing with the proceeds. As the learned judge noted, this left the beneficiaries to seek recourse against innocent parties, including the trustee, Mrs Thompson: a feature that, as we shall see, is also prominent albeit in the markedly

³¹ See L.A. Sheridan, "Excusable Breaches of Trust" [1955] Conv. 420 at 423; and also, the observations (*obiter*) of Thomas J. in *Jones v AMP Perpetual Trustee Company NZ Ltd* [1994] 1 N.Z.L.R. 690 at 712.

³² *Santander*, [2014] E.W.C.A. Civ. 183 at [20]. *Mortgage Express v Iqbal Hafeez Solicitors* [2011] E.W.H.C. 3037 (Ch.) at [51]; *Lloyd's TSB Bank Plc v Markandan & Uddin* [2012] E.W.C.A. Civ. 65 at [36]; and *Davisons Solicitors v Nationwide Building Society* [2012] E.W.C.A. Civ. 1626 at [41].

³³ In a oft-cited *dictum* Kekewich J. refers to the "grit" of the section as "reasonably and ought fairly to be excused" rather than the "absence of all dishonesty": *Perrins v Bellamy* [1898] 2 Ch. 521 (Ch.) at 527-528.

³⁴ A prime example can be found in Lord Herschell's evidence to the Select Committee on Trusts Administration, P.P. 1895 (248) XIII q. 161-163, to the effect that the default of the archetypal "lay" or voluntary trustee "may be said to be, in many cases, by reason of their neglect; and yet there is no doubt in my mind that there are many instances in which any reasonable prudent man might and would have acted as they did."

differing circumstances prevailing in the recent case law arising from mortgage fraud. Having acknowledged that Mrs Thompson “did not take all the precautions which a very careful or a very astute person might have taken”, Kekewich J. determined that for the purposes of the availability of relief she “cannot be said to have acted otherwise than reasonably, and there is therefore no reason why she should suffer.”³⁶ Such a generous approach can be seen in the interpretation of reasonableness in other cases of the same vintage, where it seems evident that the judges erred towards a lenient understanding of the notion because the breach of trust was in their assessment: “judicious”³⁷ or it was one that was “inadvertent ... involving no moral blame”.³⁸ Admittedly, the sentiment here appears to regard technical breaches of trust amounting to an administrative error as being forgivable even though they were careless. On this thinking they can and should be distinguished from instances of more blatant carelessness on the part of the trustee which clearly would and should not be considered reasonable enough to attract relief. Indeed, it is hard to contemplate how a trustee, whether lay or professional, who fails to discharge the requisite degree of care in the conduct of the trust will normally be successful in demonstrating reasonableness for the purposes of claiming relief from liability. This much is fairly evident in the English case law. A similar attitude is discernible in the interpretation of the New Zealand legislative counterpart, s. 73 of the Trustee Act 1973. In *Re Mulligan*,³⁹ the court denied relief to an aged trustee whose intransigence and antagonism prevented the diversification in trust investments recommended by her co-trustee, a trust company. Panckhurst J. concluded “[e]ven making allowance for her age and lack of trust experience, I am quite unable to find that she acted reasonably in her capacity as a trustee.”⁴⁰ It may be worth pausing to reflect upon the lessons to be drawn from this accumulated Anglo-Commonwealth case law, lessons which represent operational features of statutory power to relieve. First, the accent is on determining whether the trustee’s conduct can be viewed as reasonable. It is not pre-occupied with finding ways in which the trustee has acted unreasonably. Second, the judges have not

³⁵ (1902) 86 L.T. 401.

³⁶ (1902) 86 L.T. 401 at 402-403. For echoes of a similar judicial mind-set, see the decision Supreme Court of Canada in *Fales Wohlleben v Canada Permanent Trust Co* (1976) 70 D.L.R. (3d) 257.

³⁷ *Per* Lindley L.J. in *Perrins v Bellamy* [1899] 1 Ch. 797 (C.A.).

³⁸ *Perrins v Bellamy* [1899] 1 Ch. 797 (C.A.), Rigby L.J. at 801.

³⁹ [1998] 1 N.Z.L.R. 481.

⁴⁰ *Re Mulligan* [1998] 1 N.Z.L.R. 481 at 507.

balked at the prospect that a negligent trustee might sometimes, albeit exceptionally, be found to have acted reasonably. In effect, minor transgressions falling short of gross negligence might not operate to bar the trustee from satisfying the reasonableness component of the gateway stage of relief. In these decisions the courts do not dwell on what distinguishes negligence from gross negligence in this context; nor do they offer any guidance on how the distinction is to be drawn. This is very much in line with the way s. 61 has been traditionally viewed as facilitating an open-ended determination of each element of the legislation. These are, then, matters that are left for each judge to consider on a case by case basis. As we shall see, the approach to s. 61 that emerges from the mortgage fraud cases challenges these two archetypical features that emerge from the prevailing judicial attitude to reasonableness.

These judicial explorations of the apparent paradox – of finding negligent behaviour reasonable – have generally involved what might be loosely termed “traditional trusts”, ones that “will typically govern the ownership-management of property for a group of potential beneficiaries over a lengthy number of years”,⁴¹ and circumstances where trustee decision-making is dependent upon exercising prudence. Here, liability is fault-based. This judicial mind-set acknowledges that liability that flows from the trustee having acted with gross negligence is outwith s. 61’s conception of reasonableness. By contrast, the nature of the solicitor-trustee’s breach in the recent case law on mortgage fraud is different in a number of key respects. It occurs in that species of bare trust (dubbed by some judges a “commercial trust”) arising from the parties contractual arrangement which in the mortgage fraud cases is entered into by the lender and its solicitor.⁴² Typically, the bare trust continues until completion of the conveyance or, if completion does not occur, until the mortgage monies are returned to the lender.⁴³ Where this does not happen, so that there is a breach of trust, the solicitor-trustee’s liability is strict. It is precisely in such cases involving breach for which liability is strict that s. 61 fulfils the greatest need. This is

⁴¹ *AIB Group (UK) Plc v Mark Redler & Co* [2014] U.K.S.C. 58 at [67]; [2015] A.C. 1503 upholding Lord Browne-Wilkinson’s approach in *Target Holdings Ltd v Redferns* [1996] 1 A.C. 421. The outcome in *Target Holdings* has stimulated intense academic debate: see Lord Toulson’s references in *AIB* at [47].

