



# Buyer's solicitor beware!

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## Is it safe to act for a purchaser in a property transaction?

The recent judgment in *Dreamvar (UK) Limited v Mishcon de Reya* has caused shockwaves in both the property and insurance markets. All solicitors who act for purchasers of residential property should read the judgment to understand the Court's approach to the Conveyancing Protocol and Code for Completion by Post – documents which are used in thousands of transactions every week.

### The facts

The "real" Mr Haeems owned an empty house in Old Manor Yard, London (the House). An imposter purported to be the "real" Mr Haeems and obtained a driving licence and TV licence in the name of Mr Haeems. He had these documents certified as true copies by a solicitor, Mr Zoi. The certified documents recorded the address of Mr Haeems (the Imposter) as Broadfield Road, Catford. The Imposter then provided these certified copy documents to different solicitors, Mary Monson Solicitors (MMS) and instructed MMS to act in the sale of the House.

Reputable selling agents were instructed to market the House – their instructions being that a quick sale was needed as Mr Haeems (the Imposter) was about to be divorced.

The principal of Dreamvar, Mr Vardar, viewed the House and made an offer which was accepted. Dreamvar was content to move quickly and forego usual pre contract searches. Mishcon was instructed to act on the purchase – Dreamvar was a repeat client. Contracts were exchanged and completion occurred at speed. Completion monies – £1.1m – were paid by Mishcon to MMS and the registration formalities commenced.

But, prior to registration, alarm bells rang at HMLR. It wished to undertake a check of the identity documents obtained by MMS before registration would be completed. HMLR's bristling antennae spotted the discrepancy between the address of the House and the Catford address. It could not link the "real" Mr Haeems to Catford at all. Contact appears to have been made with the "real" Mr Haeems, who disclaimed all knowledge of the transaction. By this stage the completion monies had been paid by MMS to Denning Solicitors, and dissipated to accounts in China.

### Any comments or queries?

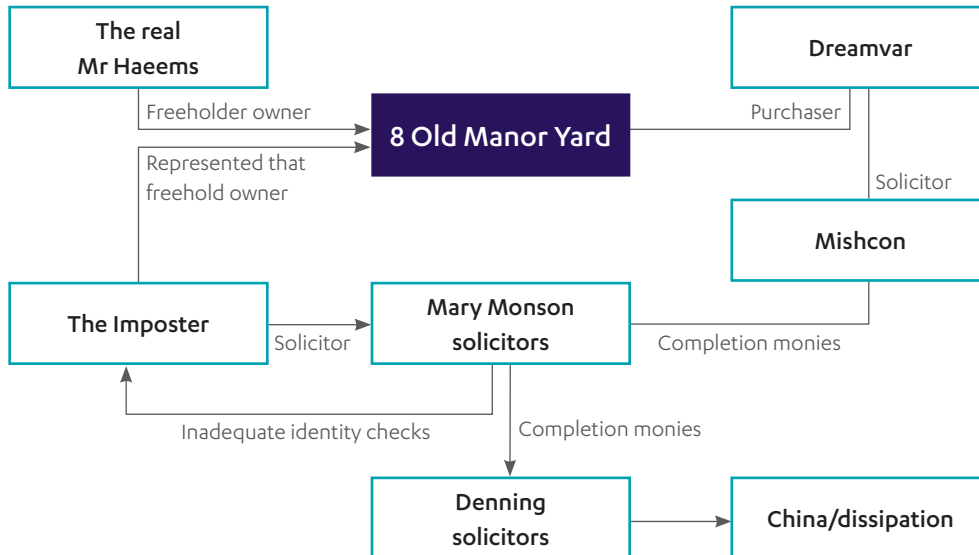
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### The parties



### The conundrum

Dreamvar paid £1.1m and received nothing in return. Mishcon had relied upon MMS conducting adequate CDD and money laundering checks on its client. MMS had conducted those checks negligently. Who, if anyone, was responsible for Dreamvar's loss?

Against those stark facts, how has Mishcon's insurer ended up liable to pay £1.1m plus interest to Dreamvar and, presumably, the costs of all parties?

### The Issues

Dreamvar's case asserted various causes of action against Mishcon and MMS, and Mishcon claimed a contribution from MMS in the event it was found liable:

- Dreamvar asserted that Mishcon was negligent in failing to advise as to the risk of identity fraud, given certain unusual features in the transaction, such as the fact the Property was empty and the speed required (the Failure to Warn Allegation)
- Dreamvar asserted that Mishcon was negligent in failing to obtain an undertaking from MMS that it had taken reasonable steps to confirm the identity of Mr Haeems (the Identity Undertaking Allegation)
- Dreamvar asserted that Mishcon was in breach of trust by paying the purchase monies away to someone other than a representative of the "real" Mr Haeems (the Breach of Trust Allegation)
- Dreamvar and Mishcon asserted that MMS was negligent in its verification procedures – in failing to spot that the Imposter was not the "real" Mr Haeems (the Negligent CDD Allegation)
- Dreamvar and Mishcon asserted that MMS was in breach of trust in paying the completion monies away to someone other than the "real" Mr Haeems (the MMS Breach of Trust Allegation)
- Mishcon asserted a breach of undertaking by MMS – that MMS undertook to receive the completion monies on the part of the "true" Mr Haeems (the MMS Breach of Undertaking Allegation)

- Dreamvar asserted that MMS was in breach of a warranty of authority given to the effect that MMS was acting on behalf of the "real" Mr Haeems (the Warranty of Authority Allegation).

