P&P PROPERTY LIMITED V OWEN WHITE & CATLIN LLP AND CROWNVENT LIMITED

DREAMVAR (UK) LIMITED V MISCHCON DE REYA AND MARY MONSON SOLICITORS

THE OUTCOME

by

David Holland QC

Landmark Chambers

David Holland was called to the Bar in 1986 and took silk in 2011.

The core of David's practice is all forms of property litigation but he also practices in the areas of costs and professional negligence.

David has immense experience of litigating at all levels of court.

His recent cases include not only the Dreamvar case but also: Gavin Edmondson v Haven Insurance [2018] UKSC 21; Gorst v Knight [2018] EWHC 613 (Ch); Lunar Office v Warborough Investments [2018] EWCA Civ 427; Budana v The Leeds Teaching Hospital NHS Trust [2017] EWCA Civ 1980; Grimes v Trustees of the Essex Farmers and Union Hunt [2017] EWCA Civ 361; Michael Wilson & Partners v Sinclair [2017] EWCA Civ 3; Various Claimants v Ministry of Defence [2016] 3 Costs LO 477. He also appeared in Denton v White [2014] EWCA Civ 906 (in which he represented both the Bar Council and the Law Society) and was counsel for the successful guarantor in Good Harvest v Centaur [2010] Ch 426. He has advised and acted for the Law Society in costs cases for many years as well as acting for many of the largest Telecoms Code Operators.

David has been ranked in the legal guidebooks as a leading practitioner in his fields for many years. In the Chambers & Partners 2018 Guide in Real Estate Litigation it is said that he *"is a seriously smooth silk"* and *"an extremely talented advocate who is ruthless in cross-*

examination. Very user-friendly and extremely charismatic, he has a wicked sense of humour." In the Costs Litigation section he is described as *"an experienced litigator"* and it states that he is, *"energetic, enthusiastic and like a dog with a bone in court." "Persistence is his hallmark".* In the latest edition of the Legal 500 in Property Litigation section he is ranked in Tier 1. It states that, *"he is a bright and tenacious individual, who inspires confidence"*, whilst in the Costs section it states that: *"His advocacy is focused and clear."* He has previously been named as the Real Estate Silk of the Year in the Chambers & Partners Bar Awards.

David sits as a Recorder and as a part time Judge of the First-tier Tribunal (Property Chamber). He also acts as an arbitrator.

LANDMARK CHAMBERS

180 Fleet Street

London **EC4A 4HG**

Tel: 020 7430 1221

Fax: 020 7421 6060

Email: dholland@landmarkchambers.co.uk

Website: www. landmarkchambers.co.uk

INTRODUCTION

1. On Tuesday the Court of Appeal handed down its judgment in the conjoined appeals in these two cases [2018] EWCA Civ 1082.
2. The cases raised common issues about the liability of solicitors and estate agents in cases involving identity fraud.
3. In both cases the fraudster posed as the owner of a registered property in London. He instructed solicitors and agents to act for him on the sale of the property and genuine purchasers were found. The purchasers instructed their own solicitors, and proceeded to exchange of contracts and completion in accordance with the Law Society Code for Completion by Post (2011) ("the Code"). Following completion, but before registration of title, the fraud was discovered but the fraudster and the purchase money had disappeared.
4. To say that the first instance decisions had caused a stir, would perhaps be an understatement. As the learned editors of Ruoff & Roper: Registered Conveyancing (Vol 2 para 47.024.01) (rightly) noted, the outcome of Dreamvar has caused the Law Society and its members "some concern". One commentator even described the first instance decision in Dreamvar as "alarming" (Evans [2017] Conv 5 (357-361).
5. The Law Society was so concerned that it sought and was granted permission to intervene in writing.
6. The outcome of the appeals can at least be said to leave the law in a slightly more satisfactory state than was the case after the first instance decisions.

THE FACTS

7. The relevant facts in detail are set out below.

8. It is in my view important to focus on what steps were, or were not, taken by the solicitors to verify the identity of their clients pursuant to what were then the Money Laundering Regulations 2007 but are now (since 26th June 2017) the Money Laundering Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

P&P

9. The case concerned a property at 52 Brackenbury Road, London W6 which was shown on the register of title at HM Land Registry as having been owned since 1989 by a Mr Clifford Harper. The property was not occupied by Mr Harper and had been let out to a succession of tenants.

