Article written by Nicole Sandells QC and Nicholas Broomfield of 4 New Square on 23rd May 2018.

P&P Property Limited v Owen White & Catlin LLP

Dreamvar (UK) Limited v Mishcon de Reya

[2016] EWCA Civ. 1082

P&P Property Limited v Owen White & Catlin LLP and ***Dreamvar (UK) Limited v Mishcon de Reya*** [2018] EWCA Civ. 1082 were conjoined appeals that raised common issues about the liability of solicitors and estate agents in cases involving identity fraud. In both cases a fraudster ("F") posed as the owner of a property, instructed solicitors and selling agents to act for him, exchanged contracts and completed in accordance with the Law Society Code for Completion by Post (2011) ("the Code"). The frauds were discovered prior to registration, but inevitably by that point the purchase monies had disappeared.

The *Dreamvar* cases consider important questions concerning the scope of solicitors' trust obligations and duties of care, wherever they are in the conveyancing chain, together with issues of warranty of authority and the meaning and effect of the Code. Perhaps most importantly, they gives a clear steer as to how the Court of Appeal sees the role of section 61 of the Trustee Act 1925 when solicitors seek to be relieved from liability for breach of trust.

David Halpern QC of 4 New Square represented Dreamvar (UK) Limited and **Ben Patten QC** and **Katie Powell**, also of 4 New Square, represented Owen White & Caitlin LLP and Mary Monson Solicitors Limited. The decision of the Court of Appeal is considered by **Nicole Sandells QC** and **Nicholas Broomfield**.

The facts and the decision of the Court at first instance

The facts of the two cases are remarkably similar. In *P&P Property Limited v Owen White & Caitlin LLP* a developer, P&P Property Limited ("P&P") made an offer to purchase 52 Brackenbury Road ("52BR"), which was registered at HM Land Registry in the name of Mr Harper. F, pretending to be Mr Harper,

telephoned Owen White & Caitlin LLP ("OWC") first indicating that he intended to raise a mortgage against 52BR, and later instructing OWC that he intended to sell it. F instructed Winkworth that he required a rapid sale, as a result of which 52BR was marketed for 75% of its market value. Winkworth relied upon OWC to check the identity of the vendor.

OWC failed to carry out comprehensive identity checks, and there were a number of inconsistencies and discrepancies in the information provided to OWC (e.g. various signatures were inconsistent, F gave different addresses and bank statements provided by F to OWC should, in the trial judge's judgment, have led OWC to make further enquiries). Nevertheless, on 4 December P&P made an offer to purchase 52BR which F accepted.

On 12 December the deposit of £103,000 and a further sum of £327,000 provided by the mortgagees was transferred to OWC. On the basis of a request from OWC that this money could be used to complete the purchase of a property in Dubai, P&P's solicitors agreed that the £430,000 should be held by OWC as agent for the vendor. The balance (£600,000) was transferred to OWC on 12 December and the net proceeds of sale were paid to F on the same day. The contract and transfer documentation were signed for F by OWC. F's fraud was discovered on 17 January 2014 following an application to register P&P's title at HM Land Registry.

After discovery of the fraud, P&P brought claims against OWC relying on breach of warranty of authority, breach of undertaking, negligence and breach of trust. It also sued Winkworth for breach of warranty of authority and in negligence. In summary, P&P alleged that both OWC and Winkworth held themselves out as having the authority of the true owner, the real Mr Harper, and were negligent in not carrying out adequate identity checks on F and (in the case of OWC) did not have authority to disburse the purchase monies to their client other than on completion of a genuine sale. At first instance Mr Robin Dicker QC dismissed each and every one of P&P's claims ([2016] EWHC 2276 (Ch)) and P&P appealed the decision to the Court of Appeal.

In *Dreamvar (UK) Limited v Mishcon de Reya* a small developer ("Dreamvar") was informed by estate agents Douglas & Gordon ("D&G") that a client was looking for a quick sale of a property at 8 Old Manor Yard, Earl's Court, London SW5 ("8OMY"). Dreamvar inspected 8OMY, which was vacant, and had an offer of £1.1m accepted.

Dreamvar instructed Mishcon de Raya ("Mishcon") to act on the purchase, acknowledging that there would not be time to carry out all of the necessary searches. Mishcon's letter of retainer did not expressly deal with the terms and circumstances under which the purchase monies would be held and/or released to the vendor or his solicitors.