The issues were very similar to those in a recent case of *P&P Property Limited v Owen White & Catlin LLP*. Many of them turned on whether a solicitor acting for a seller warrants that they act on behalf of the "real" seller – ie the natural person who actually owns the property concerned – or just a person who represents that they are the "real" seller and who, in fact, may be an imposter.

### The Court's findings on the issues

The Court considered the Code for Completion by Post, Conveyancing Protocol, the Conveyancing Handbook and standard conveyancing practice (based upon the evidence of the Mishcon solicitor). In conclusions which may surprise conveyancing practitioners, the Court's findings were as follows:

Allegation	Conclusion
<b>The Failure to Warn Allegation</b>	<ul style="list-style-type: none"> <li>• There is no general duty to warn a client of the potential risk of identity fraud</li> <li>• There was nothing specific in this case known to Mishcon that heightened the risk of identity fraud – Mishcon was entitled to assume that MMS and the selling agent had competently undertaken its CDD obligations</li> <li>• The Allegation therefore failed</li> </ul>
<b>The Identity Undertaking Allegation</b>	<ul style="list-style-type: none"> <li>• Such an obligation does not arise under the Code or Protocol</li> <li>• There are other protections in place for the Purchaser – such as other undertakings given in the Code or the fact that completion monies are held on trust</li> <li>• The Allegation therefore failed</li> </ul>
<b>The Breach of Trust Allegation</b>	<ul style="list-style-type: none"> <li>• The completion monies are held on trust</li> <li>• It was "an implied term of [the] retainer that [Mishcon] would only release...the monies...[for] a genuine completion"</li> <li>• There was no genuine completion here as the sale contract was a nullity</li> <li>• The Allegation therefore succeeded</li> </ul>
<b>The Negligent CDD Allegation</b>	<ul style="list-style-type: none"> <li>• MMS admitted that "it did not act competently in accepting [the CDD documents] as adequate proof of its client's identity, and that MMS should have insisted that its client attended for a meeting at its London office with proof of identity and proof of address"</li> <li>• The Allegation was therefore admitted</li> </ul>

<b>The MMS Breach of Trust Allegation</b>	<ul style="list-style-type: none"> <li>• “The important question is whether...MMS was authorised to use [completion monies] for a genuine completion or... “pretended completion”.”</li> <li>• But, the Code “does not require the seller’s solicitor to investigate or take responsibility for any breach of the seller’s contractual obligations....”</li> <li>• Accordingly, “it must follow that a vendor’s solicitor is entitled to release the monies , even if the transfer document received in return is not a genuine one, and there is not, as a result, genuine completion”</li> <li>• The Allegation therefore failed</li> </ul>
<b>The MMS Breach of Undertaking Allegation</b>	<ul style="list-style-type: none"> <li>• The Code states that “the seller’s solicitor undertakes (i) to have the seller’s authority to receive the purchase money on completion...”</li> <li>• “The debate is whether the reference to “the seller” is a reference to the registered proprietor, or MMS’s client, the fraudster ...”</li> <li>• “In my view, the wording of [the Code] is not, in all the circumstances, sufficiently clear to impose on MMS an obligation (whether absolute or otherwise) to have the authority of the registered owner to receive the purchase money on completion”</li> <li>• The undertaking is therefore limited to having the authority of the client – ie the person who dishonestly represents himself to be the true owner</li> <li>• The Allegation therefore failed</li> </ul>
<b>The Warranty of Authority Allegation</b>	<ul style="list-style-type: none"> <li>• As with the MMS Breach of Undertaking Allegation, the authority given is limited to having the authority of the client – ie the person who dishonestly represents himself to be the true owner – rather than the authority of the true registered proprietor</li> <li>• The Allegation therefore failed</li> </ul>

MMS therefore fended off all the allegations against it – even though it admitted its CDD procedures were inadequate – and, if they had been adequate, it follows that the fraud would never have happened. Mishcon however was found to be in breach of trust – even though it had “done nothing wrong” in terms of the performance of its retainer and had relied on MMS performing its CDD obligations.