⁴² *AIB Group (UK) Plc v Mark Redler & Co* [2014] U.K.S.C. 58 at [70].

because the trustee who is liable irrespective of fault may still benefit from the relieving provision if he or she has acted reasonably and the court determines that it is fair for liability to be excused in part or in full. The potential to grant relief in such circumstances serves to alleviate the harshness of strict liability. As such, this holds the potential for the court to contain the extent of the equitable compensation that would otherwise be recoverable.⁴⁴ By the same token, adopting causation as a means of containing the measure of liability may render consideration of s. 61 otiose.⁴⁵

SECTION 61: THE ASCENDANCY OF CAUSATION

Although the earlier mortgage fraud cases had explored a role for causation in understanding the gateway requirement of reasonableness, it took the Court of Appeal in *Santander* to promote reliance upon it to new heights. As a consequence, the place of causation in the operation of s. 61 seems to have become unassailable, leaving the main area of dispute to be the nature of the causative element. In *Santander*, the claimant lender (successors to the Abbey National Building Society), advanced £150,000 to Mr Vadika to purchase a property in London. He contributed £50,000 of his own money. The solicitor defendants, R. A. Legal (RAL), acted for both the purchaser and the mortgagee. Another solicitors' firm, Sovereign Chambers LLP (Sovereign), advised RAL that it had been instructed on behalf of the vendor. Whilst Sovereign was a legitimate firm in good standing with the Law Society, it was acting dishonestly. In fact, the registered owner, Ms Slater, had neither instructed the firm nor had she agreed to sell the property in the first place to Mr Vadika, although it was on the market. In anticipation of exchange and completion on 17 July 2009 Santander transferred the £150,000 to RAL two days earlier. RAL failed to inform Santander that completion had not occurred and also failed to return the funds to them. On 28 July RAL arranged an inter-bank transfer of £200,000 into Sovereign's client account. The following afternoon RAL believed they had effected a simultaneous exchange of contracts and completion. In fact, Sovereign never transferred any of the monies to the

⁴³ *AIB Group (UK) Plc v Mark Redler & Co* [2014] U.K.S.C. 58 at [70].

⁴⁴ Lord Toulson, citing Professor Charles Mitchell's lecture on "Stewardship of Property and Liability to Account" delivered to the Chancery Bar Association on 17 January 2014, acknowledges as much: see *AIB Group (UK) Plc v Mark Redler & Co* [2014] U.K.S.C. 58 at [50] and [69].

⁴⁵ Of course, as the law currently stands, *AIB* puts beyond doubt that causation principles do apply to claims for equitable compensation even for breaches where liability is strict: *AIB Group (UK) Plc v Mark Redler & Co* [2014] U.K.S.C. 58 at [70].

vendor nor did it discharge the mortgage registered against the property. This left Santander without any security for the money it had lent to the purchaser. It therefore initiated these proceedings against RAL for breach of trust in order to recoup its funds.⁴⁶

At first instance, Andrew Smith J. found that RAL acted in breach of trust by releasing Santander's monies on 29 July without obtaining a legal charge. He decided, however, that RAL should be wholly relieved from liability under s. 61. It was accepted that they had acted honestly.⁴⁷ Moreover, the solicitor-trustee had behaved reasonably. Responding to the claimant's barrage of criticism about RAL's negligent handling of the conveyance, the judge found that none of the alleged deficiencies on RAL's part were "connected" with Santander's loss, nor did they amount to such a degree of fault that was sufficiently serious so as to deny them access to the court's discretion to relieve them of liability.⁴⁸ On appeal, RAL were denied relief. Integral to the Court of Appeal's reasoning is an acceptance that causation has a role in determining reasonableness for s. 61 purposes. It is our contention that this raises three inter-related lines of enquiry. First, is recourse to causation in establishing the pre-condition of reasonableness for the purposes of accessing relief justified by precedent? Second, what exactly does causation mean in this context? Finally, what are the justifications for imbuing the statutory language with causation?

Precedent

It will be recalled that s. 61 makes no mention of causation. For a trustee who is in breach, access to discretionary relief is predicated on establishing no more than that he or she has "acted honestly and reasonably... ." Moreover, there is no discernible trace of "causation" in the mainstream jurisprudence surrounding the provision, for instance, the case law involving unauthorised investments by trustees.⁴⁹ Yet the preponderance of the mortgage fraud cases decided before *Santander* introduced such

⁴⁶ Mr Vadika, who ostensibly was not implicated in the fraud, was out of pocket himself and remained liable to repay Santander the loan plus interest.

⁴⁷ *Santander UK Plc v RA Legal Solicitors* [2013] E.W.H.C. 1380 (Q.B.) at [66].

⁴⁸ *Santander UK Plc v RA Legal Solicitors* [2013] E.W.H.C. 1380 (Q.B.) at [70]. The judge concluded, at [71]-[72], that it was fair to excuse RAL's breach of trust on the basis that they should not be held responsible for the fraud of others.

