

Property fraud: conveyancers beware

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Property fraud is on the rise. The most common scam is where an imposter poses as the owner of the property. The buyer is left with liability for a mortgage for a property they have no right to and may seek to recover losses from the conveyancing solicitors involved in the transaction. This scenario has been considered in three recent cases.

P&P Property Limited v Owen White & Catlin LLP and another [2016]

The focus in this case was on the scope of duty owed by a seller's solicitor to a defrauded buyer.

P&P purchased a residential property from a Mr Harper. Owen White & Catlin LLP ("OWC") acted for Mr Harper. Having completed identity checks, OWC was satisfied that Mr Harper was the owner of the Property. Following completion it transpired that Mr Harper was an imposter posing as the rightful owner. By that stage, the purchase monies had been sent overseas and Mr Harper was untraceable.

P&P brought a claim against OWC alleging breach of warranty authority, negligence and breach of trust. The court dismissed all three counts. *P&P* were left with no remedy.

Dreamvar (UK) Ltd v Mishcon de Reya (a firm) and another [2016]

Dreamvar purported to purchase a property from a fraudster impersonating the true owner of the property, Mr Haeems, but by the time the fraud was discovered (by the Land Registry) the purchase monies had been paid to the imposter and dissipated overseas. *Dreamvar* brought claims against its own solicitors, Mishcon de Reya ("Mishcons"), and the seller's solicitors, Mary Monson Solicitors Limited ("Mary Monson"), on the same grounds as the *P&P* case.

Mary Monson relied heavily on the *P&P* decision and, although Mary Monson admitted that their checks on their seller's identity were insufficient, they escaped liability as no duty was owed to *Dreamvar*.

The claims in negligence against Mishcons were dismissed because the court found that there was no general duty to warn of identity fraud and no special circumstances.

On the breach of trust allegation, however, the Judge found that the completion monies were held on trust and that it was an implied term of the retainer that Mishcons would only release the monies for a genuine completion. There had been no genuine completion here and so the sale contract was a nullity. This allegation, therefore, succeeded.

Whilst the Judge found Mishcons to have acted reasonably, they were refused relief under Section 61 of the Trustee Act 1925, because Mishcons was in a better position to absorb the consequences of the breach of trust, compared to *Dreamvar*, as the solicitors were insured for such events.

Patel v Freddy's Ltd and others [2017]

Mr Patel owned a property which was managed by his brother whilst he lived overseas. A fraudster agreed to sell the property to a Mr Feingold. The fraudster said that he wanted a quick completion because he said he was unwell. The transaction involved a sub-sale by Mr Feingold to Freddy's Ltd.

The solicitors acting for Freddy's Ltd identified numerous problems in relation to planning issues. They advised Freddy's Ltd not to proceed, but following negotiations and a lower price, completion of the sale to Feingold and the sub-sale to Freddy's Ltd took place.

The fraud then subsequently came to light.

Freddy's Ltd was the owner of the property under the Land Registration Act 2002. Mr Patel therefore applied to rectify the register to restore himself as the registered owner. In order to succeed in the application, he had to show that Freddy's Ltd had caused or substantially contributed to the mistake by lack of proper care. The Claimant argued that Freddy's Ltd had failed to check the title of the seller, Mr Feingold, and failed to make proper enquiries of the occupiers of the property.

The Judge held that the solicitors acting for Freddy's Ltd had not contributed to the mistake as the solicitor had been alive to the risks and had taken great care.

The Judge also confirmed the comments in both *P&P* and *Dreamvar* that it is not normal professional conveyancing practice

for a purchaser's solicitor to check the identity of the seller. Mr Feingold's solicitor had tried to do this, but their request for identification documents had met with short shrift from the fraudster's solicitors.

As the fraud was discovered after the Transfer was registered and the purchaser of Freddy's Ltd had obtained good title, they suffered no loss. The defrauded seller (Mr Patel) would have a claim for an indemnity from the Land Registry.

Commentary

Both *P&P* and *Dreamvar* have been granted permission to appeal and it is hoped the circumstances where relief will be granted under section 61 will be clarified. Nonetheless, it is worth considering the implications of these decisions and the steps conveyancers can take to avoid the risk of identity fraud.

Seller's Solicitors

- Seller's solicitors do not, in usual circumstances, assume any responsibility in negligence to the buyer when completing their client due diligence checks. Further, claims for breach of trust and breach of warranty were dismissed against the seller's solicitors in both *P&P* and *Dreamvar*, suggesting the risk profile of a seller's solicitor to a defrauded purchaser is limited.
- If there are discrepancies, seller's solicitors should ensure further enquiries are made with the client and insist on satisfactory responses prior to proceeding.
- The Law Society's 2010 Practice Note on Property and Registration Fraud recommends enhanced due diligence should be undertaken in circumstances where properties are unoccupied by tenants or are mortgage free. Firms should ensure they have internal procedures to help identify potentially higher-risk transactions/sellers at an early stage.

Buyer's Solicitors

- The risk profile is greater for the buyer's solicitor.
- In *Dreamvar*, where the buyer's solicitors were honest and reasonable, the court was, nonetheless, unwilling to grant relief under section 61. This appears to be a decision based on public policy rather than law and solicitors and their insurers will follow the appeal process with interest to see if this decision is subject to change.
- Firms should risk-assess transactions as low to high risk and provide recommendations to buyers on the steps they can take to alleviate the chances of a fraud. This could include some limited checks on the seller's identity using online resources.
- As a means of future prevention, conveyancers could consider informing clients of the Land Registry's Property Alert Service. This is an email based service whereby interested parties can register to be informed of any searches or applications performed on a property in question. The service alerts the real owners of the properties of the searches being performed on their property.

The appeals will be followed with interest.

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