10. On 20 November 2013 a firm of solicitors, OWC, were telephoned by someone who said that he was Clifford Harper who had a property in Hammersmith with no mortgage which was worth about £1.2m. He wanted to raise a loan of £800,000 on the property by way of bridging finance to enable him to buy another property and he wanted to complete the borrowing within 10 days.

11. The supposed Mr Harper was put through to Ms Joyce Lim. She then emailed to the address he had given her various documents including an anti-money laundering ("AML") leaflet and informed him she would need to take steps to verify his ID and address. It was evident from the telephone numbers on the client questionnaire form that the vendor either lived or worked abroad. On 26 November he contacted Ms Lim and told her that he would be coming back to the UK at the end of that week and would

come to her office. She opened a file in the name of Clifford Harper and told him to bring his passport and two recent utility bills.

12. An appointment was arranged for Friday 29 November. By then Ms Lim had spoken to a solicitor who was instructed by the proposed lender. At the meeting the supposed vendor gave Ms Lim a business card and his passport which indicated that he was born on 25 May 1966. He also provided a partially completed ID verification form giving the property as his current address and stating that he had lived there for 10 years even though it was apparent that he was now working abroad. The office copy entries for the property also, as I have said, indicated that it had been purchased by Mr Harper back in 1989. The vendor produced only one utility bill showing proof of address but said that he would arrange for his bank statements to be couriered to her.

13. On 2 December the vendor emailed Ms Lim (purportedly from Dubai) and told her he wanted to complete by Friday 6 December. By then the proposed lender had been pressing the vendor to produce evidence of his residence in Dubai including his contract of employment and bank statements. However the vendor then told Ms Lim that, instead of obtaining the bridging loan, he now wished to sell the property.

14. On 2 December the vendor also telephoned a Mr Hunt at Winkworth and told him that he needed to complete the purchase of another property by 15 December and therefore needed to find a cash buyer quickly for his London property. On the same day Ms Lim received the results of her AML search which came back as "Referred" because it was not possible to "uniquely identify the applicant at his address". It was also impossible to verify his date of birth from the available databases including the electoral roll.

Notwithstanding this Ms Lim made no further attempts to verify the vendor's identity and accepted him as a client.

15. To obtain a rapid sale Winkworth (on the vendor's instructions) marketed the property for £1m which represented a discount of 25% on its current value. The agents were given a mobile number, an email address and an address in Dubai for the vendor but relied on Ms Lim to carry out the necessary AML checks instead of doing that for themselves as required by the AML Regulations.

16. The bank statements were provided to Ms Lim on 3 December. They were not full copies of the statements but only the front pages. What was disclosed indicated that the vendor was often in the UK and the judge considered that the contents of the statements should have prompted Ms Lim to make further enquiries. On 4 December P&P, a property investment company, made an offer to purchase the property and the vendor was advised by Winkworth to accept it. They then prepared a memorandum of sale giving the vendor's address as in Dubai. Ms Lim received a copy of the memorandum but did not query the address. Nor were any further steps taken by OWC to verify the vendor's identity.

17. The vendor signed and returned to OWC the TA10 (Law Society Fittings and Contents Form) and TA6 (Law Society Property Information Form) but neither signature on examination corresponded to the signature on the passport. In the TA6 form the vendor confirmed that he did not live at the property but Ms Lim made no further enquiries as to where he did live when he was in the UK. On 6 December she emailed to him a copy of the transfer and asked him to take it to a local solicitor in order to witness his signature. The vendor confirmed to her that he was happy for her to sign the contract

on his behalf and contracts were exchanged at 16:55 on 6 December. The deposit of £103,000 continued to be held by P&P's solicitor as stakeholder under the contract.

18. The vendor produced a document signed by a Peter Lazarus of Winterhill Largo in Dubai purporting to confirm the identity of the vendor with an address in Dubai. Ms Lim did not check the credentials of Mr Lazarus or Winterhill Largo but it later transpired that Mr Lazarus had been suspended from practice in 2010 and that Winterhill Largo was a debt recovery business. Ms Lim produced a completion statement and asked the vendor to provide a forwarding address. At the same time the vendor continued to press for a rapid completion on the basis that he needed the money to complete his other purchase. To facilitate an early completion, it was arranged that the solicitors acting for P&P's mortgage lenders would transfer the balance of the purchase price (£927,000) directly to OWC but, before this could be done, OWC (on 11 December) served a notice to complete on P&P.

