

briefing note

Dreamvar: a nightmare for conveyancers?

Conveyancing is competitive, and it is difficult. It has always attracted significant risk of claims, notwithstanding the low cost which firms can charge. Unfortunately, life for the average conveyancer has just been made much harder following the decision of the Court of Appeal in *Dreamvar (UK) Ltd v Mishcon de Reya* and the linked claim in *P & P Property Ltd v Owen White and Catlin LLP*, both of which were handed down this morning. The decision addresses many aspects of the conveyancing process but the most significant will be the decision in respect of breach of trust.

Overall these are very significant decisions for those who involved in the property market. It will undoubtedly be an issue for those who insure conveyancing practices. One cannot help feel that the Court of Appeal have considered the legal issues without much regard to the very real implications for the conveyancing process, since they have not given any guidance as to what steps conveyancers can take in practice to avoid liability given that, as Mishcons have learnt to their cost, doing everything right may not be enough.

The facts

The cases are examples of the growing number of cases involving identity theft and property fraud. In both cases, an imposter posed as the true owner of a property. Although no-one can be sure how they did it, it is likely they took a tenancy of the property they planned to sell. Being the tenant allowed them to generate identity documents linked to the address, and to arrange access to the property as if they were the owner.

Each buyer instructed solicitors to sell the property, and the sales completed in an unexceptional fashion. Following the sale the purchase money was released to the imposter, and once it was out of reach of the authorities, the fraud was discovered. The buyers had lost their money, retained a continuing liability to repay their loan, and yet they didn't own the properties they thought they had bought. Quite understandably they sued the professionals involved.

P & P sued the imposter's solicitor and estate agent. Dreamvar did the same but they also sued their own solicitor. At trial, both cases failed against the imposter's solicitors and the estate agent. However, despite being found to have acted impeccably, Dreamvar's own solicitors were found liable. That decision caused considerable controversy within the profession given those solicitors were probably the only party who was absolutely free of any criticism.

The outcome of the appeal has therefore been long awaited by the conveyancing community, and also by those who insure them. The significance of this decision is hard to underestimate.

The Court of Appeal decision

The decision addresses a number of aspects, and little of it is good news for conveyancers.

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Breach of warranty of authority

When acting for “the seller”, does a conveyancer warrant that they have a client with authority to transfer title, or is it a narrower warranty that the conveyancer’s client is simply a person who says he can transfer title? The difference is very significant. If it is the wider warranty, a conveyancer is effectively liable for the value of the property in the event he has an imposter as a client, even though he has acted reasonably and has done all of his money laundering checks.

The last time the Court of Appeal dealt with this point they tended to approach matters based on the wider warranty, but many recent first instance decisions have applied the narrower warranty.

Unfortunately the Court of Appeal has been equivocal. Rather than giving clear guidance, they have concluded that the imposter’s solicitor in P & P signed the contract on behalf of the seller, that amounts to the wider warranty. They have not answered whether it would still have been the wider warranty if the fraudster had signed the contract. Due to the evidence which emerged at first instance in *Dreamvar*, it was not a relevant issue in that case.

The only helpful comments from the Court of Appeal are their clarification that the buyer will need to demonstrate actual reliance on the warranty to bring a claim based on it. To protect themselves, selling conveyancers will need to think about expressly excluding any such warranty and making it clear that reliance is unjustified.

Breach of duty

This can be looked at fairly quickly. Conveyancers will be pleased to know that the conventional view has been upheld. A conveyancer acting for a seller does not ordinarily owe a general duty to the purchaser. Conveyancers should take this as the silver lining in the decision.

Breach of undertaking

The code for completion by post includes an undertaking that the “seller’s solicitor [has] the seller’s authority to receive the purchase money on completion”. The Court of Appeal has concluded that the code is predicated on the basis that “seller” means a genuine seller, not an imposter. Therefore, when a selling conveyancer completes in accordance with the code, and where their client is in fact an imposter, the selling conveyancer will be in breach of undertaking.

The court has not addressed the measure of loss arising from the breach of undertaking, but since a breach of undertaking is capable of being enforced summarily, conveyancers can expect innocent purchasers to explore whether claims might be brought under the summary jurisdiction in future in order to get an earlier award. Watch this space.

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Breach of trust

This is the most significant part of the decision. When a buyer hands the purchase monies to his conveyancer, the money is held under a trust. When the buying conveyancer hands it to the selling conveyancer they do so in breach of trust if the property is not actually transferred, which is the position when the “seller” turns out to be an imposter. That isn’t controversial, and was not part of the appeal.

The controversial part of the appeal was whether the buying conveyancer should be excused their liability for breach of trust under section 61 of the Trustee Act 1925 when they had acted properly, and whether the seller’s conveyancer is liable for breach of trust at all when they innocently release the money to the imposter. The decision is not good news for conveyancers, or their insurers.