### But presumably S61 Trustee Act saved Mishcon ?

S61 provides a defence (and the Court a discretion to provide relief from personal liability) in the event that a trustee “has acted honestly and reasonably and ought fairly to be excused for the breach of trust”. There was no question of dishonesty on Mishcon’s part, so was its conduct reasonable ?

Mishcon was found not to be in breach of duty to Dreamvar – the Failure to Warn Allegation and the Identity Undertaking Allegation failed. So that must mean it acted reasonably, right ? Well – sort of – even if there was reasonable conduct by the trustee, a discretion still remains as to whether the relief will be granted.

In a passage which will cause insurers considerable consternation, the Court found:

*“the effect of the breach of trust on Dreamvar has been disastrous. It has lost the purchase price and received nothing.....it is common ground that [Mishcon] is insured for events such as this, and that its insurance cover is sufficient to cover in full the loss suffered, should it not be excused from liability. In terms of balancing the relative effects or consequences of the breach of trust, it is apparent that [Mishcon] (with or without insurance) is far better able to meet or absorb it than Dreamvar.....[Dreamvar's] only practical remedy is against [Mishcon].....[Mishcon] ought not fairly to be excused for the breach of trust...”*

So, it follows from this, that Mishcon, which did nothing wrong, must suffer the consequences of a fraud perpetrated by an Imposter client of an “opposing” solicitor – consequences which may prove to be very real in terms of excess payable under its policy and claims record in addition to the indemnity payment.

### Is it all bad news ?

In a case short on silver linings, the following straws can be clutched:

- permission to appeal has been granted – it might be the case that the Law Society or other interested bodies may intervene to explain the concern to the profession if the judgment is upheld
- MMS, despite its admitted negligence, escaped liability – the risk profile is therefore more significant for solicitors acting for Purchasers rather than Sellers
- the fact that Dreamvar could not insure against the risk played heavily in the Court's decision to deny S61 relief – is there a market here for insurers to sell “identity fraud” policies to purchasers as part of the suite of insurance arrangements available (such as title insurance etc)
- banks – by far the largest “class” of claimant against conveyancing solicitors – will routinely have crime insurance to protect them against the risk of fraud. The S61 arguments may therefore play out differently in a CML Lending context.

But what about solicitors acting for purchasers? How can they avoid the risk of identity fraud? There are no easy answers but there are some mitigation steps that may be useful, as follows:

- first of all, the firm should develop a risk assessment framework for defined classes of conveyancing transactions. The framework should allow a firm to identify transactions as presenting greater or lower risk, especially liability risk, and take remedial steps as required. Example factors could be whether the property to be sold is vacant, with no mortgage or high value
- secondly, consider whether it would be commercially acceptable to try to negate the implication of a duty. It is possible to turn the risk of implication of a term that monies will only be transmitted to a “real” vendor into an express and different obligation, eg that the firm makes no such promise. This may however be difficult to achieve by terms and conditions alone; the issue then arises whether it would be commercially acceptable to say this in an engagement letter. Exclusion of this kind of loss is unfortunately probably impossible (it might fail UTCA-reasonableness and the SRA would frown upon attempts to limit liability below the rule-mandated minimum level of insurance cover). The negation of an implied duty might be more effective, and UCTA-reasonable, if it is triggered by a risk

assessment of the transaction rather than applied in a blanket manner. That means the risk assessment framework needs to be in place and operating at the time of matter acceptance so that the firm can assess whether to include the term in the letter of engagement

- thirdly, and assuming negation of the implied duty does not work, another approach would be to embrace the implied duty and seek to obtain better evidence of identity from the other side. For example, a firm could adopt the policy of always asking for the Vendor's solicitor's CDD where the risk framework flags a transaction as (say) moderate to high risk. After all, the Money Laundering Regulations 2007 do envisage the possibility of reliance on someone else's CDD, although many do not consent to it. One could start by asking for provision of the CDD with the ability to rely on its accuracy. Vendors' solicitors may refuse; the next stage might be simply to ask for copies so you can check their accuracy (with no duty owed). If the provision of copies without responsibility is refused, then that could be a red flag triggering other actions eg a very clear warning to the client about the position. Of course, this involves a risk of assumption of responsibility to the client to check out the vendor's CDD in the first place, but that only reflects the duty implied in this case, so perhaps it is not such a bad thing to undertake
- a fourth approach, complementary to the above, is for the buyer's firm to carry out some limited checks on vendor identity using the usual online sources. They may not be quite as robust as own client CDD but the possession of any information on the issue is capable of de-risking the firm, especially where it is integrated into a proper risk framework for the entire transaction.

We would be delighted to discuss any issues arising out of this note further.

This document is an informal document, which does not pretend to be exhaustive, and is intended to provide commentary and general opinions relating to the recent judgement in *Dreamvar (UK) Limited v Mishcon de Reya*. It is not to be regarded and/or relied upon as a substitute for advice on how to act on any particular matter. RPC Partners will be pleased to provide further information and advice on specific facts.

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