19. On 12 December the deposit of £103,000 and a further sum of £327,000 provided by the mortgagees were transferred to OWC. On the basis of a request from Ms Lim that the vendor should be able to use the money to complete the purchase of another property in Dubai, P&P's solicitors agreed that the £430,000 should be held by OWC as the vendor's agent rather than as stakeholders. The remaining £600,000 was transferred to OWC at 12:49 on 12 December. The £430,000 was sent to the vendor that afternoon followed by the sum of £581,410 which represented the balance of the £600,000 after deduction of legal costs and other disbursements.

20. The fraud was discovered on 17 January 2014 following an application to register P&P's title.

Dreamvar

21. Dreamvar is a small residential development company which had instructed Mishcon de Reya ("MdR") in relation to other property transactions. On about 1 September 2014 the director of Dreamvar (Mr Vardar) was contacted by Douglas & Gordon ("D&G"), the estate agents, and told that they had a client who was looking for a quick sale of a property at 8 Old Manor Yard, Earl's Court, London SW5. Mr Vardar was told that the vendor was getting divorced and was seeking to complete the sale in 3 days. D&G had been asked to contact developer clients who might be interested. The sale price was £1.1m.

22. Mr Vardar inspected the property on 1 September. It was unoccupied. He made an offer of £1m to D&G. They said that another developer had already offered £1.1m and was in a position to proceed. Mr Vardar increased his offer to £1.1m and confirmed he had the funds to complete the purchase. His offer was accepted. He then instructed Ms Curtis-Goulding of MdR to act for Dreamvar on the purchase. He told Ms Curtis-Goulding that he knew there would not be sufficient time in which to carry out all the necessary searches before completion but he was willing to take that risk. He asked MdR to advise him if this was possible and the risks which could be involved.

23. The following day D&G sent to MdR a memorandum of sale giving the name of the vendor as Mr David Haeems and stating that his solicitors were Mary Monson Solicitors Ltd ("MMS"). On 3 September Ms Curtis-Goulding confirmed to Ms Slater of MMS that she was instructed to act for Dreamvar on the purchase and was told that MMS had not yet received proof of the vendor's ID or formal instructions on the sale. She was not therefore able to send MdR a contract pack.

24. On the same day Ms Curtis-Goulding sent to Dreamvar a retainer letter relating to the purchase. MdR was to carry out a full review of the contract and title and would prepare a full report explaining all the title and other matters relating to the purchase. Importantly, the retainer letter did not deal expressly with the terms on which MdR would hold and be authorised to release the purchase monies to the vendor or his solicitors.

25. Nothing further was heard from MMS until 11 September when MdR received a draft contract, office copy entries and the TA6 and TA10 forms, each of which appeared to have been signed by Mr Haeems on 6 September. The proprietorship register showed that the property was unencumbered and that Mr Haeems had been the registered proprietor since 19 January 2000. The register gave the address of the property as Mr Haeems's address but on the draft contract his address was given as a flat in Broadfield Road, London SE6.

26. Prior to 10 September MMS had asked the vendor to verify his identity and address. He had produced copies of a driving licence and TV licence which had been verified on the face as a true likeness of the originals by Mr Faroq Zoi, a solicitor. It later transpired that Mr Zoi had been asked to verify the documents by the vendor when they met by chance in the waiting room of another firm of solicitors, Dennings. The driving licence had been issued only shortly before (on 28 August) and was valid for only 3 years but it did give the Broadfield Road address for the holder. The TV licence is a document which, according to the Law Society's Anti Money Laundering ("AML") Practice Note, is not identified as suitable for the verification of UK based clients. The judge found that no other steps were ever taken to verify the vendor's identity and that no one from MMS ever met him.

27. At the trial MMS accepted that it had not acted competently in accepting the driving and the TV licences as proof of identity but should have insisted on meeting the client and obtaining from him proper proof of identity and of his address.

28. Ms Curtis-Goulding received the draft contract, made some minor amendments and raised further enquiries about the property. Replies were received from MMS on 15 September when they also sent to MdR the Completion Information and Undertaking document signed by MMS on behalf of the vendor. The document indicated that completion would take place in accordance with the Code.

29. On 16 September MdR sent to MMS the draft transfer together with requisitions on title concerning rights of way over the property. MMS offered to provide indemnity insurance. The transfer was approved and MMS indicated to Ms Curtis-Goulding that it and the contract had been sent to the vendor for signature. Simultaneous exchange and completion were to take place, if possible, the following day.

30. Ms Curtis-Goulding sent to Dreamvar her report on title in which she noted that only the local authority searches remained outstanding. Mr Vardar was willing to proceed without them. The report did not mention the risk of identity fraud on the part of the vendor. Mr Vardar told MdR that he wanted, if possible, to exchange contracts that day (16 September) even if completion could not take place. He attended at MdR's offices to sign the contract and the transfer.

