



**APPORTIONMENT
OF PURCHASE
MONIES BETWEEN
THE PROPERTY AND
THE CONTENTS**

The Conveyancing Committee wishes to draw to the attention of practitioners the decision of the Court of Appeal in England in the case of *Saunders and Anor -v- Edwards and Anor*. (1987) 2 All ER 651.

The facts are as follows;

The Plaintiffs agreed to purchase from the Defendants the Defendant's leasehold interest in a flat for £45,000 to include certain fixtures and fittings. Prior to executing the contract, the Plaintiffs were shown around the flat and were particularly keen to buy it because it appeared to include a roof terrace. The Plaintiffs wished to save stamp duty and at their request the Defendants agreed that the total purchase price of £45,000 should be apportioned as to £40,000 for the property and £5,000 for the fixtures and fittings.

It was clear from the correspondence that the agreed apportionment was merely to facilitate the plaintiffs in reducing their stamp duty liability; the sum of £5,000 was far greater than the actual market value of the fixtures and fittings.

After completing the transaction and on discovering that the flat did not, in fact, include the roof terrace, the Plaintiffs sued the Defendants for damages for fraudulent misrepresentation. The Plaintiff's claim was in tort only and did not include a claim for damages for breach of Contract.

The Plaintiffs were successful at first instance and were awarded damages. The Defendants appealed, not against the find of fraudulent misrepresentation but against the entitlement of the Plaintiffs to damages. The nub of the appeal turned on whether the Plaintiffs were bound by the value of £5,000 put upon the chattels for the purpose of reducing stamp duty. There was expert evidence that at the date of completion of the transaction in November 1983, the value of the flat with a roof garden was £48,250 and without a roof garden was £40,650. The Defendants argued that the Plaintiffs should be bound by the apportionment in the Contract and should not be allowed to open up that apportionment and rely upon the true value of the fixtures and fittings in order to arrive at the proper value of the flat they had bought.

In the Court of Appeal Lord Justice Kerr concluded the fixtures and fittings were worth something between £500 and £1,000. He rejected the Defendants argument but stated that the practice of attributing false values to fixtures and fittings in order to avoid stamp duty cannot be condoned; he indicated that if a solicitor is involved in an apportionment of this kind which he knows not to be in accordance with the fact, then he must be guilty of professional misconduct and possible criminal offences; he also indicated that consequences for buyers may well be that their Contract becomes unenforceable. The



relevant maxim is *ex turpi causa non oritur actio*, meaning that an action does not arise from a base cause.

The Court of Appeal held in favour of the Plaintiffs and dismissed the Defendant's appeal on the grounds that:

- (a) The Plaintiffs had a non-answerable claim against the Defendants for fraudulent misrepresentation.
- (b) The Defendant's own moral culpability greatly outweighed that of the Plaintiffs and he ought not to be allowed to keep the fruits of his fraud and,
- (c) The illegal apportionment in the Contracts was wholly unconnected with the Plaintiff's cause of action in tort and that the Plaintiff would have suffered loss as a result of the fraudulent misrepresentation regardless of whether or nor the Contract contained the illegal apportionment.

Lord Justice Kerr said in the Court of Appeal that there were a number of authorities which showed that the *ex turpi causa* defence lies mainly in the field of contractual claims and only rarely in tort. The *ex turpi causa* defence therefore failed.

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UPDATE: Practitioners should be aware that apportionments, while legal, must reflect true values and are open to query by the Revenue Commissioners. Apportionments which bridge a stamp duty threshold leave the property liable to stamp duty at the higher rate.

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