⁴⁹ See *Re Turner* [1897] 1 Ch. 536.

a requirement into the equation, albeit with varying degrees of emphasis. For example, in *Davisons Solicitors v Nationwide Building Society*,⁵⁰ reversing the finding of the trial judge, the Court of Appeal granted relief under s. 61. Nationwide offered to lend in excess of £185,000 for the purchase of a West Midlands property that was subject to an existing charge in favour of GEMHL Ltd. In reality the owner was not selling, but a fraudster, who had set up a fake branch of a genuine solicitor's firm, and impersonated a solicitor from that firm, and claimed to be acting for him. Mr Wilkes, Davisons' solicitor acting for Nationwide, checked the existence of the branch office and the named solicitor both by an online search and with the Law Society and the SRA. When they released the mortgage money to fund completion the purchaser was registered at the Land Registry. However, Nationwide's charge could not be registered because the imposter had absconded, leaving GEMHL's pre-existing charge undischarged. Liability for breach of trust was clear-cut. Even though completion had not taken place, Mr Wilkes was found to have been honest in releasing the funds. On the key question of reasonableness for the purposes of the relieving provision, the issue centred on whether Mr Wilkes had properly obtained confirmation that the GEMHL charge would be redeemed. Nationwide contended that the defendant had been unreasonable in failing to use the requisite TA13 form as provided by the Council of Mortgage Lenders Handbook for this purpose. The Court found that Mr Wilkes had not acted unreasonably because the answers he had obtained in the OYEZ form he had used instead of TA13 contained an implicit undertaking to discharge pre-existing charges. Delivering the only reasoned judgment, Sir Andrew Morritt C. observed that:

“The section only requires Mr Wilkes to have acted reasonably. That does not, in my view, predicate that he has necessarily complied with best practice in all respects. The relevant action must at least *be connected with the loss* for which relief is sought and the requisite standard is that of reasonableness not of perfection. . . . In my view, Mr Wilkes did, in all the circumstances, act reasonably.”⁵¹

⁵⁰ [2012] E.W.C.A. Civ. 1626.

⁵¹ *Davisons Solicitors v Nationwide Building Society* [2012] E.W.C.A. Civ. 1626 at [48]. Emphasis supplied.

The judge continued:

“Little argument was directed to the exercise of the discretion if we found that Davisons had acted honestly and reasonably. This is not surprising. The loss sustained by Nationwide was caused by the fraud of an unconnected third party. Even if Davisons had insisted on answers to requisitions on form TA13 and on separate written undertakings it is probable that the impostor would have complied, the matter would have proceeded to apparent completion by post and the impostor would have disappeared with the balance of the purchase money. The lapse from best practice, if any, did not cause the loss to Nationwide. Given that Mr Wilkes acted both honestly and reasonably I can see no ground on which Davisons should be denied relief from all liability. I would so order.”⁵²

It is striking that when the Chancellor is determining whether Mr Wilkes acted reasonably his reference to causation is couched relatively obliquely in the term “connected”. Nonetheless, this lays the foundation for the more extensive and explicit development of the role afforded to causation in subsequent cases dealing with relief. It is also worthwhile reflecting on why the judges feel the need to refer to causation. Typically this arises by way of response to the contention that the mortgagee’s loss would have occurred in any event irrespective of the solicitor’s conduct, given that, among other things, the loss is attributable to the independent activities of the fraudster. So in *Davisons* it was contended that had Mr Wilkes fully complied with his instructions the loss to the claimants would have occurred anyway. It therefore appears that it is this understandable nod to the innocence of the solicitor that is leading the courts to overlay their assessment of reasonableness with a consideration of which of the solicitor’s actions are connected to the loss. Arguments about causation are, however, not confined to discussion of s. 61’s gateway requirement of reasonableness. It is also a factor being judicially considered in those mortgage fraud cases where the court goes on to make its assessment of whether it is fair to grant the solicitor-trustee relief. As we will later go on to argue, if causation has any place in

the operation of the relieving provision it should be within this discretionary element (fairness) as opposed to the pre-condition (reasonableness).

The tendency, nascent in *Davisons*, to read causation into s. 61's notion of reasonableness gained heightened momentum in *Ikbal v Sterling Law*.⁵³ Here the singular factual difference in the litigation is that the transaction did not, strictly speaking, depend upon a mortgage fraud because the house purchaser, Ikbal, raised the necessary funds from family members rather than an institutional lender. Nonetheless, his solicitors, Sterling Law, committed a breach of trust in making an unauthorised disbursement of the purchase money to Fernando & Co, the solicitors acting for a fraudulent vendor who was impersonating the deceased registered proprietor.⁵⁴ It appears that the fraudulent party was employed by Fernando & Co, although this was not known by Sterling at the time of its breach of trust. Mr Nicholas Davidson QC, sitting as a Deputy Judge of the Chancery Division, identified a range of failings on the solicitor's part, some before and some after the apparent completion date. These were, respectively, assessed as being either "unreasonable" or "very unreasonable indeed".⁵⁵ However, this was not enough to complete the determination of s. 61's requirement of reasonableness. In the judge's view it was not simply a matter of determining Sterling's requisite duty of care because the question to be considered is different under the statute.⁵⁶ Taking his lead from the approach taken in *Davisons*, he concluded that it was imperative to go further by enquiring whether any of the unreasonable conduct, of either degree of culpability, was "connected" with the claimant's loss.⁵⁷ Indeed, had it been enough to show negligence, it seems clear that Sterling would have been held to be ineligible for relief.⁵⁸ Absent some causative connection, the shortcomings, however grossly negligent, were therefore not inimical to a consideration of the discretionary element of s. 61. Thus, the judge found:

⁵² *Davisons Solicitors v Nationwide Building Society* [2012] E.W.C.A. Civ. 1626 at [50].

⁵³ [2013] E.W.H.C. 3291 (Ch.).

⁵⁴ No steps had been taken to alter the Land Register to reflect the change of ownership.

⁵⁵ *Ikbal v Sterling Law* [2013] E.W.H.C. 3291 (Ch.) at [232]-[233].

⁵⁶ *Ikbal v Sterling Law* [2013] E.W.H.C. 3291 (Ch.) at [229].

⁵⁷ *Ikbal v Sterling Law* [2013] E.W.H.C. 3291 (Ch.) at [234]-[236].