31. MMS's client (also on 16 September) asked MMS to transfer the purchase monies to another firm of solicitors (again Dennings) who were also acting for the vendor. This request came shortly after MMS had asked the vendor for details of the bank account to which the purchase monies should be transferred. MMS (rightly) considered that the

request was unusual but were prepared to act on the instructions after receiving an email from a solicitor at Dennings (subsequently confirmed in writing) that they were acting for the vendor in another matter in connection with the purchase of machinery and equipment from China.

32. The purchase monies were sent by MdR to MMS on 17 September on terms that MMS obtained indemnity insurance to cover the risk that there were adverse rights of way over the property. The monies were to be held to MdR's order until the policy was agreed. This took place later that day and exchange and completion took place simultaneously by telephone that afternoon.

33. Dreamvar commenced work to the property but, after receiving the application to register Dreamvar's title, the Land Registry managed to contact the real Mr Haeems and the fraud was discovered.

THE DECISIONS AT FIRST INSTANCE

34. In the P&P case the purchaser (P&P) did not bring a claim against its own solicitors but against the vendor's solicitors (OWC) relying on: (i) breach of warranty of authority; (ii) breach of undertaking; (iv) negligence and (v) breach of trust. It also sued the selling agents, Winkworth, for breach of warranty of authority and in negligence. In summary P&P contended that OWC and Winkworths: (i) held themselves out as having the authority of the true owner to conclude the sale of the property; (ii) were negligent in not carrying out adequate checks (in accordance with the Anti-Money Laundering Regulations 2007) to establish the identity of their client; and (iii) (in the case of OWC) had no authority to disburse the purchase monies to their client other than on the completion of a genuine sale.

35. In the Dreamvar case the purchaser (Dreamvar) brought proceedings against its own solicitors (MdR) for: (i) negligence and (ii) breach of trust and against the vendor's solicitors (MMS) for: (i) breach of warranty of authority; (ii) breach of an undertaking and (iii) breach of trust. Dreamvar did not originally allege negligence against MMS but it made a late application to the Court of Appeal to raise such a claim.
36. In P&P the trial judge dismissed all the claims against both OWC and Winkworths. P&P appealed against the judgment on all issues.
37. In Dreamvar the trial judge dismissed the claim against MdR for negligence but found that the firm was in breach of trust in releasing the purchase monies in relation to a fraudulent sale. This was despite the fact that MdR had not breached any statutory or contractual duties and had behaved entirely reasonably. The judge also declined to grant MdR relief from the consequences of their breach of trust under s.61 of the Trustee Act 1925. He dismissed all the claims against MMS but indicated that had he found MMS to have been in breach of trust he would have granted relief to MdR (but not to MMS) under s.61.
38. MdR did not appeal the judge's finding that it acted in breach of trust in releasing the purchase monies. But both it and Dreamvar challenged the judge's findings that there was no breach of trust or breach of undertaking by MMS. MdR also sought relief under s.61. Dreamvar also appealed against the judge's finding that MdR were not negligent. It contended that MdR should have obtained an undertaking from MMS only to use the purchase money to complete a true sale of the property.
39. Dreamvar did not appeal against the judge's dismissal of its claim based on breach of warranty of authority. The solicitor at MdR accepted in her evidence that she did not treat MMS as warranting that it had the authority of the true owner to sell the property and did not rely on any such warranty.

THE CONTEXT

40. Before examining what the Court of Appeal has decided, it is worth focusing on three aspects of the background.

The Code

41. The first is the terms of the Code. These are set out in the Annex to this talk.

The Money Laundering Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017

42. The Money Laundering Regulations 2007 (which are recited in the Court of Appeal judgment and were applicable at the time) have now been replaced by the Money Laundering Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. The 2017 regulations are materially different in certain respects from the 2007 regulations but the thrust is the same.

43. A solicitor carrying out a conveyancing transaction on behalf of a client is a "relevant person" within the regulations (regulation 8).

