Conveyancing fraudsters – who picks up the bill after *P&P* and *Dreamvar*?

P&P Property Ltd v Owen White & Catlin LLP

[2018] EWCA Civ 1082
Court of Appeal (Civil Division)
Vice President of the Court of Appeal, Civil Division; Gloster, Patten and Floyd LJJ
15 May 2018

Breach of trust – Conveyancing – Fraud – Solicitors – Warranty of authority

Conveyancing fraud claims are ever increasing in volume and pose difficult questions as to who is (and should be) liable to the innocent purchaser for the loss of the money paid for the prospective property. On this tricky issue the judgment of the Court of Appeal in the conjoined appeals of *P&P Property Limited v Owen White & Catlin LLP and Crownvent Limited,*[1] and *Dreamvar (UK) Limited v Mishcon De Reya (a firm) and Mary Monson Solicitors*,[2] differs in many respects from the approach taken by both judges at first instance.[3] The decision has sent alarm bells ringing throughout the conveyancing solicitors' profession and for good reason.

Facts

The facts of *P&P* and *Dreamvar* are broadly similar. Both concerned a property transaction where the vendor was in fact a fraudster impersonating the real owner and had no legal title to the property that he was purporting to sell. The money for the property had been paid by the intended purchaser to the person posing as the vendor, through the hands of the purchaser's and vendor's solicitors. In *P&P* the fraudster was posing as the real owner of a property in Hammersmith, West London – Clifford Harper. The claimant, P&P, who was the intended purchaser, brought a claim against the firm of solicitors and the estate agent who had acted on behalf of the fraudster. Claims were brought against the solicitors, Owen White & Catlin LLP (OWC) for breach of warranty of authority, negligence, breach of undertaking and breach of trust. There were also claims against the estate agents, Crownvent Limited trading as Winkworth (Winkworth) for breach of warranty of authority and negligence.

In *Dreamvar*, the claimant was a small building development company whose director was Mr Vardar. Mr Vardar thought that his company was buying a property in the prestigious London postcode of SW5. Once again, the fraudster was posing as the real owner, in this case David Haeems. Dreamvar sued its own solicitors, Mishcon de Reya (MdR) and the solicitors of the seller, Mary Monson Solicitors Ltd (MMS). Dreamvar brought claims against MdR for negligence and breach of trust, and MMS for breach of warranty of authority, breach of trust and breach of an undertaking.

1 [2016] EWHC 2276 (Ch); [2016] Bus LR 1337.
2 [2016] EWHC 3316 (Ch).
3 Mr Robin Dicker QC (sitting as a Deputy High Court Judge) in *P&P* and Mr Railton QC (sitting as a Deputy High Court Judge) in *Dreamvar.*

While the appeal was from two different decisions, the first instance decisions themselves were consistent. The position can be summarised as follows: only MdR were liable to the buyer on the basis that (a) it had acted in breach of trust by releasing the purchase funds to the vendor's solicitor and (b) it should not be granted relief in accordance with section 61 of the Trustee Act 1925. This was despite the judge holding that MdR had behaved reasonably and honestly, whereas MMS had accepted that it did not exercise reasonable care in performing identity checks.

The decision of the Court of Appeal

Patten LJ gave the majority judgment, with whom Floyd LJ agreed and Gloster LJ agreed for the most part, subject to holding that in *Dreamvar*, MdR should have been granted relief from breach of trust in accordance with section 61 of the Trustee Act 1925.

First, the Court of Appeal held that there had been a *prima facie* breach of warranty of authority by OWC,[4] overturning the decision of the judge below on this issue. However, the Court of Appeal held, like the judge below, that reliance upon the breach of warranty was necessary in order to make out a cause of action.[5] Patten LJ considered the evidence on this issue, in the form of two witness statements of Mr Robinson, the purchaser's solicitors. He noted that Mr Robinson transferred the money to the seller's solicitors because they were a reputable firm and not on the basis of any warranty of authority.[6]

Second, the Court held that OWC owed the purchaser no duty of care in negligence and thereby refused to overturn the decision in *Gran Gelato Ltd v Richcliff (Group) Ltd*.[7] In *Gran Gelato* Sir Donald Nicholls V-C held that generally a solicitor in a conveyancing transaction does not owe a duty of care to anyone but its own client. While Patten LJ expressed some reservations about this as a general rule,[8] he considered the relevant Money Laundering Regulations[9] (MLR) together with applying the *Caparo* test[10] and found that OWC did not owe P&P a duty of care in these particular circumstances.[11]

Third, OWC and MMS were held to be in breach of trust, in transferring the purchase monies to the vendor in the absence of a genuine completion, again contrary to the decision of the judge below. The judge below had relied on paragraph 3 of the Law Society's Code for Completion by Post 2011 in holding that this paragraph, setting out the vendor's solicitors' obligations, was inconsistent with a breach of trust claim. The Court of Appeal held that this was not the case and that it 'does no more than to absolve [the seller's solicitor] from any responsibility as the buyer's agent to investigate possible breaches by the seller of his contract'.[12] Neither MMS nor OWC were afforded relief under section 61 because they did not act reasonably.[13]

4 [2018] EWCA Civ 1082; [2018] PNLR 29, [56].
5 *Ibid* at [58]–[59].
6 *Ibid* at [61].
7 [1992] Ch 560.
8 *Supra* n 4 at [71].
9 The 2007 Regulations (2007 No. 2157) were in force at the time but have since been replaced with the Money Laundering Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.
10 As originally formulated in *Caparo Industries plc v Dickman* [1990] UKHL 2; [1990] 2 AC 605.
11 *Supra* n 4 at [82].
12 *Ibid* at [97].
13 *Ibid* at [108].

