INSURERS TO PICK UP THE BILL IN £1M IDENTITY FRAUD CASE

Dreamvar v Mishcon de Reya and another [2016] EWHC 3316

In the latest decision to wrestle with issues relating to the dangers now inherent in the sale and purchase of property, the Court in *Dreamvar v Mishcon de Reya and another [2016] EWHC 3316* was required to determine from whom, if at all, an innocent purchaser was entitled to recover damages where the property was placed up for sale by an imposter.

The facts

Dreamvar (a company) intended to purchase a residential property (the "Property") for £1.1m. They were informed that the Property was unoccupied and unencumbered and its registered owner, David Haeems, was seeking a prompt sale due to a pending divorce.

The vendor (by which we refer to the purported seller), who had retained the services of Mary Monson Solicitors Limited ("MMS") was an imposter. He had provided MMS with an independently certified copy of a driving licence and TV licence to establish his identity. The address on the driving licence, issued only several days beforehand, was for a property in Catford – later shown as being the vendor's address in the Contract for Sale. MMS admitted that it did not carry out the identity checks required of a competent solicitor.

Dreamvar instructed Mischon de Reya ("MdR"). During initial exchanges MMS informed MdR that it had not received its "*client's ID or formal instructions in writing*". The same day, MdR issued a retainer letter to its client. This did not address the manner in which MdR was to hold, or be authorised to release, purchase monies.

The transaction was otherwise unremarkable. MdR completed a Report on Title in the usual way. MdR accepted that it did not identify to Dreamvar that there was any risk of identity fraud. The purchase monies were transmitted from MdR to MMS. Simultaneous exchange (adopting Law Society Formula B) and completion were effected that day. MdR confirmed the purchase monies could be released and MMS transmitted the balance of £1,078,570, to the vendor's nominated firm of solicitors, Dennings. Dennings were instructed to pay those monies to an account in China from which they have not been recovered.

Claims against MMS

Dreamvar alleged that MMS had acted:-

(i) In breach of trust, as MMS was authorised to pay away monies only upon a genuine completion occurring in respect of a genuine transaction;

(ii) in breach of undertaking, relying upon the provisions of paragraph 7(i) of the Law Society Code for Completion by Completion by Post (2011 edition), that it had the authority of the real Mr Haeems to receive the purchase monies upon completion;

(iii) In breach of warranty of authority as it had warranted it had the authority of the registered owner of the Property; and/or

(iv) In breach of warranty of authority it acted for the person claiming to be Mr Haeems and that it had exercised reasonable skill and care in establishing his identity.

Breach of Trust - Having regard to the recent decisions of *P&P* and *Purrunsing v A'Court & Co*, the Court accepted the purchase monies, once transferred to MMS, were held on trust by them pending completion. The Court concluded that MMS was entitled to release the monies (to itself or to its client's order) even if no genuine completion had taken place. The Court therefore rejected the allegation of breach of trust.

Breach of Undertaking - The allegation derived from paragraph 7(i) of the Code which provides *"the seller's solicitor undertakes (i) to have the seller's authority to receive the purchase money on completion"*. Dreamvar argued this required MMS to have the registered proprietor's authority, rather than that of the vendor, when effecting completion and receiving the purchase monies. If accepted, this would run contrary to the conclusion reached in *P&P*.

Breach of Warranty - The Court noted the observations in *Bristol & West v Fancy & Jackson* and *Midland Bank v Cox McQueen* that if an obligation were placed upon a solicitor that imposes upon it the risk that the transaction is a fraud then clear wording would be required. Having regard to the evidence of MdR's solicitor, that no firm would be willing to give an undertaking as to the identity of its client, the Court concluded that any reference to 'seller' within the Code was intended to refer to the individual purporting to sell rather than the registered proprietor.

In light of this assessment, the Court determined that any further references to 'seller' within the course of the transaction meant only MMS' client. Fundamentally, MdR recognised in evidence there was a prospect of MMS acting for an imposter and, as such, had not understood MMS to be warranting that its client was, in fact, the registered proprietor. MdR expressly stated that they had not relied upon any representation to that effect. This acknowledgment proved fatal to the breach of warranty allegations.