44. By regulation 27:

> *(1) A relevant person must apply customer due diligence measures if the person—*
> *(a) establishes a business relationship;*
> *(b) carries out an occasional transaction that amounts to a transfer of funds within the meaning of Article 3.9 of the funds transfer regulation exceeding 1,000 euros;*
> *(c) suspects money laundering or terrorist financing; or*
> *(d) doubts the veracity or adequacy of documents or information previously obtained for the purposes of identification or verification…*

By regulation 28 (2):

> *(2) The relevant person must—*
> *(a) identify the customer unless the identity of that customer is known to, and has been verified by, the relevant person;*

> *(b) verify the customer's identity unless the customer's identity has already been verified by the relevant person; and*
> *(c) assess, and where appropriate obtain information on, the purpose and intended nature of the business relationship or occasional transaction.*

By regulation 30(2):

> *a relevant person must comply with the requirement to verify the identity of the customer, any person purporting to act on behalf of the customer and any beneficial owner of the customer before the establishment of a business relationship or the carrying out of the transaction*

By regulation 31(1):

> *(1) Where, in relation to any customer, a relevant person is unable to apply customer due diligence measures as required by regulation 28, that person—*
> *(a) must not carry out any transaction through a bank account with the customer or on behalf of the customer;*
> *(b) must not establish a business relationship or carry out a transaction with the customer otherwise than through a bank account;*
> *(c) must terminate any existing business relationship with the customer;*
> *(d) must consider whether the relevant person is required to make a disclosure (or to make further disclosure) by—*
> *(i) Part 3 of the Terrorism Act 2000; or*
> *(ii) Part 7 of the Proceeds of Crime Act 2002.*

Regulation 33 provides for "enhanced due diligence" in a number of circumstances which include (by regulations 33(1)(e) and (g)) any case "where the relevant person discovers that a customer has provided false or stolen information" and any other case "which by its nature can present a higher risk of money laundering". This "enhanced due diligence" must include:

> *(a) seeking additional independent, reliable sources to verify information provided or made available to the relevant person;*
> *(b) taking additional measures to understand better the background, ownership and financial situation of the customer, and other parties to the transaction;*
> *(c) taking further steps to be satisfied that the transaction is consistent with the purpose and intended nature of the business relationship;*
> *(d) increasing the monitoring of the business relationship, including greater scrutiny of transactions.*

45. By regulation 86 it is a criminal offence for a relevant person to contravene a relevant requirement.
46. The Court of Appeal noted in its judgement (at paragraph 31) that the 2007 regulations did not, and were not intended to, create a statutory liability on the part of solicitors and estate agents towards innocent third parties who are the victims of fraud. Although the carrying out of the necessary anti-money laundering ("AML") checks in the present cases might have deterred or prevented the frauds from taking place, that was not the purpose behind the regulations.
47. However, the Court did state that the existence of the 2007 regulations and the obligations they imposed may be an important background feature in determining what liability (if any) should be imposed on solicitors and agents who undertake the sale of property on behalf of a client who turns out to be an imposter.
48. Although the terms of the 2017 regulations are materially different in some respects, there is no reason to suppose that the Court's rulings would have altered in any way had the 2017 regulations been in force instead of the 2007 regulations.

Law Society Guidance

49. The Law Society published an Anti-Money Laundering Practice Note of October 2013 extracts from which are set out in the Annex.
50. In addition, and partly as a result of these cases at first instance, in September 2017 the Law Society and HM Land Registry published a joint note on "Property and Title Fraud". This is *"intended to provide a practical guide to solicitors on some of the indicators of potential frauds in land transactions and registration of title (title fraud)"*. Extracts from this are also set out in the annex to the talk.

51. It is worthwhile looking at this carefully. It is quite clear that a number of the specific indicators of fraud identified in that document were present on the facts of these cases. If the solicitors had been more alive to the issues raised in this Note, then it is in my view likely that these frauds would not have taken place.
52. For example, in the P&P case, I do not think that it is a coincidence that, when the original proposed mortgagee started asking the vendor to produce evidence of his residence in Dubai, including his contract of employment and bank statements, the fraudster changed his instructions and decided to sell instead.
53. Both these frauds were spotted, prior to registration, by HM Land Registry. Given the statutory system of title indemnity in section 103 and Schedule 8 to the 2002 Act (which would kick in on registration) and the increasing prevalence of this type of identity fraud, HMLR are very alive to the possibility of fraud. It may well be that individual firms of solicitors will have to become as vigilant as HMLR in this regard.

THE COURT OF APPEALS DECISION

54. The main judgment was given by Patten LJ. Floyd LJ agreed with Patten LJ in all respects. Gloster LJ dissented on one point only, that is whether or not MdR should be relived from liability under section 61 of the Trustee Act 1925.