⁵⁸ The judge stated emphatically, "Were it not for the causation point, I would refuse relief.": *Ikbal v Sterling Law* [2013] E.W.H.C. 3291 (Ch.) at [243].

“It follows that, for the purposes of section 61, the defendant has proved that he acted reasonably. This is, *and is only*, because of the lack of causal connection between the defendant's behaviour and the loss.”⁵⁹

A notable feature of this approach is the determinative emphasis attributed to causation when assessing reasonableness. It is important to remember the context for this assessment. The judge's focus is on differentiating between the various tasks carried out by the solicitors as part of the conveyancing process, some being seen as relevant to the weighing up of whether they have acted reasonably, and others as being irrelevant, even where there was clear evidence that such tasks were handled incompetently. Further, the later analysis in the judgment does not confine causation to the gateway component of reasonableness. The judge returned to make considerable play of causation when evaluating whether or not, for the purposes of the third element of the provision, it was fair to grant relief. Such a construction of reasonableness proved determinative, the judge noting that “[w]ere it not for the causation point, I would refuse relief” notwithstanding his assessment that “[t]he claimant was ill served by the defendant.”⁶⁰ In this way, the courts seem intent on cementing the idea that it is sensible to allow the double importation of causation into the operation of s. 61.

This judicial inclination to utilise causation when determining solicitor-trustees' claims for relief from liability in the mortgage fraud litigation is less clear-cut and more muted in *Lloyd's TSB Bank Plc v Markandan & Uddin*.⁶¹ There, the trial judge identified two key obstacles as to why the defendant solicitors' payment of purchase money in breach of trust could be said to be reasonable for the purposes of s. 61. The first shortcoming was that they had paid the money over to solicitors who fraudulently purported to act for the vendor without receiving the necessary documentation. The second shortcoming was their failure to take the necessary steps to verify that the vendor's solicitors' branch office with which they had been dealing was, in fact, genuine.⁶² This analysis finds resonance in the reasoning of the Court of

⁵⁹ *Ikbal v Sterling Law* [2013] E.W.H.C. 3291 (Ch.) at [237]. Emphasis supplied.

⁶⁰ *Ikbal v Sterling Law* [2013] E.W.H.C. 3291 (Ch.) at [243].

⁶¹ [2012] E.W.C.A. Civ. 65.

⁶² *Lloyd's TSB Bank Plc v Markandan & Uddin* [2010] E.W.H.C. 2517 (Ch.) at [36].

Appeal, where the single reasoned judgment was delivered by Rimer L.J. Affirming the trial judge's refusal of relief, he observed:

“Whilst it is impossible not to have sympathy for [the defendants] in becoming enmeshed in the fraud, the judge's conclusion was that, by these two shortcomings, they brought their misfortune upon themselves. If they had instead performed their role as solicitors with exemplary professional care and efficiency, but had still parted with the loan money in circumstances that were objectively reasonable, the decision on the s. 61 application might have been different.”⁶³

The focus here is rightly fixed upon the evaluation of reasonableness by reference to the defendant solicitors' conduct of the transaction, and most particularly upon the extent to which any “shortcomings” are tantamount to gross negligence. It is not made dependent upon assessing whether or not that conduct caused the loss sustained by the bank. Finding the solicitor-trustee to have been unreasonable so as to preclude the availability of s. 61, Rimer L.J. added the following insightful parting shot, albeit by way of an *obiter* explanation about why the discretionary relief was unavailable:

“It is, therefore, the discretionary power under section 61 that provides the key to the claimed unfairness of holding a solicitor liable for breach of trust in circumstances such as the present. The careful, conscientious and thorough solicitor, who conducts the transaction by the book and acts honestly and reasonably in relation to it in all respects but still does not discover the fraud, may still be held to have been in breach of trust for innocently parting with the loan money to a fraudster. He is, however, likely to be treated mercifully by the court on his section 61 application. [The defendant's] conduct of the transaction was, however, found to fall short of the standard that merited such mercy.”⁶⁴

⁶³ *Lloyd's TSB Bank Plc v Markandan & Uddin* [2012] E.W.C.A. Civ. 65 at [60]

⁶⁴ *Lloyd's TSB Bank Plc v Markandan & Uddin* [2012] E.W.C.A. Civ. 65 at [61].

Rimer L.J.'s reasoning is attractive. Re-locating causation back to its appropriate place, as a factor to be weighed in the balance when determining the fairness of granting relief. This means it forms part of the second stage of what s. 61 requires, the exercise of the discretion rather than adding unwarranted complications to the statutory gateway pre-condition of reasonableness.

Notwithstanding Rimer L.J.'s holistic view of the statutory components of s. 61, *Markandan & Uddin* does, however, refer to ideas of causation, and does so in the guise of the "but for" test.⁶⁵ Thus, counsel for the trustee-solicitor submitted that the loss would still have occurred even if there had been completion involving an exchange of money for forged documents. Although the relevance of this was robustly rejected,⁶⁶ it draws attention to the perceived unfairness visited upon the unwitting solicitor-trustee. Despite some ambivalence about relying upon notions of causation, it cannot be denied that in both *Davisons* and *Markandan & Uddin* the courts appear to believe it holds some relevance to the determination of the reasonableness of allowing relief. Yet in these decisions its place is relatively unformed, and is certainly less cogently pressed than the way in which *Santander* injects causation into the terms of the provision. It is therefore hard to resist the conclusion that in terms of precedent the basis for the importation is at best fragile. The judicial navigation of the relieving provision in the case law that preceded the mortgage fraud cases does not give unassailable support for this modern development.

The uncertain meaning of causation

Concerns about legitimacy aside, there is no denying that infusing reasonableness with ideas of causation has gained currency in the majority of decisions surrounding mortgage fraud. What is less clear is what is meant by causation. Here there is a measure of indeterminacy over the correct test, just as there is indeterminacy in setting the standard to be applied to conduct connected to the loss. This is a deliberate choice

⁶⁵ Based upon ideas applicable to breach of trust claims: see *Target Holdings v Redferns* [1996] 1 A.C. 421 at 436.