Fourth, MdR (having conceded that there was a breach of trust on its part) was refused relief under section 61. Again, this is a departure from the decision of the judge below who (while he refused relief) held that if MMS were liable for breach of trust then MdR should be given relief.[14] Patten LJ (with whom Floyd LJ agreed) held that this should not affect the court's exercise of discretion.[15] Gloster LJ disagreed with this approach for reasons which are considered below.

Fifth, once again in a departure from the judge below, the Court of Appeal held that MMS and OWC had acted in breach of an undertaking. This was because paragraph 7(i) of the Code for Completion by Post 2011 meant that the solicitors were undertaking to have the authority of the true seller.[16]

Sixth, the Court of Appeal upheld the judge's findings that the estate agents owed no duty of care in negligence, nor had they acted in breach of warranty of authority.

Analysis

A few important points arise from this decision. First, the potential practical impact is that property solicitors are now effective guarantors that the person purporting to sell the property is the real owner. As acknowledged by the Court of Appeal, this is even in spite of the fact that the solicitors may have carried out all the checks required of them by law and which were reasonably required. The key battleground for future debate, at least so far as the Court of Appeal's judgment is concerned, is the section 61 defence. However, given the majority of the Court of Appeal's analysis, it is unlikely that the buyer's or seller's solicitor will be freed from liability for breach of trust. That is because, a key reason why MdR were not granted relief, was (endorsing this part of the reasoning of the judge below) 'it is common ground that it is insured for events such as this and that its insurance cover is sufficient to cover in full the loss suffered, should it not be excused from liability'.[17] This is in spite of the fact that MMS had also been found liable for breach of trust, had materially failed to carry out proper checks, and thus been refused relief under section 61.

Patten LJ explained that this is not relevant because 'although such a finding gives Dreamvar another means of recovering its money, it does not provide MdR with any grounds for being relieved of its own liability'.[18] He argued that the assessment of reasonableness of MdR's conduct remained the same and that MdR was better placed to protect Dreamvar against the risk. However, in this case those points are entirely artificial, as he had already upheld the judge's finding that MdR had done all that they could reasonably have done. Further, he was at pains to state that the court should first consider whether the party seeking relief behaved honestly and reasonably, and then separately and more generally consider whether they ought fairly to be excused.[19] He failed to explain why it is that MMS also being found to be liable did not impact upon the exercise of discretion in respect of the latter part of the test.

Gloster LJ's approach on this issue is, with respect, to be preferred. Aside from acknowledging that whether MMS was liable was clearly a relevant consideration,

14 *Supra* n 2 at [188].
15 *Supra* n 4 at [111].
16 *Ibid* at [119].
17 *Ibid* at [110].
18 *Ibid* at [111].
19 *Ibid* at [105].

Gloster LJ highlighted that it should not be enough to simply identify that one party is better equipped to absorb the loss than another. Dreamvar was entering into a business transaction as a property developer. The finding of the judge below, not disturbed by the Court of Appeal, was that Mr Vardar of Dreamvar wanted the sale of the property processed as quickly as possible because he felt like he was getting a good deal.[20] It should be irrelevant whether his company was newly formed or the beneficial owner was a young man. To Gloster LJ, the Court's sympathy should not be with one commercial party, rather than another, because one has insurance. This must be correct, because otherwise the upshot is that property conveyancing solicitors will be invariably left bearing responsibility for property developers' opportunistic and risky endeavours.

Second, the Court of Appeal has confirmed that the MLR and the Anti-Money Laundering checks are not for the benefit of individual purchasers, but for 'society at large'.[21] The court has refrained from using these Regulations and checks as able to provide extra protection to buyers. This will come as a particular relief to estate agents who were also obliged to carry out checks, and this decision makes clear the stark difference between those obligations and those of solicitors. Given the different functions that the two professions discharge in the conveyancing context this makes sense.

The decision does, however, leave open the potential for the intervention of Parliament, for example, to impose legislative requirements that go beyond the MLR and checks imposed for the good of society. However, given the extensive pulls on Parliament's time at the moment with the approach of Brexit, it seems highly unlikely that this issue will be placed on the agenda.

Third, insofar as the breach of warranty of authority claim is concerned, the Court appears to have distorted the law on this important issue. In a thorough consideration of the case law the Court distinguished between cases that unambiguously hold that a solicitor does not warrant the accuracy of his instructions[22] (or indeed that the name of the client as it appears in proceedings is correct) and the present case. The key fact, so far as the Court of Appeal were concerned, appears to have been that a Ms Lim of OWC executed and exchanged the contract on behalf of her client.[23] The Court of Appeal does not however, despite careful analysis of the case law, set out precisely what impact this had upon its decision – a crucial issue for solicitors acting for vendors going forward.

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20 *Ibid* at [25].
21 *Ibid* at [78].
22 See, eg, *SEB Trygg Liv Holding AB v Manches* [2006] 1WLR 2276.
23 *Supra* n 4 at [55].