

Editor's Notebook

Seller Fraud and Conveyancers' Liabilities

Lately, the problems caused by seller fraud have materialised in a string of cases dealing with the potential liability of the buyer's solicitor. In most of these cases the devil is in the detail - particularly the interpretation of the small print in the documentation - but the basic outline is simple. A buyer transfers funds to his solicitor's client account for completion of a house purchase. The buyer's solicitor thoroughly checks title and relies on the other side to verify the seller's identity. All appears well. The buyer's solicitor pays the other side and takes a signed transfer form. Before registration, however, it transpires that there was an identity theft, the seller had no title, and the money has been spirited away. A similar tale might have been told about money provided by a lender by way of mortgage finance. The buyer (or the lender), having lost the money and got nothing for it, casts around for a target to sue and alights on his own solicitor. Is the solicitor safe if he acted honestly, reasonably and met competent professional standards throughout? Recent case law says no. That makes profoundly disturbing reading for solicitors. Action will be required and the impact for conveyancing practice is likely to be significant.

The setting for the problem is the lack of precision in the terms on which the solicitor is to act. When funds are transferred by the buyer or lender to a solicitor, they are held on trust for the client¹ but are subject to the client's instructions about releasing them for completion. A typical buyer will have given little thought to the details of what exactly the solicitor should require before the price is released, so the client instructions and the terms of the trust may be patchy, leaving them to gap-filling by the court. A lender is likely to have given somewhat more thought to the instructions about release of funds, which are normally embodied in the lender's standard in-house instructions or on the terms of the UK Finance Mortgage Lenders' Handbook. They might specify that the solicitor holds the advance on trust 'until completion' and require the solicitor to certify 'good and marketable title' to the property; yet those terms still omit much of the detail of what is required and so the precise obligations on the solicitor are left to be fleshed out by the court through a process of interpretation. So the problem of liability could be eliminated by tightly drafted instructions which make sure that all the relevant risks are explicitly allocated between solicitor and client.

While the current practices remain, however, it is worth investigating how the courts have approached the issue of liability. One might expect that the starting point should be that the buyer's solicitor's responsibility is only to exercise their calling with the level of care that comes from centuries of accumulated professional knowledge of the risks in conveyancing and the practical ways in which the profession mitigates them: a duty based on reasonableness. In the lenders' litigation

¹ *Twinsectra Ltd v. Yardley* [2002] 2 AC 164 at [99] per Lord Millett, *Target Holdings v. Redfern* [1996] AC 421 at 436A-C per Lord Browne-Wilkinson.

that followed the 1990s crash, there were judicial comments which appeared to take that approach.² For example, a solicitor's undertaking to release mortgage funds only against good marketable title does not constitute a guarantee of title to the lender but instead is given a qualified interpretation as 'what a reasonably competent solicitor acting with proper skill and care would accept as a good marketable title.'³ A general reluctance towards strict liability on conveyancing solicitors is hinted at elsewhere: 'it would in my judgment require very clear wording to produce so inconvenient and impractical a result. No solicitor could safely accept such instructions, for he could never be certain that he was entitled to complete.'⁴ Those comments were made in the context of burdens and flaws affecting title, but they are equally applicable to the question of whether the seller has the right to convey - and one of the leading cases from that era decided against liability on the part of the lender's solicitor when a seller's signature was forged.⁵ Despite those indications, however, there has subsequently been increasing recognition of liability without fault.

Let us take three recent examples. In *Markandan & Uddin*,⁶ it was held that the payment by the buyer's solicitor on the strength of an undertaking given by the other side was necessarily in breach of trust when paid to a fraudster falsely passing himself off as a solicitor acting for the seller. Even if the money were paid to a genuine solicitor in exchange for a forged transfer form, that too would be a breach, as it would have been 'no completion at all'.⁷ In *RA Legal*,⁸ it was held a breach of trust to transfer the funds to the solicitor on the other side, on the strength of a professional undertaking to hold them to the order of the buyer's solicitor until completion, if the solicitor on the other side turned out to be a fraudster who had no instructions to sell from the true owner. In *Abensons Law Ltd*,⁹ it was held that a solicitor's undertaking to procure a deed which was 'validly executed' was sufficient to impose strict liability if it turned out to be forged, despite earlier authority that an undertaking to procure a deed which was 'executed' (without the reinforcing adverb) was not sufficient to impose strict liability on the solicitor.¹⁰ If decisions turn on such subtle linguistic distinctions, it suggests little judicial willingness to resist strict liability.