⁶⁶ *Lloyd's TSB Bank Plc v Markandan & Uddin* [2012] E.W.C.A. Civ. 65 at [64]: "I consider, however, that the speculative possibility that a purported "completion" by way of an exchange of money for forged documents might in certain circumstances have yielded either no, or only a lesser, loss to C&G provides no exculpatory answer to the claim for full restitution to which C&G was entitled for the breach of trust that actually happened."

advanced as both a virtue and a necessity. In his leading judgment in *Santander*, Briggs L.J. loosely posits what may be seen as a spectrum of potential tests by which causation might be determined. He roundly rejects two of the stricter variants on the continuum; namely, “the effective, primary or predominant cause of the loss” as casting “the net too narrowly”;⁶⁷ and a “but for” test,⁶⁸ for being too “restrictive”.⁶⁹ By the same token he gives equally short shift to adopting the most expansive test, one that would accommodate “every aspect and detail of the solicitor trustee's conduct which occurred, or played any part in, the process which began with the transfer of the loan money by the lender to the solicitor trustee and ended with its theft by the fraudster.”⁷⁰ This led him to adopt something of a “middle way”:

“Between those extremes, it seems to me that some element of causative connection will *usually* have to be shown, and that conduct (even if unreasonable) which is completely irrelevant or immaterial to the loss will *usually* fall outside the court's purview under s. 61.”⁷¹

The judge's formulation is far from definite. While this may well be the nature of the beast given the permutations of the conduct that the court may be asked to consider as having a causal link with the loss suffered, this hardly sets up a clear sense of what level of connection will render s. 61 unavailable. The position is exacerbated because Briggs L.J. goes on to contemplate how exceptional circumstances may dictate a relaxation of the usual test. He therefore adds the following rider, one that cautions against:

“... an over-mechanistic application of the requirement to show the necessary connection between the conduct complained of and the lender's loss. There may be highly unreasonable conduct which lies at the fringe of materiality in

⁶⁷ Typically the argument here is that the loss is attributable to the fraudster rather than the conduct of the defendant solicitor.

⁶⁸ Which would ignore the unreasonable conduct if the loss would have occurred even if the solicitor had acted entirely reasonably.

⁶⁹ *Santander UK Plc v RA Legal Solicitors* [2014] E.W.C.A. Civ. 183 at [24]-[25].

⁷⁰ *Santander UK Plc v RA Legal Solicitors* [2014] E.W.C.A. Civ. 183 at [27]. The Court of Appeal saw this as the assumption of what causation means behind *Santander's* catalogue of complaints about RAL's handling of the conveyancing transaction.

⁷¹ *Santander UK Plc v RA Legal Solicitors* [2014] E.W.C.A. Civ. 183 at [28]. Emphasis supplied. For

terms of causation, and only slightly unreasonable conduct which goes to the heart of a causation analysis. It would be wrong in my view to allow this purely mechanistic application of a causation-based test for the identification of relevant conduct to exclude the former from any consideration under s. 61.”⁷²

Overall, the effect is to pile ambiguity onto what is an uncertain basic position – Briggs L.J.’s middle way. It seems incontrovertible that the line of cases, culminating in *Santander*, suggests that causation in one form or another is superimposed upon s. 61’s pre-condition of reasonableness. It remains to be seen how future courts will respond; and what they will make of the rationale of this development.

Justifications

The thrust of judicial thinking that sees causation as relevant has the effect of separating conduct that is considered reasonable for the purposes of awarding relief, from conduct that is considered unreasonable. In other words, it is meant to serve as a filter mechanism. It appears that the underlying anxiety here is with the perceived conundrum that a trustee can ever be regarded as acting reasonably when in breach of duty. As commented above, this is well-trodden territory in respect of trustees and s. 61. However, Briggs L.J. does not refer to that line of authority. Rather, he prefers to see the debate as if it is exclusive to the judicial discussions relating to the parallel company law provision – currently to be found in s. 1157 of the Companies Act 2006.⁷³ To his credit, it is true to say that this conundrum has assumed greater prominence in the company law equivalent to s. 61, although, in fact, there has not always been unanimity in the response to the perceived difficulty on this point. The most explicit consideration is to be found in *Re D’Jan of London Ltd.*⁷⁴ There the company’s controlling director was held liable for the loss it sustained when, after a fire, the insurers repudiated the company’s policy because the insurance proposal contained various misrepresentations. There was little difficulty in establishing

similar thinking in Sir Terence Etherton C.’s judgment, see [2014] E.W.C.A. Civ. 183 at [109].

⁷² *Santander UK Plc v RA Legal Solicitors* [2014] E.W.C.A. Civ. 183 at [29].

⁷³ Rejecting the willingness of the trial judge, Andrew Smith J., (reported at [2013] EWHC 1380 (QB); [2013] P.N.L.R. 24) to draw upon s. 727 of the Companies Act 1985 (re-enacted in s. 1157 of the Companies Act 2006) decisions in interpreting the reasonableness criteria in s. 61: see *Santander UK Plc v RA Legal Solicitors* [2014] E.W.C.A. Civ. 183 at [67]-[70].