Breach of Warranty of Authority

55. The Court allowed P&P's appeal against the ruling that the vendors solicitors, OWC, were not liable for breach of warranty of authority. The Court held that they were.
56. In P&P the purchaser argued that the solicitor had signed the contract "on behalf of the Seller". "Seller" was a defined term under the contract and appeared on its first page defined to mean "Clifford Michael Phillip Harper of 52 Brackenbury Road London W6

OBB". The obligation of the "Seller" under the contract was to transfer "the Property" which was the property at 52 Brackenbury Road. The purchaser relied on the contract and other documentation passing between OWC and its solicitors in which OWC indicated that they had instructions to act for the seller of the property.

57. In relation to the agents, Winkworth, P&P relied on the memorandum of sale sent to the director of P&P on 4 December 2013 in which Clifford Harper was named as the vendor of the property at Brackenbury Road and was referred to in the covering letter as "our client".

58. P&P contended that the representation made in each case was that the solicitors and the selling agents had authority to act on behalf of the true owner of the property and not merely the person who gave them their instructions. This was said to be consistent with the obligation imposed on OWC and Winkworth by the 2007 regulations to verify the identity of their client and the inability of the purchaser or those advising it to do so. It would, they argued, have been unrealistic to expect the purchasers to have carried out identity checks and, in the context of contractual negotiations, they had no access to the vendor or his personal details that could allow them to do so. It was for the vendor's solicitors to carry out the "Know Your Client" procedures and the AML checks are requirements imposed on them precisely because they are the persons with direct access to the vendor client and his documents: see PATEL V FREDDY'S LIMITED [2017] EWHC 73 (Ch).

59. After a lengthy review of the relevant authorities, the Court effectively agreed. It held that the solicitor had done more than merely warrant that she had authority from a client who gave her instructions and said he was the vendor. The matter:

> *"…depends on a consideration of [the solicitors] actions in their proper context having regard to her representation that she acted for the seller who was named*

> *as Clifford Harper with the address of the property to be sold…in these cases the only meaning available to be given to the representation that the agent acted for the wife or the landowner was that he had the authority of that person. The existence of an additional factor in the form of the person instructing the solicitors or agents does not override the clear terms of the representation that was made. Accordingly, I would hold that [the solicitor] did indeed give a warranty that she was authorised to act on behalf of the actual Clifford Harper who owned Brackenbury Road*."

(paragraph 56).

60. The same was not true of the Estate Agent. The Memorandum of Sale which stated that the agents acted for a vendor called "Clifford Harper", and on which the claim was based, reasonably read, was no more than a statement of the details which the agent had been given by the fraudster. It pre-dated the contract and contained nothing to indicate in terms that the agents had received the instructions summarised in the memorandum. Patten LJ concluded (at paragraph 57):

> *I do not consider that the objective bystander would regard this as a statement or warranty by the selling agent that they had been given those instructions by the real Clifford Harper. In that regard, their position is different, I think, from that of [the solicitor]*.

61. However there was a "sting in the tail". The Court, having held that the solicitor had warranted that she was acting for the real property owner and not just for a fraudster who said he was the owner, held that nevertheless the purchaser's solicitors had, on the facts, not relied on any such representation or warranty. The purchaser's solicitor had given evidence, and the judge had found, that he had not relied on any warranty or representation. Patten LJ concluded (at paragraph 61) that the solicitor:

> *"…did not in terms mention the warranty of authority or suggest that contracts had been exchanged on the basis that the solicitors had confirmed or undertaken in some way that they were acting for the real Clifford Harper. In these circumstances, it was in my view open to the judge to make the finding that there was no material reliance on the warranty as such and that what induced Mr Robinson to allow his client to exchange contracts was his belief that the necessary due diligence had been carried out. "*.

62. You will recall that this was the same reason why the purchaser in the Dreamvar case did not pursue such a claim on appeal. Its solicitor had accepted in evidence that she had not relied on any warranty of authority.

63. Thus, the claim against both the solicitor and the agent for breach of warranty of authority was dismissed, albeit for different reasons.

Negligence

64. The Court held that the fraudulent vendors solicitors did not owe a duty of care in the circumstances to the innocent purchaser.

65. The solicitors relied on the well-known case of GRAN GELATO V RICHCLIFF [1992] Ch 560 in which the Court of Appeal held that a solicitor acting for a vendor in a conveyancing transaction owed no duty of care to the purchaser for inaccurate replies to inquiries before contract.