Conventionally, one might not have read too much into the strict liability found in cases like these because of the widespread assumption that statutory relief

² E.g. *Barclays Bank plc v. Weeks Legg & Dean* [1999] QB 309, *Bristol & West Building Society v. Mothew* [1998] 1 Ch 1, *Midland Bank plc v. Cox McQueen* [1999] PNLR 593. Those attitudes find occasional echoes in more recent decisions, e.g. *P&P Property Ltd v. Owen White & Catlin LLP* [2017] PNLR 3, *Patel v. Freddy's Ltd* [2017] EWHC 73.

³ *Barclays Bank plc v. Weeks Legg & Dean* [1999] QB 309 at 328A per Millett LJ.

⁴ *Bristol & West Building Society v. Mothew* [1998] 1 Ch 1 at 24C per Millett LJ. See also *Broker House Insurance Services Ltd v. OJW Law* [2011] PNLR 23.

⁵ *Barclays Bank plc v. Weeks Legg & Dean* [1999] QB 309, third action (*Mohamed v. Farida*). The two forms of liability in breach of contract and breach of trust were understood to correspond to one another: p.324D-F.

⁶ *Lloyds TSB Bank plc v. Markandan & Uddin* [2012] PNLR 20. See also *Nationwide Building Society v. Davisons Solicitors* [2013] PNLR 12.

⁷ *Lloyds TSB Bank plc v. Markandan & Uddin* [2012] PNLR 20 at [50] per Rimer LJ (obiter).

⁸ *Santander UK v. RA Legal* [2014] PNLR 20.

⁹ *LSC Finance Ltd v. Abensons Law Ltd* [2015] EWHC 1163. See also *Zwebner v. The Mortgage Corporation* [1998] PNLR 769.

¹⁰ *Midland Bank plc v. Cox McQueen* [1999] PNLR 593 at 602 per Lord Woolf MR.

under section 61 of the Trustee Act 1925¹¹ would provide suitable protection for the solicitor in the event of breach of trust over the buyer's or lender's funds.¹² That brings us to the latest decision, *Dreamvar (UK) Ltd v. Mishcon de Reya*,¹³ which is noteworthy for refusing any relief under section 61. The High Court held that it was an implied term of the retainer between a buyer, Dreamvar Ltd, and its solicitors that the funds should only be released to the seller's solicitor on a 'genuine' completion,¹⁴ and as the transaction turned out to involve a sale by a fraudster, there had inevitably been a breach of trust by the buyer's solicitors. Despite having acted honestly and reasonably, they were denied relief under section 61 because of the unfair effect it would have on Dreamvar Ltd. That unfairness was, in part, due to the solicitors being better placed than the client to absorb the loss.¹⁵ It brings home the point that section 61 is not simply a no-negligence defence. It seems, in retrospect, that it was rather complacent to tolerate strict liability in respect of releasing client funds on the assumption that section 61 would protect the careful solicitor.

Dreamvar illustrates that it is a thoroughly unsatisfactory result which emerges from the combination of strict liability and the section 61 defence. On the one hand, no buyer can count on getting secure protection for client money because of the risk that section 61 will be successfully invoked. On the other hand, no solicitor has the reassurance that taking reasonable care will necessarily discharge their professional responsibilities. The current position satisfies neither party.

If section 61 cannot be relied upon as the sweetener that makes strict liability palatable, is there anything that remains to justify strict liability in respect of solicitors releasing client funds against undetectable identity fraud? During the nineteenth century an increasingly strict approach to trustee liability was tolerated because of the access which trustees had to court for directions or administration. The point was made by the plain-speaking Lord Lindley: 'I think that trustees have been very harshly dealt with by the Court of Chancery from time out of mind, and the only justification for it is that they have the compensating protection of the Court; that is to say, they can always file a bill, or bring an action for the administration of a trust.... they can go to the Court for advice if they want it.'¹⁶ But that solution offers no real assistance today for the buyer's solicitor seeking protection against possible seller fraud; a pre-emptive court application in all conveyancing transactions would, of course, be absurdly impractical.¹⁷ If court applications are a non-starter, it means that this historic ground for tolerating strict trust liability in these circumstances falls away too.

¹¹ 'If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust... but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.'

¹² *Barclays Bank plc v. Weeks Legg & Dean* [1999] QB 309 at 328E *per* Millett LJ. See also *Lloyds TSB Bank plc v. Markandan & Uddin* [2012] PNLR 20 at [61] *per* Rimer LJ.