⁷⁴ [1994] 1 B.C.L.C. 561.

liability because he had breached his common law duty of care and skill as a director by signing the proposal form without first reading it. However the court relieved him in part from liability. In so doing Hoffmann L.J. highlighted the ostensible incongruity:

“It may seem odd that a person found to have been guilty of negligence, which involves failing to take reasonable care, can ever satisfy the court that he acted reasonably. Nevertheless, the section clearly contemplates that he may do so and it follows that conduct may be reasonable for the purposes of section 727 despite amounting to lack of reasonable care at common law.”⁷⁵

It is noteworthy that this approach injects some measure of subjectivity into the relieving provision’s gateway criteria of reasonableness.⁷⁶ It seems highly likely, given Mr D’Jan’s status as a director of, and 99% shareholder in, his own business, that signing the form without first reading it was reasonable because it was “the kind of thing that could happen to any busy man” and it was not “gross”.⁷⁷ Moreover, Hoffmann L.J. is not alone in adopting a flexible and pragmatic construction of reasonableness, one that does not bar less culpable negligence from meeting the gateway requirement so as to qualify for consideration of full or partial absolution. Take, for example, the similarly aligned observation in *Re Brian D Pierson (Contractors) Ltd* that “...’reasonableness’ for the purpose of section 727 must be meant to be capable of being satisfied by something less than compliance with the common law standard of care in negligence.”⁷⁸

⁷⁵ *Re D’Jan of London Ltd* [1994] 1 B.C.L.C. 561 at 564. This conundrum has also been identified, but left unresolved, by antipodean courts: see *Fletcher v National Mutual Life Nominees Ltd* [1990] 3 N.Z.L.R. 641 at 692-93; *Dimond Manufacturing Co Ltd v Hamilton* [1969] N.Z.L.R. 609; and *Pacific Acceptance Corporation Ltd v Forsyth* (1970) 92 W.N. 29, (N.S.W.).

⁷⁶ A similar judicial inclination can be detected in earlier cases on the company law relieving provision: *Re Barry and Staines Linoleum Ltd* [1934] Ch. 227, at 233-34 (Maugham J.); and *Re Gilt Edge Safety Glass Ltd* [1940] 1 Ch. 495 at 503; [1940] 2 All E.R. 237 at 245 (Crossman J.). What remains unclear in the judge’s application of the relieving power to Mr D’Jan’s negligence is the precise dividing line between reasonableness and the weighing up of whether fairness dictates that the discretion should or should not be exercised. As is typically found in much of the jurisprudence surrounding the statutory power (both in the trust and company law contexts), Hoffmann L.J.’s determination elides the two.

⁷⁷ *Re D’Jan of London Ltd* [1994] 1 B.C.L.C. 561 at 564.

⁷⁸ [1999] B.C.C. 26 at 48; [2001] 1 B.C.L.C. 275 at 393 (Judge Hazel Williamson Q.C.). See further, the *obiter* remarks at first instance of Judge Peter Smith Q.C. in *Re Simmon Box (Diamonds) Ltd* [2000] B.C.C. 275; on appeal s. 727 was immaterial because the Court of Appeal found that the director in question was not in breach of duty: see *Cohen v Selby* [2000] B.C.C. 275; [2001] 1 B.C.L.C. 176.

There is, however, at least one contrary pronouncement since *Re D'Jan*. In *Coleman Taymar Ltd v Oakes*,⁷⁹ Judge Robert Reid Q.C. offered a trenchant rebuttal of Hoffmann L.J.'s more lenient stance: "I do not see how the reasonableness requirement can be a subjective requirement. Any reasonableness test must by its very nature be objective."⁸⁰ However, this is not the last judicial word on the matter. In *Barings Plc v Cooper & Lybrand*,⁸¹ Evans-Lombe J. sided with Hoffmann L.J.'s stance:

"They may have acted reasonably for the purposes of the section even though I have found them to have acted negligently, if they acted in good faith and their negligence was technical or minor in character, and not '*pervasive and compelling*'".⁸²

In *Santander* Briggs L.J. acknowledges this prevailing interpretation. Yet he dismisses the relevance of relying upon the associated case law,⁸³ on the basis that it would "be wrong, by any process akin to reverse engineering, to interpret section 61 by reference to the historically more recent and undoubtedly more difficult provisions now to be found in section 727 of the Companies Act 1985."⁸⁴ In our view the judge appears to

⁷⁹ [2001] 2 B.C.L.C. 749.

⁸⁰ *Coleman Taymar Ltd v Oakes* [2001] 2 B.C.L.C. 749 at 770. See also the remarks of Robert Walker L.J. in *Bairstow v Queens Moat Houses Plc* [2001] EWCA Civ 712 at [58]; [2001] 2 B.C.L.C. 531 at 550.

⁸¹ [2003] E.W.H.C. 1319 (Ch.).

⁸² *Barings Plc v Cooper & Lybrand* [2003] E.W.H.C. 1319 (Ch.) at [1133]. Endorsement of this approach and *Re D'Jan* is also to be found in Popplewell J.'s judgment in *Madoff Securities International Ltd v Raven & Others* [2013] E.W.H.C. 3147 at [334]; [2014] Lloyd's Rep. F.C. 95: "It is apparent from the fact that the section is applicable to liability for negligence that "reasonably" is a broad concept, such that the relief is potentially available even where the director has been in breach of his duty to exercise reasonable care." See also, the reasoned *obiter* remarks by Mr Bernard Livesey Q.C., sitting as a Deputy High Court Judge in *Green v Walkling and Others* [2007] E.W.H.C. 3251 at [42]-[46]; [2008] B.C.C. 256.

⁸³ Apart from *Barings Plc v Cooper & Lybrand* [2003] E.W.H.C. 1319 (Ch.), the case law Briggs L.J. refers to is *Re D'Jan of London Ltd* [1994] 1 B.C.L.C. 561, and *Maelor-Jones v Heywood-Smith* (1989) 54 S.A.S.R. 285 (in which Olssen J. relies upon Moffitt J.'s reasoning in *Pacific Acceptance v Forsyth* (1970) 92 W.N. 29 N.S.W.).