D&G sent a memorandum to Mishcon naming Mr David Haeems as the vendor and stating that his solicitors were Mary Monson Solicitors Limited ("MMS"). On 3 September MMS indicated that it had not received proof of Mr Haeems' ID and was therefore unable to send out the contract pack. In fact, MMS never met Mr Haeems and took no proper steps to verify his identity. MMS acted for F, and not the true Mr Haeems, the owner of 8OMY. Notwithstanding this, on 11 September Mishcon received from MMS the draft contract, office copy entries and TA06 and TA10 forms, each apparently signed by Mr Haeems.

It was agreed that completion would take place in accordance with the Code and that MMS would send the purchase monies to another firm of solicitors, Dennings. On 17 September Mishcon sent the purchase monies to MMS on terms that MMS hold it to Mishcon's order pending obtaining indemnity insurance to cover the risk that there were adverse rights of way over 8OMY. That took place later the same day, and exchange and completion took place simultaneously that afternoon.

Dreamvar started work on 8OMY, but after an application was made to register Dreamvar as proprietor the Land Registry contacted the real Mr Haeems and the fraud was discovered.

Following discovery of the fraud, Dreamvar brought proceedings against Mishcon for negligence and breach of trust and MMS for breach of warranty of authority (not pursued in the Court of Appeal), breach of undertaking and breach of trust. A late application, heard by the Court of Appeal, was made by Dreamvar to amend to include an allegation of negligence against MMS. At first instance Mr David Railton QC dismissed the claim against Mishcon for negligence but found that it had acted in breach of trust by releasing the money to a fraudulent purchaser and denied it relief under s.61 of the Trustee Act 1925 ("TA 1925"). The claims against MMS were dismissed.

The decision of the Court of Appeal

Lord Justice Patten, with whom Gloster LJ and Floyd LJ agreed (save in respect of s.61 TA 1925, where Gloster LJ dissented), handed down judgment on 15 May 2018. The Court of Appeal held that OWC and Winkworth were not in breach of warranty of authority or negligent, but that OWC and MMS were in breach of undertaking under the Code and had acted in breach of trust. The Court of Appeal upheld the first instance decisions that a vendor's solicitor (or estate agent) does not owe the purchaser a duty of care when verifying the identity of his client. None of the solicitors, including Mishcon (who accepted that it acted in breach of trust but contended that it should be relieved from liability) was granted s.61 TA 1925 relief.

Breach of Warranty of Authority

P&P alleged that by signing the contract of sale on behalf of "the seller", and against the backdrop of the requirements of the Money Laundering Regulations 2007 ("the MLRs"), OWC represented that it had authority to act on behalf of the *real* Mr Harper and not F using Mr Harper's identity to pose as the seller. Similar, but weaker, allegations were made against Winkworth, relying on the MLRs. Both resisted this allegation on the basis that they did not guarantee the vendor's identity, the MLRs do not impose such liability on solicitors/estate agents and the position would have been no different if they had carried out thorough checks. As Patten LJ identified at [35], the question for the Court was, *"who is the other person for whom [OWC] purported to contract and Winkworth to act?"* In order to answer that question it was therefore necessary to consider whether the obligation of the vendor's solicitors/estate agent to check the identity of the vendor creates an obligation which amounts to a warranty that the agent/solicitor is acting for the *real* owner of the property, as opposed to the firm's actual client, F.

Following detailed consideration of the authorities concerning warranty of authority, Patten LJ held that Winkworth had not breached any warranty of authority. It should be noted that the allegations against Winkworth were substantially the same as would be made against a solicitor in most circumstances. The claims against OWC went further in this case because OWC executed the contract for F- see [55] and [56]. Patten LJ held that OWC's position was therefore different. By executing the contract of sale itself, and by adopting the terminology of the contract in so doing, OWC had, he said, warranted that it had authority to act for the *real* vendor, as opposed to F. This was the only meaning that could be given to the warranty. However, lesser statements, even in the context of obligations imposed on Winkworth and OWC by the MLRs, were not, upon applying the objective bystander test, sufficient to amount to warranties that they acted for the real vendor. Patten LJ concluded that they were *"no more than a statement of the details which they had been given by the fraudster in respect of the sale of the property"* and concluded that the selling agent had not warranted that it had been instructed by the real Mr Harper. It follows that if all that is alleged against the solicitor is a failure to comply with the MLRs coupled with correspondence indicating that the solicitor has *a* client, there is unlikely to be a breach of warranty of authority. Something expressly linking the solicitor's client to actual ownership of the property is required.