Claims against MdR

Dreamvar alleged that MdR:-

(i) negligently failed to warn it of the risk of identity fraud having regard to ten features of the transaction;

(ii) negligently failed to seek or procure an undertaking from MMS that MMS had taken reasonable steps to establish the identity of its own client;

(iii) paid away (to MMS) the purchase monies, in breach of trust, where a genuine completion of a genuine purchase had not occurred.

Duty to warn of Fraud - The Court rejected the ten factors. MdR's solicitor's evidence was that, even with the benefit of hindsight, the various features (high value, unencumbered property, vendor living elsewhere, rushed sale etc) did not give rise to suspicion of fraud where the vendor had instructed reputable solicitors whose conduct entitled MdR to conclude that MMS had undertaken reasonable due diligence as to their client's identity.

Procure an undertaking - the Court noted both that the transaction had been subject to the terms of the Code and that the Law Society Handbook set out guidance for the conduct of such matters. Neither imposed an obligation to obtain an undertaking. This aspect was dismissed.

Breach of Trust - the Court noted that the basis for passing monies from MdR to MMS depended upon the terms of the former's retainer. In the absence of express terms it was argued that the monies could be paid either (i) on actual completion (ie of a genuine transaction), or (ii) against an undertaking from the seller's solicitor to be provided with the required title documents.

Relying upon the decision in *Lloyds TSB v Markandan & Uddin [2012]*, the Court held that the monies should be paid away only upon a genuine completion taking place and rejected MdR's argument that a solicitor's undertaking was a sufficient basis . Accordingly MdR was found to have acted in breach of trust.

Section 61 Trustee Act 1925

Under s 61, a trustee found liable for breach of trust can be excused by the Court if they have acted honestly and reasonably in the course of a transaction and ought fairly to be excused for the consequence of the breach.

Having concluded that MdR acted non-negligently but in breach of trust the Court had to determine whether MdR 'ought fairly to be excused'. The Court assessed the impact of the breach upon Dreamvar and the consequence should relief be granted to MdR and, secondly, the financial impact to both Dreamvar and MdR.

The Court concluded that MdR, with or without the benefit of professional indemnity insurance, was far better-placed to absorb the (financial) loss than Dreamvar. Whilst MdR was not negligent, the Court noted that it was in a position to have advised upon and secured better protection for Dreamvar against the potential adverse consequences of the transaction. Accordingly, the Court decided it was inappropriate for MdR to be excused the breach of trust.

Comment

This case represents the latest in a series of three cases (following *P&P* and *Purrusing v A'Court*) where an innocent buyer has been duped into losing significant sums without acquiring good title to property.

The decision can appear confusing – MMS admitted a failure to verify its client's identity to the required standard yet, despite such concession, was exonerated of liability. MdR, by comparison, despite being found to have acted honestly and non-negligently, were left facing a damages bill of £1m+.

Those firms acting for purchasers should heed the guidance available to them and ensure they have procedures in place to identify higher risk transactions such as those involving vacant or high value properties. Purchasers' solicitors would be well-advised to obtain the seller's solicitors 'know your client' information (as envisaged by the 2007 Money Laundering Regulations). A refusal to provide copies may, of itself, present a 'red flag' which would require reporting to the purchaser client.

For insurers, it is troubling that the very existence of MdR's PII cover was considered a significant factor in the Court's refusal to afford relief under section 61. In circumstances where purchasers will not likely have

insurance place to militate against such an eventuality (a chance, perhaps to introduce a new product akin to title indemnity insurance?) firms and their insurers, will be left to foot the bill.

Solicitors have long been custodians, qua trustees, of client monies leading to many breach of trust cases being brought where such monies have been wrongly paid away. The decision, which remains subject to Appeal, is unlikely to have a material affect on premiums in the short term at least.

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