66. The Court here considered that the circumstances here were notably different:

> *"…neither the liability of the vendor for the fraud nor the fact that the purchaser had its own solicitors can necessarily be regarded as providing the purchaser with adequate protection against the loss caused by the vendor's dishonesty. The fraudster himself is unlikely to be traceable (as the present cases illustrate) and the purchaser's own solicitors will not be in the position to carry out their own due diligence and can reasonably expect the vendor's own solicitors to have carried out the necessary AML checks as they are required to do under the MLR. It can therefore be said that the focus of the claims in these cases is on the duty of the vendor's solicitors to take reasonable care to ensure that the transaction is a genuine one rather than on any duty to ensure that accurate information is given about matters such as title or the physical state of the property to be sold."*

67. Having examined a number of different and recent authorities, the Court were nevertheless not prepared to impose a duty of care on the vendors solicitors. Patten LJ said (at paragraph 74):

The imposition of liability in negligence towards a third party who is not the solicitor's client clearly requires something more than it being foreseeable by the solicitor that loss will be caused to the third party by a lack of care on the solicitor's part in carrying out whatever is the relevant task. Nor is it sufficient that the test of proximity is satisfied whether by an actual assumption of responsibility or by the existence of a direct interest on the part of the third party…in the product of the solicitors' instructions. The incremental approach approved in Caparo requires all these and any other relevant factors to be taken into account and globally assessed including any relevant policy considerations. In deciding whether it is just or reasonable to recognise a duty of care, the approach enshrined in the case law requires the Court to take account of the contractual framework and any other factors bearing on liability.

68. The following reasons were cited by the Court as justification for not imposing a duty of care (paragraphs 77 to 81):

(i) There was no actual assumption of responsibility by the vendors solicitors.

(ii) In both cases the purchasers instructed their own solicitors who were free to raise any inquiries they wished and could, at least in theory, have sought some undertaking from the vendors' solicitors.

(iii) The 2007 regulations did not create any statutory duty which if breached gave rise to a cause of action at the suit of the innocent purchaser. The court found it difficult to see how the imposition of such liability could be justified where Parliament did not intend a breach of the regulations to create a private law cause of action in favour of the claimants.

(iv) There was a conflict of interest between the vendors and the purchasers who were engaged in an arm's length transaction. Unlike cases, such as White v Jones, none of the actions of the vendor's solicitors could be said to be for the benefit of the purchasers.

(v) The vendor's solicitors were not asked to give undertakings or assurances that they had properly carried out the AML checks and, had they been asked to do so, they would have had the opportunity to refuse or to limit their liability in some way by a suitable disclaimer.

69. The Court thus held that these were not cases in which it would be fair just and reasonable to treat the solicitors (or the estate agents) as having assumed responsibility to the purchasers for the adequacy of the due diligence performed in relation to their client's identity.

Breach of trust

70. The Court held that the vendor's solicitors in both cases were in breach of trust in paying away the purchase monies to a fraudster rather than to the true owner of the properties.

71. This claim depended to a large extent on the correct construction of the terms of the Code which was adopted by both sets of solicitors in both cases.

72. The Court said that the starting point was that, in the hands of its own solicitor, the purchase monies were held on a bare trust for the purchaser pending completion: see TARGET HOLDINGS LTD V REDFERNS [1996] AC 421 at 436 B-C. The entitlement of the solicitor to part with the money is governed by the instructions he receives from his client. It was not suggested in either case that those instructions permitted the purchaser's own solicitors to release the monies except on completion of a genuine sale and purchase of the property (which is why MdR conceded liability for breach of trust in Dreamvar.)

73. The Court also held that, if the Code had had no application to the vendor's solicitors, then they would have received the purchase money as agents for the purchasers' solicitors and with knowledge that the money belonged to the purchaser. On that hypothesis, they would have had no authority to release the monies except with the express authority of the purchaser which in this case was only given on terms that it would be used to fund an actual purchase of the property. There would therefore have been a clear breach of trust if the Code had not been used.

