

A Conveyancer's Lot Post P&P Property and Dreamvar

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The spotlight has never been so bright on the world of conveyancing as now following the recent judgment in the conjoined appeals in *P&P Property Ltd v Owen White & Catlin and others; Dreamvar (UK) Ltd v Mischon de Reya and others* [2018] EWCA Civ 1082. The Court of Appeal has had to wrestle with the answer to the intricate question of who bears the loss when a fraudster impersonates the seller in a house sale and disappears with the sale proceeds before the scam is revealed. With the money gone and the buyer owning no property in return where does the liability fall for the professionals involved in the conveyancing transaction?

Given that conveyancers largely acting in equal measure for both sellers and buyers the outcome of the appeal has understandably generated much interest (and concern) and has been the subject of much copy as to the whys and wherefores of the legal principles involved. With the dust having started to settle on the judgment (and whilst it is by no means done and dusted yet) we summarise here the facts of the claims and the findings in the judgment. More importantly where the appeal judgment contains very little by way of guidance as to what steps can be taken to avoid liability we then focus on some practical issues to consider for the management of risk in a conveyancing transaction which has got a whole lot harder.

The facts

These cases are at their simplest examples of fraud facilitated through identity theft in a property transaction. The fraudster poses as the true owner of the property – basically the sellers who instructed the solicitors to act for them were not who they said they were. The buyer (and lender) similarly instructing solicitors are entirely innocent – they know nothing of the scam that is unfolding.

The transactions proceed, contracts are exchanged and on completion the completion monies are paid over by the buyer's solicitors to the seller's solicitors. In both cases here the sums involved exceeded £1million. The seller's solicitors pay over to the fraudster the sale proceeds which very quickly disappear – certainly they are irrecoverable by the time the fraud is discovered and registered title for the buyer can't be secured.

With no property acquired and their capital long gone the buyers unsurprisingly pursued claims against the professionals instructed (the solicitors and in *P&P* the estate agent) in an effort to get their money back.

The appeal decision

Breach of warranty of authority

Does the seller's solicitor warrant that they are acting for the true seller? The court approached this question on the basis that the warranty should be construed according to the particular circumstances in the transaction involved. In *P&P* the seller's solicitor signed the contract on behalf of the seller as the *seller's solicitor* and referred to the seller as being *of* the address of the property to be sold. The court concluded that this all contributed to there being a warranty that their client was the true seller rather than just a client who said they were the true seller.

However the claims for breach of warranty failed as the evidence in both *P&P* and *Dreamvar* was that the buyer's solicitors had placed no reliance on any such warranty.

Breach of a duty of care

There was better news in that efforts to impose a duty of care on the part of the seller's solicitor in favour of the buyer to undertake due diligence as to the seller's identity were unsuccessful. The conventional view prevailed of duties being owed to their client the seller, not to the buyer.

Breach of undertaking

The Law Society Code for Completion by Post (2011) contains an undertaking by the seller's solicitor *to have the seller's authority to receive the purchase money on completion*. The court concluded that this means a *genuine seller* – and so does not apply where the seller is an imposter. The seller's solicitors were accordingly in breach of undertaking by reference to the Code.

Breach of trust

The decision at first instance found that the buyer's solicitor was in breach of trust on the basis that the purchase monies were held by them on trust for the buyer and to pay those monies away when the seller is an imposter is a breach of trust. That was not part of the appeal and so stands.

The appeal addressed whether the seller's solicitor holds the completion monies on trust for the buyer at all (as opposed to on trust for his own client) and if he does whether they were in breach of trust in paying away the monies other than for a genuine completion. The Court of Appeal concluded that the seller's solicitor holds the completion monies on trust for the buyer and was in breach of that trust in having paid away the purchase monies in a transaction other than for a *genuine* completion.

The court further considered whether either the seller's or the buyer's solicitors should be excused their breach under section 61 of the Trustee Act 1925 on the basis that they had acted honestly and reasonably. No section 61 relief was granted not even for the buyer's solicitors in *Dreamvar* against whom there was no finding of breach of duty. This was largely because in exercise of its discretion, the court felt that the buyer's solicitor, who had PI insurance, was better able to sustain the loss than the buyer.

By the same token, however, we would expect section 61 relief still to be available where the victim has equal or superior financial strength to an insured solicitor, eg a commercial lender.

Buyer's solicitors can now however seek to pass on their liability to the seller's solicitors who were also in breach of trust, by virtue of the agency arrangement in the Code for completion whereby a seller's solicitor acts as the buyer's solicitor's agent (and sub trustee and fiduciary) for the purposes of completion.

In an effort to simply the findings we refer to the table on the next page;

Buyer's causes of action	Imposter seller's solicitor	Buyer's solicitor
Breach of warranty of authority – that the seller is the true seller	Possibly depending on the facts and whether there was reliance by the buyer's solicitor	No
Breach of undertaking under the Code	Yes	No – no undertaking given
Breach of duty of care	No – seller's solicitor owes no duty to the buyer who is not his / her client	Yes – buyer's solicitor will owe a duty to his / her client
Breach of trust	Yes. To avoid liability will need to rely on court granting relief under s.61 Trustee Act 1925, but this is very unlikely to be granted unless the victim is of equal or greater financial strength to an insured solicitor	Yes. To avoid liability will need to rely on court granting relief under s 61 Trustee Act 1925 but this is very unlikely to be granted unless the victim is of equal or greater financial strength to an insured solicitor. However, in most cases buyer's solicitors should be able to pass the blame to the seller's solicitor under the agency provisions of the Code.