¹³ *Dreamvar (UK) Ltd v. Mishcon de Reya* [2016] EWHC 3316.

¹⁴ Whether by actual delivery of the title documents or the standard undertaking to forward them under the relevant Law Society code for completion.

¹⁵ *Dreamvar* at [185]-[187]. See also *Santander UK v. RA Legal* [2014] PNLR 20 at [33] *per* Briggs LJ.

¹⁶ 'Report from the Select Committee on Trusts Administration' (1895, HC Papers, no. 248, XIII), Minutes of Evidence, answers to questions 422 and 462.

¹⁷ And query eligibility to seek directions on this question, since the release of funds to the other side is technically a matter of the client's authorisation as beneficiary rather than execution of the trust.

Overall, it appears that the current legal rules, without more, are not up to the task of protecting solicitors and protecting clients. In the first place, section 61 is poor legislation. As pointed out by a future law lord¹⁸, the idea of a grace-and-favour dispensation from legal principle, which depends on a subjective impression of fairness and is assessed after the event with the benefit of hindsight, is quite alien to accepted ideas of private law based on rights and duties. Section 61 is singularly inappropriate where the trust is not set up to distribute family gifts but an automatic response in the context of a client providing funds to a professional under a contractual arrangement - the original section was not designed with that context in mind.¹⁹ Secondly, the strict liability rule is not offset by a practicable regime for obtaining protective court orders, nor by a satisfactory no-negligence defence. Thirdly, there is something of a mismatch between the generous approach to title matters mentioned earlier²⁰, fulfilled by reasonable professional care, and the harsh approach to seller identity in recent cases which has imposed strict liability. If there is to be a tenable distinction drawn between title matters and seller identity, which seems to be out of keeping with older precedents, then it needs to be delineated and justified.

An appeal in *Dreamvar* has been set down for February 2018, but no manipulation of liability rules is likely to achieve a solution that satisfies buyers, lenders and solicitors. That is not to say that the problem is utterly intractable. But in the current climate no solution is going to be satisfactory unless it gives a cast-iron guarantee to the individual who loses his life savings in a conveyancing fraud. Consumers are not going to be appeased by a mere incremental uplift in the extent of precautions required from solicitors—making additional checks, reviewing the other side’s KYC steps or invoking the somewhat primitive right to attest execution.²¹ There are, however, plenty of other options which could offer full consumer protection. One way to bring about complete security might be through a regime of strict liability that cannot be excluded by retainer terms, and which is coupled with an approach that ensures section 61 is not applied to the detriment of consumers. That seems to be the direction case law is heading, but section 61 is not well suited to that purpose - it is heavily dependent on the slippery test of fairness, lacks predictability and does not distinguish consumer cases from others.

Full consumer protection does not, of course, have to mean liability on solicitors. The development of a simple insurance product to cover the risk of seller imposture might be the easiest solution, no doubt supplemented by a duty on the solicitor to advise buyer clients of it. Alternatively, with a little imagination, conveyancing processes could be redesigned to link into the guarantee already administered by the land registry. It would be possible to adopt continental processes whereby the registry passively and unquestioningly accepts transfers submitted by particular conveyancing professionals. Equally, a move to e-conveyancing would close the gap between payment and registered title, ensuring that that buyer parted

¹⁸ F. H. Maughan, ‘Excusable Breaches of Trust’ (1898) 14 LQR 159.

¹⁹ See the ‘Report from the Select Committee on Trusts Administration’ (1895, HC Papers, no. 248, XIII) which uses examples of family trusts but not client-professional trusts.

²⁰ Specifically *Barclays Bank plc v. Weeks Legg & Dean* [1999] QB 309, third action (*Mohamed v. Farida*), standing resolutely against strict liability in cases of seller forgery.

²¹ Section 75, Law of Property Act 1925.

with the money at the same time as acquiring guaranteed title notwithstanding forgery. Or, instead, the buyer could wait until registration to hand over payment; and if cautious sellers dislike transferring full ownership before payment, another continental process could be adopted whereby the seller gives the buyer's solicitor a power of attorney to complete the sale, and once the power is registered there can be no question over its validity.

Whatever new processes emerge, one pressing matter has become clear from the case law. The drafting of the Lenders' Handbook and the Codes for Completion, which dictate the terms of the solicitor's liability, is in need of thoroughgoing review so that there is consistent usage of terms such as 'completion' and 'execution' including, in particular, an explicit statement of whether they include an act that is only ostensibly valid and turns out to be a fraudulent nullity.

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