Even then, that may well not get the claim home. Despite Patten LJ's findings, the claim failed because, at [61], he also upheld the trial judge's finding that P&P had not been induced into the purchase of 52BR by the warranty. Breach of warranty of authority therefore remains a very problematic claim in such cases.

Breach of undertaking

That is not, however the end of the story, as Patten LJ effectively achieved Dreamvar and P&P's desired result through the interpretation of undertakings in the Code.

Paragraph 7 of the Code contains the following undertaking (emphasis added):

> "The **seller's solicitor undertakes**:
> (i) To **have the seller's authority to receive the purchase money** on completion; and (ii) on completion, to have the authority of the proprietor of each mortgage, charge or other financial incumbrance which was specified under paragraph 6 but has not then been redeemed or discharged, to receive the sum intended to repay it;
> BUT if the seller's solicitor does not have all the necessary authorities then:
> (iii) to advise the buyer's solicitor no later than 4pm on the working day before the completion date of the absence of those authorities or immediately if any is withdrawn later; and
> (iv) not to complete without the buyer's solicitor's instructions."

As Patten LJ stated at [113], "[t]he issue is therefore the same as the one which arises in relation to the claim for breach of warranty of authority save that in this case it turns on the proper construction of the express undertaking that was actually given". He then concluded that, on a true construction, paragraph 7 is an undertaking that the vendor's solicitor has the authority of the *real* vendor, the true owner, to receive the purchase monies on completion – because only the real seller could give that authority for the purposes of a genuine completion. The claim for breach of undertaking against MMS and OWC therefore succeeded, and achieved the same result as a breach of warranty of authority claim.

Negligence

At [62] – [82] the Court of Appeal considered the important question of whether or not solicitors and agents acting for the vendor owed a common law duty to the purchaser, on the other side of an apparently arms length transaction, to ensure that the transaction is a genuine transaction. As Patten LJ identified at [65], this question arises from the mechanics of residential conveyancing; the vendor's solicitors and agents have access to the vendor and are required to carry out identity checks, whereas the purchaser's solicitors do not and are not. The issue arose in both appeals; in *P&P* the purchaser alleged that OWC and Winkworth owed it a duty of care and in *Dreamvar* the purchaser sought permission to amend to make allegations of negligence against MMS.

The idea that such a duty could arise seems heretical, but the claimants sought to pull it together from the duties undoubtedly imposed on those acting for vendors and an extension of *White v Jones* type liability, distinguishing *Gran Gelato Ltd v Richcliffe (Group) Ltd* [1992] Ch 560. The argument was that the test laid down by the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 had been satisfied because it was obvious that the purchaser (who could not conduct his own identity checks) would rely upon the

due diligence of F's agent. Further, the duty owed to the purchaser would not place the agent in conflict with its own client, as it was required to carry out the identity checks in any event.

Following consideration of the law on assumption of responsibility, recently reaffirmed in a similar context in *Steel v NRAM* [2018] UKSC 18, Patten LJ considered the following factors: (a) there was no actual assumption of responsibility to the purchaser; (b) the MLRs do not create a private law right of action; and (c) *P&P* and *Dreamvar* are distinguishable from *White v Jones* on the grounds that in the latter case the instructions given by the client were intended to benefit a third party, whereas a conveyancing transaction is an arms length arrangement between the parties. Patten LJ concluded at [82] that it would not be fair, just and reasonable to treat the vendor's solicitors as having assumed responsibility to the purchasers for the adequacy of the due diligence performed in relation to their client's identity. Patten LJ accordingly upheld the decision of the trial judge in *P&P* and dismissed Dreamvar's application to amend.

Breach of Trust

Both *P&P* and *Dreamvar* concerned the use, and interpretation, of the Code in imposing and defining trust obligations on the vendor's solicitors. The question for the Court of Appeal was whether, at the point when the purchase money is released by the vendor's solicitor to his client, the terms on which that solicitor holds the money authorise that payment, such that it is not a breach of trust, even if the transaction is not a genuine sale.