⁸⁴ *Santander UK Plc v RA Legal Solicitors* [2014] E.W.C.A. Civ. 183 at [32]. This provision is now contained in s. 1157 of the Companies Act 2006, the terms of which are indistinguishable. For a tentative willingness, relying *inter alia* on *Barings Plc v Cooper & Lybrand* [2003] E.W.H.C. 1319 (Ch.), that recognises s. 61's reference to reasonableness might not always bar relief to a solicitor-trustee's negligent breach of trust in a mortgage fraud case, see *The Mortgage Business Plc v Conifer & Pines & Essex Solicitors* [2009] E.W.H.C. 1808 (Comm.) at [26]-[27].

over-emphasise the distinctions in the drafting of the two provisions and their consequential significance. Section 727 lists (as does its successor, s. 1157) distinct heads of liability, namely “negligence, default, breach of duty or breach of trust”. By contrast, s. 61 simply refers to relief for breach of trust. In our view, this is of little import. The absence of iteration in s. 61 should not disguise the reality that liability for breach of trust sometimes depends upon establishing fault. Of course, this is not the case in the mortgage fraud litigation. There are, however, many breaches of trust where the question of liability depends upon conduct that is unreasonable or otherwise involves fault. As the corpus of s. 61 cases indicate, the availability of relief does not turn upon whether the breach in question is or is not fault-based. Besides, as we have shown, there is support in the case law surrounding s. 61 and its Victorian predecessor in favour of the possibility that a careless trustee who is in breach of duty can nevertheless be found to have acted reasonably.⁸⁵ Briggs L.J.’s strident dismissal of the jurisprudence surrounding the parallel company law provision is clearly misconceived. This is not a case of interpreting earlier legislation by reference to later analogous provisions. The initial introduction of statutory relief in company law by s. 32 of the Companies Act 1907 was substantially influenced by the original 1896 trustee relieving provision.⁸⁶ Not only is there evidence of a close link in the Parliamentary history,⁸⁷ there are also instances of judicial interpretation of the company legislation by reference to its trust’s predecessor.⁸⁸ Moreover, since the enactment of the parallel relieving provisions, the judges have also encountered and responded to the same conundrum of finding negligent behaviour reasonable.

It is possible to discern other justifications being offered in support of both the value of turning to causation *per se* and also for adopting the preferred version of the test – termed the middle way. Throughout their legislative existence the relieving provisions have been applauded as creating a broad, open-ended and flexible basis for intervention, one untrammelled by strict precedent and illuminated only by loose

⁸⁵ See above, text following n. 34.

⁸⁶ For fuller consideration of this aspect, see R. Edmunds and J. Lowry, “The Continuing Value of Relief for Directors’ Breach of Duty” (2003) 66 M.L.R. 195 at 198-201.

⁸⁷ See the Report of the Company Law Amendment Committee 1906, Cd. 3052 (London, H.M.S.O., 1906). The Committee was chaired by Lord Loreburn L.C., who in 1895 chaired the Select Committee on Trusts Administration, P.P. 1895 (248) XIII, whose recommendations culminated in s. 3 of the Judicial Trustees Act 1896.

generic judicial guidance. Arguably, this is a virtue and positive strength. This is seen in the most recent review of the company legislation, which, in 2006, resulted in the enactment of the substantially unchanged terms in s. 1157.⁸⁹ The mortgage fraud cases, however, take a different perspective. The judicial unease appears to arise from two intertwined considerations. One of these lies with the need to deter litigation by maximising certainty for those advising the parties about the application of s. 61.⁹⁰ The paradox here is that there is every prospect that such clarity and certainty will not be achieved by introducing causation in to the determination of reasonableness. Indeed it may simply shift the focus of the advice that is needed about the operation of the provision. This is all the more likely when one considers the ill-defined and indeterminate ambit given to causation by the courts in the mortgage fraud litigation. Overall, it is difficult to avoid being sceptical about this particular claim. The other concern appears to be about constructing reasonableness in a way that will help bolster and maintain the quality of the conduct of solicitors engaged in conveyancing transactions.⁹¹ Sir Terence Etherton C. robustly states this prophylactic-orientated agenda in more general terms, not simply confined to solicitors, as follows:

“Furthermore, section 61 must be interpreted consistently with equity’s high expectation of a trustee discharging fiduciary obligations.”⁹²

Whatever justifications there may be for requiring causation as an additional component to the award of relief, the absence of any such requirement in the legislative language must lead to the conclusion that the courts are engaging in judicial statutory re-drafting. The judgments in the mortgage fraud cases are heavily nuanced and the repercussions may not be fully appreciated until there have been further opportunities for the judges to revisit the issues. One possible development

⁸⁸ See, for example, *In re Claridge’s Patent Asphalte Company Ltd* [1921] 1 Ch. 543.

⁸⁹ Reform of the pre-existing relieving provision in s. 727 of the Companies Act 1985 was considered as part of the fundamental review of UK company law, culminating in two White Papers – *Modernising Company Law* (Cm. 5553-1) and *Modernising Company Law – Draft Clauses* (Cm. 5553-II). For specific discussion of s. 727 within this review exercise, see *Modern Company Law for a Competitive Economy: Developing the Framework*, <http://webarchive.nationalarchives.gov.uk/20121029131934/http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006/clr-review/page25086.html>, (accessed 14 April 2016) at para. 3.77.

⁹⁰ *Santander UK Plc v RA Legal Solicitors* [2014] E.W.C.A. Civ. 183 at [23].

⁹¹ See, for example, *Santander UK Plc v RA Legal Solicitors* [2014] E.W.C.A. Civ. 183 at [99].