The court has concluded that the selling conveyancer is in breach of trust since completion must mean a “genuine completion”. Completing on behalf of an imposter is, at best, a false completion. The court has not explored what would be necessary for the selling conveyancer to do to be granted relief from liability for breach of trust, but it should be assumed that, at the least, the selling conveyancer will need to have completed their money laundering checks properly. Any conveyancer who doesn’t do those is very unlikely to be excused from a breach of trust, and frankly they don’t deserve to be.

However it is hard to see what they can do to be sure to be excused from their breach of trust. In *Dreamvar* the buyer’s conveyancers did their job impeccably. No-one criticised their conduct. However, by a majority decision, the court still refused to excuse them from the consequences of their breach of trust. The silver lining for them is that they will presumably try to pass the liability to the seller’s conveyancer, or at least to share it. However, if their impeccable approach does not excuse them from a breach, what should a selling conveyancer do to adequately defend against their own breach of trust? We have to remember that money laundering checks have never been effective to identify all frauds, and they are not even designed to do so. No matter how good your checks, some fraudsters will beat the system. It is to be hoped that the Supreme Court will give the guidance which is absent in the decision of the Court of Appeal.

Against that, these cases will be self-selecting. The issues will only arise where, with hindsight, the parties discover that an imposter is involved, and in those case it will often be possible, with the benefit of forensic hindsight, to find an inconsistency in the quality of the identity documents which have been provided. Unless future courts are kinder to conveyancers than the Court of Appeal has been to *Mishcons*, it potentially isn’t a defence to a claim for breach of trust to say, even if it is the case, that the fraud could not have been identified by the exercise of reasonable skill and care.

The effect of the decision

It is hard to resist the conclusion that the Court of Appeal has effectively made the conveyancing profession guarantors of the genuineness of property transactions. One or other of the selling or buying conveyancer now faces a significant risk of being liable to the purchaser. The measure of damages is very likely to be the value of the property. It might take some time for a fraud to be discovered, by which time further transactions might have taken place, especially if there is a chain.

Conveyancers, and their insurers, must think very carefully about how to proceed in each transaction. The conveyancer remains at risk at any time until title is registered. Only then does the Land Registry assume a liability but even then the Land Registry can bring a subrogated claim if they need to provide compensation when later altering the title to pass title back to the true owner.

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Things to consider include:

- The extent of the disclaimers which a seller's conveyancer will now want to give, and whether they are effective. Equally, will a buyer's conveyancer be able to advise their clients to accept those disclaimers, and what happens if the conveyancers reach an impasse and a transaction becomes deadlocked? We have heard of deadlock in transactions even before the decision of the Court of Appeal, and this will not make things easier. It is especially unhelpful that no conveyancer acts exclusively in purchases or exclusively in sales. They will have to change their approach depending on their role in the transaction in question.
- Does a buyer's conveyancer now need to think about the level of the seller's conveyancer's insurance? If the property is worth more than a solicitor's minimum level of cover (presently £2 million for a partnership and £3 million for a corporate, but the Solicitors Regulation Authority wants to reduce those levels to nearer £500,000) do they need to see a certificate of insurance before being prepared to complete?
- Can more be done to bolster the money laundering checks which are done on behalf of a selling client? Should the seller's conveyancer offer the buyer's conveyancer the opportunity to do their own money laundering checks on the seller, so responsibility for checking their identity is transferred, or shared? Should the parties sub-contract the checks to a third party? It won't avoid their own liability but it might mean there is a third party from whom to seek a recovery, or with whom to share the exposure.
- Overall, it remains vitally important for conveyancers to be extra cautious in high risk cases, which will include high value properties, properties without mortgages, tenanted properties, sellers based overseas and sales where the price looks to be too good to be true.
- Property owners should take steps to protect themselves against identity theft. All owners of property should register their property with the Land Registry Property Alert Service, so they get an email if there are any dealings with their title. It will always be better to stop the fraud than to await the consequences and to then try to recover their property.

What happens next?

It is a real shame that the Law Society did not take a greater role in this appeal given their position as the body able to speak on behalf of much of the conveyancing profession. They intervened, and lodged a skeleton. However, they applied for permission to intervene at such a late stage, despite telling the Law Society Gazette almost a year before the decision that they intended to do so, that it was too late for the court to allow them time to appear at the appeal through counsel. That appears to be a real missed opportunity since the court might have benefited from hearing about the effect on conveyancing overall.

Whilst there are no clear answers at the moment, and it can only be hoped that the Supreme Court are asked to consider the issues, conveyancers face some very difficult issues over the coming months. It is to be hoped that the Law Society and the Council for Licensed Conveyancers provide urgent guidance. This has the feel of an issue which could be solved by standalone transactional insurance policies to protect against identity theft.

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Pending that, conveyancers (and their insurers) need to consider seeking advice. They are welcome to contact [Niall Innes](#) or [Jacqui King](#), who acted for the successful estate agents in *P & P* at first instance and on appeal, or [Angus Turner](#) if they would like to discuss the issues arising from this case.



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