Patten LJ started from the well-established starting point that purchase monies are held, by the purchaser's solicitor, on trust for the purchaser pending completion; *Target Holdings v Redferns* [1996] A.C. 421 at 436B – C. Completion in this context was defined by the Court of Appeal in *Lloyds TSB Bank v Markandan* [2012] EWCA Civ 65 as the exchange of genuine money for genuine documents. In cases where the Code applies, the steps that a solicitor must take to complete the sale, and the terms upon which a solicitor holds the purchase money, are set out in the Code. The issue for the Court of Appeal was the construction of the Code, and whether the word completion could mean different things to different parties at different stages of a conveyancing transaction, such that release of the monies to the vendor could be a breach of trust by the purchaser's solicitor, but not the vendor's solicitor.

MMS and OWC argued that, where the Code applies (and no other terms are superimposed), its true construction means that the vendor's solicitor never becomes trustee and/or is always authorised to release the monies, because under the Code completion takes place at the moment that the purchase monies come into the hands of the vendor's solicitor, and means nothing more than that receipt - regardless of whether there is a completion as defined in *Markandan*. On that basis, there is no *scintilla temporis* during which vendor's solicitor becomes trustee of the money for the purchaser. The vendor's solicitor is authorised to pass the money to his client come what may and cannot be liable for a breach of trust, even if a *Markandan*

completion never takes place. If the transfer, or the conveyancing documents, turn out to be forgeries, so the argument goes, then the purchaser's claim is against the fraudulent vendor, not his solicitor. In reality, following *Markandan*, the easiest claim in such circumstance is a breach of trust claim against the purchaser's own solicitor – to which he will have no answer, as he has released money without receiving genuine documents in return.

If the argument is right, then, there is a serious mismatch between the obligations of the two solicitors at either end of the transaction and a yawning gap in the Code. The argument found favour at first instance, but Patten LJ was quick to point out the misconceptions at its root.

First, Patten LJ pointed out at [91] that, but for the Code, there is no doubt that the vendor's solicitor receives the money knowing that it belongs to the purchaser until completion – and therefore the solicitor would hold the money on trust and not be authorised to release the money save for a *Markandan* completion. Second, in order to change that position, it would be necessary to interpret the Code as treating payment of the money to the vendor's solicitor as if it were the same as making a direct payment to the vendor, such that no obligations are imposed on the vendor's solicitor – [92]. Patten LJ pointed out that is "not likely to be an accurate analysis" – [93]. Third, none of this matters and the timing point goes nowhere because completion means *Markandan* completion, even in this context – [94]. To treat completion under the Code as simply the receipt of money into the account, rather than *Markandan* completion, is irreconcilable with how the Code was intended to operate and deprives the Code of all meaning.

The only justification for such a position was, as the trial judges accepted, an argument that paragraph 3 of the Code excludes liability for breach of trust because it provides that the seller's solicitor is not required to 'take responsibility for any breach of the seller's contractual obligations'. If there is no such responsibility, the argument goes, how can there be a trust obligation and liability for breach of trust which only arises in the context of such a breach? Patton LJ gave this short shrift at [97]:

"In my view paragraph 3 cannot be construed as releasing or excluding any liability on the part of the vendor's solicitor for breach of trust still less as giving him authority to release the purchase monies in the absence of a genuine completion of the sale. It does no more in terms than to absolve him from any responsibility as the buyer's agent to investigate possible breaches by the seller of his contract. … there is nothing in paragraph 3 which either qualifies or alters the instructions to the vendor's solicitors contained elsewhere in the Code or limits their personal liability for not complying with those instructions."

Both OWC and MMS were therefore held to be in breach of trust, curing the mismatch created at first instance.

Section 61 of the Trustee Act 1925

Following the Court of Appeal's conclusions about breach of trust, OWC and Mishcons sought to rely on s.61 TA 1925 to relieve them of liability. Liability for breach of trust is strict. However, relief can (not must) be granted if a trustee can show he has acted honestly and reasonably, and the Court considers he ought fairly to be excused for the breach of trust. Mishcons based its claim on the trial judge's finding at [188] that, had he found MMS to have been in breach of trust, he would have granted relief to Mishcons.

Patten LJ noted that relief is granted more sparingly to professional trustees being paid for their duties than to lay trustees, and referred to the recent case law concerning solicitors and fraudulent conveyancing transactions (notably *Davisons v Nationwide Building Society* [2012] EWCA Civ 1626 and *RA Legal v Santander UK plc* [2014] EWCA Civ 183). He concluded at [108] that OWC had not acted reasonably due to its failure to carry out a number of basic checks. It did not meet the threshold criteria for s. 61 relief.