⁹² *Santander UK Plc v RA Legal Solicitors* [2014] E.W.C.A. Civ. 183 at [109].

might be to confine the use of causation to solicitor-trustees in mortgage fraud cases, leaving the more fluid assessment of whether the defendant has acted reasonably to contests involving what may be imprecisely termed, traditional trusts. This, however, would lead to the unappealing outcome of setting up diverging approaches to relief which would be hard to justify and operate. Ultimately, this brings us back to the crux of our argument. Section 61 does, and should, function by assessing whether the trustee has acted “reasonably”. Giving an answer may involve accepting that a trustee may or may not be at fault in committing the breach. It is common ground in the mortgage fraud cases that the disbursement of the purchase monies without the prospect of completion is always a breach of trust, and one that inevitably causes loss to the lender. But in such cases, and even those where the breach entails a finding of negligence, there is nothing inherently wrong or illogical in saying that he should be eligible for relief because, taking a holistic view, the defendant acted reasonably. Of course in determining reasonableness, the behaviour to be judicially considered is almost invariably connected in some sense to the breach. But that does not mean that causation should be the driver in assessing reasonableness for the purposes of the granting of relief. In the context of the mortgage fraud cases, if there is a call to balance where the loss should fall, be it on the unwitting mortgagee or the hapless solicitor, the appropriate mechanism within s. 61 is its reference to fairness rather than the gateway requirement of reasonableness.

CONCLUSION

The mortgage fraud cases are a timely reminder of the adaptability of the trustee relieving provision in the 120 years of its lifetime. They promote the question of the availability of relief to excuse trustee liability from its customary peripheral position in trusts litigation to centre stage. However, they are atypical. For one thing the commercial backdrop to the litigation of solicitor-trustees undertaking conveyancing work is in stark contrast to the concerns about over-burdening trustees of traditional trusts which triggered and resulted in the wake of the introduction of the jurisdiction in 1896. Liability for breach in the mortgage fraud cases is also strict. There is therefore no need to establish a breach of duty in managing the terms of the trust that falls short of the requisite standard of care and skill. It is our contention that these

factors are not especially relevant when it comes to thinking about the scope and judicial mechanics of relief. Certainly it is not immediately obvious how they justify – in terms of precedent or principle – a substantial interference with the *status quo* as represented by the pre-existing case law about relief, such as *Re Smith*.⁹³ The statutory jurisdiction in s. 61 may be perceived as existing in tension with the need to maintain the highest possible standards of trusteeship. However, the granting of relief should not be taken as a signal that no breach of trust has occurred. It is not, nor should it ever be, an inducement for trustees to fall short in the performance of their duties. Whilst this is important in all spheres of trusteeship, it is, nowhere more critical than for solicitor-trustees in conveyancing where the trust is an incidence process. This is all the more important because other innocent parties to the transaction, including lending institutions, will have suffered financial loss as a result of the solicitor-trustee’s breach. What relief can ensure is that the law does not overlook circumstances which indicate that it may be appropriate to excuse such a solicitor-trustee from liability if the departure from best practice is pardonable. As the duties are strict, not depending on determinations of whether reasonable care has been taken, s. 61’s gateway consideration of “reasonableness” holds particular importance.

Indeed it is clear that the gateway considerations – honesty and reasonableness – hold continuing value. Certainly, there is nothing in the mortgage fraud cases in support of a more radical solution of erasing reasonableness from the provision – even though doing so would overcome the need to gloss s. 61 with notions of causation. Although this revision was proposed by the UK’s Company Law Steering Group it was not implemented by the Companies Act 2006;⁹⁴ and it is not realistic to suppose that any such change to the power to relieve trustees is likely to occur in England and Wales.⁹⁵

⁹³ (1902) 86 LT 401. And, for its company law counterpart, see *Re D’Jan of London Ltd* [1994] 1 B.C.L.C. 561.

⁹⁴ See, *Modern Company Law For a Competitive Economy: Developing the Framework* <http://webarchive.nationalarchives.gov.uk/20121029131934/http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006/clr-review/page25086.html>, (accessed 14 April 2016), where the Steering Group concludes, at para. 3.77: “There is doubt as to the extent to which... [s. 727] allows relief for negligence, because it is hard in logic to regard a director as having acted reasonably if he is liable in negligence (ie as having failed to exercise reasonable care or skill). We nevertheless believe that in such cases the court should grant relief if it believes he ought fairly to be excused. This could be achieved by deleting the requirement that the director must have acted reasonably, while retaining the other conditions.”

⁹⁵ The Scottish relieving provision (s. 32 (1) of the Trusts (Scotland Act) 1921) has been the subject of

As reasonableness is set to continue to play its gateway function it should not operate so as to impede unduly the trustee's access to the discretionary component of the relieving provision, which involves examining the fairness of excusing the trustee. In terms of finding an appropriate balance between the two stages to be considered when granting relief, the paradigm is encapsulated in Olssen J.'s analysis delivered in *Maelor-Jones v Heyward-Smith*.⁹⁶

“the court... ought not to shrink from giving effect to its sense of fairness and justice. It should not hesitate, in a proper case, to relieve a person from what, having regard to particular facts and circumstances – particularly where the person concerned has acted honourably, fairly, in good faith and in a commonsense manner as judged by the standards of others of a similar professional background – from what might otherwise be seen to be a harsh and oppressive consequence of the strict application of the law... .”⁹⁷

The italicised words indicate that the solicitors in the mortgage fraud cases whose handling of the transactions fell below industry norms may not be entitled to the merciful application of s. 61. This is unobjectionable and should not distract from the central issue of process when construing the statutory terms. With its emphasis on justice, Olssen J.'s approach is attractive. It resonates with the objectives set for the provision by its architects. Considering fairness may often turn upon bringing the interests of others affected by the breach into the equation. All this also stands against unnecessarily complicating the meaning given to reasonableness. Moreover the accent here should be on the conduct surrounding the breach that can be described as reasonable, and not on the connection that conduct – whether reasonable or unreasonable - has to the loss. One effect of introducing an imprecisely conceived idea of causation is to side-line s. 61 in a significant number of cases. This is because the extent of a trustee's liability is already subject to the loss caused by the breach.

review culminating in proposals for its repeal by the Scottish Law Commission: *Report on Trust Law* (S.L.C. 239) (2014), 12.89-12.94

⁹⁶ *Maelor-Jones v Heywood-Smith* (1989) 54 S.A.S.R. 285.

⁹⁷ *Maelor-Jones v Heywood-Smith* (1989) 54 S.A.S.R. 285 at 296.