The judgment feels like a real move away from solicitors being judged in their conduct by standards of reasonable care and skill closer towards a form of strict liability – at least where the transaction is a seller fraud where no genuine completion is achieved. The liability landscape may well further shift but in the meantime we discuss below some of the ways in which the risks inherent in this sort of fraud may be averted always bearing in mind that there are regrettably no easy answers.

Matters to consider include;

First and foremost extra vigilance throughout is necessary in all cases and particularly where the transaction is high risk (including properties that are high value; mortgage free; tenanted; vacant or unoccupied; owner overseas; where the deal has elements of bargain price / required speed). Critical attention to risk is required throughout the course of the retainer.

Acting for the seller:

- Whether to seek to apply a disclaimer to the effect that no express or implied warranty is given to the buyer / buyer's solicitors as to the identity of the seller and that the purchase is without any reliance on any representation made, any such reliance being unjustified. Will that ever be acceptable to the buyer / buyer's solicitors? Will some transactions simply reach an impasse?
- Consideration to be given as to whether it's possible to vary the standard undertakings and contractual arrangements in a conveyancing transaction. Would it be possible for agreement to be reached that the completion monies are held on terms other than on trust and so possibly be outside the scope of the Code. To what extent variations are achievable may again be dependent on acceptability to the buyer / buyer's solicitors or to the lender. A nuanced approach may be needed – with the focus of these variations being in the high risk transactions.
- The highest level of attention to detail and due diligence is applied to the process of establishing the identity of the seller client and in relation to the money laundering checks is applied in all cases and with extra vigilance in *red flag* transactions. Details should be cross checked where that's possible and any discrepancies fully investigated. If it isn't possible to meet the seller in person critically assess the reasons why not and cross check them against what's already known.
- Ask the seller for details of the solicitors that acted in the purchase. Is the purchase file available? Does the seller have any documents available from when they bought the property eg the official copies of the title or the completion statement? The target properties tend to be unencumbered but if there are any entries in the charges register can the seller provide documentation in relation to them?
- And if uncertainty remains? Is there a conversation to be had with the seller client to explain? Consider taking instructions on the sharing of concerns with the buyer's solicitors. The seller client's response to such a request might just be telling as to the credibility of suspicions. However unpalatable this is, be prepared to refuse to act in the sale if concerns remain that the seller may not be who they say they are.
- Review the indemnity limit of professional indemnity insurance and ensure that it is adequate for the value of conveyancing transactions being handled.

Acting for the buyer:

- Review the terms of engagement to exclude / limit liability in the event that the seller proves to be an imposter. Will such a disclaimer be acceptable to the buyer client? A lender will still want the transaction to be handled subject to the CML terms which provide for the monies to be held on trust for a genuine completion. This will be the case in the majority of transactions in any event.
- Seek confirmation from the seller's solicitor that they have verified the seller's identity.
- Make it clear that reliance is being placed on the seller solicitor's warranty that it is the true seller. Taking that into account to what extent are enquiries made as to the identity of the seller? This may afford some comfort as to the risk of seller fraud but could this indicate a lack of reliance on the warranty?
- Attention to detail is needed if there are efforts on the part of the seller's solicitors to vary the terms of standard undertakings and contractual arrangements. What is their effect? To what extent are these acceptable? At all times the buyer client needs to be aware of the position and the risk.

- Be vigilant throughout the transaction as to the potential for risk – in all transactions but in particular where it is a high risk transaction. Share any concerns with the buyer client taking specific instructions as to whether, despite those concerns, they wish to proceed.
- Check that the seller's solicitors have the appropriate level of professional indemnity cover especially in high value transactions. Consider the availability of other insurance products.

Moving forward and general considerations:

- Property owners should ensure that the contact details in the title register are up to date. This will, of course, be the address for service of any important notices and correspondence relating to the property from the Land Registry or indeed anyone else given that the register is open. Owners need to ensure that they receive these communications and it's a detail often overlooked. This is especially crucial where the property is rented, empty or unoccupied – the address given should not be the property address.
- If the property is at risk of fraud the client should be advised to register with the Property Alert Service at the Land Registry <https://propertyalert.landregistry.gov.uk/>. Once signed up the property owner will receive email alerts when certain activity occurs on any monitored property including official searches and applications allowing action to be taken if necessary. Again the email address needs to be kept up to date and steps taken to ensure that any such emails are not being caught as spam.
- For those owners at particular risk and seeking additional protection it is now possible for a restriction to be entered against the property which prevents the registration of a transfer or charge of the property unless a conveyancer has certified that they are satisfied that the person involved is the same as the owner. Aside from the standard restriction (Form RX1) there are particular restrictions for applicant that don't live at the property (Form RQ) and for companies that own property (Form RQ (Co)).
- In the light of the Court of Appeal judgment the Law Society says that the work to update the terms of the Code is currently underway – we will be closely monitoring developments.
- Will there now be the development of specialist insurance products to meet the risk of seller fraud? Should there be a review of the whole process of client identification with options for sub-contracting this to a third part in the way that employee checks in recruitment are regularly done now?

As the dust on this decision continues to settle solicitors will need to carefully review their approach to risk and remain ever vigilant to the badges of fraud in conveyancing transactions. For this risk in particular the move towards strict liability is of real concern – it's probably fair to say that in the round, post this judgment a conveyancer's lot is a far from happy one.

Disclaimer: This document does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to highlight issues that may be of interest. Information is correct at the time of release.
