

A matter of trust

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Francesca Kaye & Helen Whalley discuss breach of trust claims against solicitors

- **Breach of trust claims against solicitors—consideration of s 61 of the Trustee Act 1925 relief.**

A recent case offers guidance as to how the court will consider a claim for relief in whole or in part under s 61 of the Trustee Act 1925 from a solicitor on the receiving end of a breach of trust claim.

In *P & P Property Limited v Owen White & Catlin (1) and Crownvent Limited t/a Winkworth* [2016] EWHC 2276 (Ch), [2016] All ER (D) 15 (Oct) a fraudster posing as Mr Harper (the true owner of the unoccupied property concerned) claiming to be based in Dubai instructed Owen White & Catlin (OWC) to act for him initially on a mortgage of the property, and subsequently on its sale. The solicitor with conduct of the matter at OWC, Ms Lim, satisfied herself as to her client's identity and that he owned the property. She met him in person, taking a copy of his passport and utility bill, obtained copies of his latest bank statements by post as proof of his address and obtained an "anti-money laundering search".

On 4 December 2013 P & P offered to purchase the property for £1,030,000. Contracts were exchanged two days later. Completion purportedly occurred on 12 December 2013. Mr Harper's signature on the transfer was witnessed by Mr Lazarus of Winterhill Largo, Dubai who provided a letter saying he had met Mr Harper, satisfied himself as to his identity and had witnessed his signature on the transfer.

The fraud emerged when the real Mr Harper discovered renovation work had commenced at the property. He was in time to prevent P & P registering title to the property.

No breach of trust

P & P brought claims against OWC and Winkworth for breach of warranty of authority and negligence, and against OWC only for breach of undertakings and a breach of trust that in the absence of a genuine completion, purchase monies were paid to "Mr Harper". They failed on all claims.

The judge in considering the breach of trust claim determined the monies received by OWC from P & P's solicitors were not held on trust by OWC at any time. There was no breach by OWC.

No relief in any event

The judge then considered if s 61 of the Trustee Act 1925 relief would have been granted to Ms Lim if there had been a breach of trust.

Section 61 provides that for relief to be available, the trustee in breach must show they "have acted honestly and reasonably and ought fairly to be excused for the breach of trust".

There being no issue of dishonesty the issue was whether Ms Lim had acted reasonably such that the court should exercise its discretion in her favour.

He referred to principles identified in *Lloyds TSB plc v Markandan & Uddin* [2012] EWCA Civ 65, [2012] All ER (D) 62 (Feb); *Davisons Solicitors v Nationwide Building Society* [2012] EWCA Civ 1626, [2012] All ER (D) 114 (Dec); and *Santander UK Plc v RA Legal Solicitors* [2014] EWCA Civ 183, [2014] All ER (D) 216 (Feb) relevant to applying s 61.

He considered:

- Ms Lim's conduct throughout including the anti-money laundering and client due diligence checks she conducted.
- The warning bells that should have alerted her to the transaction becoming high risk including the unexpected change in instructions (from mortgaging the property to selling it in a very short timeframe) and the property's unusual sale price (Winkworth valued it at over £1.2m but it sold for £1,030,000).
- The general increase in fraudulent transactions (as highlighted in the Law Society's Property and Registration Fraud Practice Note 11 October 2010).
- Factors which made the property particularly vulnerable to fraud: it was of relatively high value, without a legal charge, unoccupied and being sold by someone overseas.
- Ms Lim's failure to raise queries of Mr Harper or obtain further information to verify his identity and address. The "anti-money laundering search" came back "referred" indicating Mr Harper's identity could not be independently verified (he was not on the electoral role), and further checks were required. She concluded, as Mr Harper had been working in Dubai for some time, he must have de-registered himself for council tax purposes. She assumed this would be his explanation and had been reluctant to ask too many questions believing this would annoy the client. The copy bank statements Mr Harper provided did not support her view that he lived and worked in Dubai, and should have prompted further consideration.
- Ms Lim did not verify the identity of Mr Lazarus, who witnessed Mr Harper's signature on the transfer, or his firm Winterhill Largo assuming he was a solicitor, when he was not.

The judge was not satisfied that OWC would have proved Ms Lim had acted reasonably. Ms Lim should have questioned the purported property seller further to verify his identity and ownership. She would have (had he found a breach of trust) “fallen short of the high standard equity expects of a trustee”. Section 61 relief would not have been available.

At first blush, the decision in P & P provides some reassurance for solicitors. In reality, though, it is a stark warning of the importance of being assiduous in pursuing any doubts or discrepancies that arise in the identification process and asking further questions of the potential client—proceeding where there is any doubt risks falling short of solicitors’ obligations under anti-money laundering regulations and of the standards expected of trustees in the event a trust arises.

The judgment has left the victim of this particular fraud without redress. At the time of writing, the decision is subject to appeal.

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