The approach to Mishcons was more surprising. Relief was refused by a majority (Gloster LJ dissenting), even though the honest and reasonable hurdles appeared to be jumped and MMS was already on the hook. Agreeing with Halpern QC, Patten LJ concluded that MMS' liability was not a reason to grant relief to Mishcon, and that s.61 TA 1925 should not be used as a means of distributing liability between trustees; any such distribution should be achieved through contribution proceedings.

Gloster LJ, in her dissenting judgment, set out seven reasons why Mishcon should be exonerated under s.61 TA 1925, including: (a) Mishcon had not acted dishonestly and obtained a satisfactory undertaking under paragraph 7 of the Code; (b) primary responsibility for carrying out identity checks lay with MMS; (c) the Judge considered MMS should bear primary liability for the breach of trust, and the Court of Appeal should not interfere with that finding; (d) the fact that Mishcon was insured should not lead to the conclusion that it should bear financial responsibility for Dreamvar's loss; (e) there was no suggestion that MMS were not adequately insured; (f) there is no good reason for the proceedings to be prolonged by contribution proceedings.

Commentary

P&P Property Limited v Owen White & Catlin LLP and ***Dreamvar (UK) Limited v Mishcon de Reya*** is an important decision and worthy of note by conveyancers, solicitors and legal professionals in all fields for a number of reasons, but not as ground breaking as the response to it might suggest. It is strongly arguable that it merely reiterates the law as it was considered to be before the first instance decisions took the law down a blind alley.

The position regarding breach of trust by a purchaser's solicitors was set out in *Target Holdings* and any doubts were put to bed by *Markandan*. Patten LJ's conclusion that completion means completion in all relevant contexts including the Code should not be controversial. It merely confirms that there is no mismatch between the duties and obligations of purchaser's and vendor's solicitors, and that vendor's solicitors are subject to the expected trust duties that arise when holding someone else's money pending a specified outcome. Any other solution would have risked undermining, if not exploding, a conveyancing system that has been working reasonably well for many years.

The Court of Appeal's decision not to extend the vendor's common law duty of care to encompass purchasers is to be applauded, although should not be unexpected. Such a duty is unnecessary given the other protections available to purchasers in the law of trusts and the carefully crafted undertakings in the Code, as this judgment illustrates. An additional duty is otiose and could have had unanticipated consequences. Where the necessary machinery already exists, if appropriately applied, it would have been a false step to impose a further duty.

The Court's consideration of the law of warranty of authority is more interesting, in that the Court of Appeal has now cited with approval a number of first instance decisions whose weight was in question. While Patten LJ made clear that the question is one of construction against the landscape and context in which the warranty is given, the steer was clear. It is likely to be increasingly difficult to succeed in such actions in this context, even though the Court of Appeal was careful not to lay down any general rule. The importance of such claims in the conveyancing context is clearly diminished, however, by the interpretation given to the undertakings in the Code, which may promote certainty unless the Code is now amended.

Looking for a unifying theme in the judgment, there appears to be a trend towards causes of action with a degree of certainty or strict liability, such as breach of trust and undertaking, and away from more fact dependent, evidence based, nuanced claims such as warranty of authority or tortious duty of care.

This can even be seen in the application of s. 61, which is by its very nature case specific and fact dependent. There has been a tendency to assume that relief will be granted in such cases if the "honest" and "reasonable" hurdles are jumped, almost by way of introducing a negligence test into the law of trust. This judgment makes clear that such a view is not the way the Court of Appeal is going – even in circumstances where there is another insured target. The long terms effects of Patten LJ and Floyd LJ's approach to Mishcon's application for relief under s.61 TA 1925 remain to be seen, but there does appear to be a trend away from relief and towards maintaining strict liability in trust for professionals with the benefit of insurance. It could certainly be seen as a harsh line. The endorsement of the trial judge's reasoning at [188] appears, as Gloster LJ highlights at [125(iv)], to place undue weight upon the fact that Mishcon was insured (and its insurance was adequate), but Dreamvar was not. It is valid to ask whether the existence, or lack, of

insurance is truly a factor which should "fairly" tip the scales of liability. It is to be hoped that, in this respect, the case will be seen as turning on its own facts and not as setting out decisive factors. If not, there is a real risk that the Law Society's concerns as to the burdens to be placed on small firms of conveyancers will be fulfilled, and small firms may be priced out of the market by their insurance premiums – or a whole new market will develop in purchaser's insurance as all solicitors seek to exclude liability.

Nicole Sandells QC and Nicolas Broomfield, 4 New Square

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