74. However the vendor's solicitors had successfully contended at first instance that the terms of the Code meant that they were not so liable. The relevant terms of the Code were paragraphs 10 and 3. These are:

> *"3. In complying with the terms of the code, the seller's solicitor acts on completion as the buyer's solicitor's agent without fee or disbursement but* ***this obligation does not require the seller's solicitor to investigate or take responsibility for any breach of the seller's contractual obligations and is expressly limited to completion pursuant to paragraphs 10 to 12****.*

(emphasis added)

> *10. The seller's solicitor will complete upon becoming aware of the receipt of the sum specified in paragraph 9, or a lesser sum should the buyer's and seller's solicitors so agree, unless –*
>
> *(i) the buyer's solicitor has notified the seller's solicitor that the funds are to be held to the buyer's solicitor's order; or*
>
> *(ii) it has previously been agreed that completion takes place at a later time.*
>
> *Any agreement or notification under this paragraph should if possible be made or confirmed in writing.*

The Judges at first instance had held that the terms of paragraph 3 excluded such liability and that "completion" in paragraph 10 could include "pretended completion" to a fraudster. The Court of Appeal disagreed

75. The Court held that in paragraph 10 the word "completion" must mean genuine completion of a genuine sale of the relevant property (see LLOYDS TSB BANK V MARKANDAN [2012] EWCA Civ 65-a case on clause 10.3.4 of the Council of Mortgage Lenders Handbook). Since completion in this sense did not take place, the vendors solicitors had no authority to release the purchase monies to their clients or otherwise to dispose of it. At paragraph 94 the Court said:

> *"[Counsel] seeks to meet this point by submitting that the references to completion in the Code should be read as meaning no more than the ceremony of completion regardless of whether in fact what occurred was the completion of a genuine transaction of sale. Not only is that inconsistent with the approach which this Court has taken to the use of the word "completion" in similar documents to the Code but it is also irreconcilable with the obvious context in which the Code was intended to operate. The Code was adopted to set out the agreed basis for completion of a transaction which both firms of solicitors involved assumed was a genuine transaction. It was also drafted by the Law Society for use in relation to such transactions. The construction for which Mr Patten contends would deprive it of any purpose or utility."*

76. The Court was not impressed by the argument based on paragraph 3.

> *"we are not concerned with whether the vendor's solicitor should be responsible by reason of his agency for any breaches of the vendor's own obligations. The issue is simply one of authority to complete and 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."*

77. Thus both firms of vendor's solicitors were held to have acted in breach of trust when they released the purchase monies to, or at the direction of, their clients.

78. The court also dismissed an argument in the P&P case that there was some difference to be made between the different tranches of the purchase price which had been paid

away at different times following the agreed variation to the contract. The sale contract was at all times a nullity (as the vendor was in fact a fraudster with no title). Thus OWC were entitled to rely on neither the original nor any variation to the contract to pay away any part of the purchase monies.

Breach of undertaking

79. This turned entirely on the correct construction of paragraph 7 of the Code. This is as follows:

> *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."*

80. The key part of the undertaking is at paragraph 7(i). In both cases at first instance the sellers solicitors had managed to persuade the Judge that the reference to "the seller's authority" in paragraph 7(i) was only a reference to the person who was agreeing to sell the property (i.e. the solicitor's actual client) and not to the real owner. This was to be contrasted with the terms of paragraph 7(ii).
81. The Court of Appeal disagreed. They said that, although "seller" was not a defined term in the Code, the Code had been drafted on the assumption that the sale was otherwise

genuine and that the vendor giving instructions to the solicitor was the person named in the contract. Paragraph 7(i) was (consistently with paragraph 7(ii)) therefore likely to have been intended to denote the vendor identified in the contract rather than the person actually giving the solicitor his instructions. That was the correct construction.

82. In both cases at first instance there was some evidence to the effect that, within the solicitors profession, vendors solicitors would not be expected to undertake that they acted for the real owner. In the Dreamvar case at first instance the Judge expressed:

> *"…concerns as to the views expressed in some of the cases which indicate that the general understanding within the profession is that solicitors acting for vendors in transactions for the sale of residential property would not give, and would not be expected to give, an undertaking to the effect that their client is the registered owner of the property being sold."*

It appears that the Court of Appeal were untroubled by such concerns. They have interpreted paragraph 7(i) of the Code as just that: an undertaking by the vendor's solicitors to the effect that their client is the registered or real owner of the property to be sold.

Section 61 relief

83. As a result of their rulings thus far both vendors solicitors, OWC and MMS (as well as MdR) had been held to be in breach of trust. Perhaps unsurprisingly, given its admitted failures to comply with its AML requirements, MMS did not apply for relief. However both OWC and MdR did.

84. Section 61 reads:

> *"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, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, 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."*

85. The Court of Appeal emphasised that the section constitutes the exercise of a discretion and that there are three requirements before relief can be granted: (i) the trustee must have acted honesty; (ii) he must have acted reasonably; (iii) the trustee must show that he ought fairly to be excused. Thus it is not sufficient for the trustee to show that he acted both honestly and reasonably: more is required.

86. The Court referred to certain authorities and noted a "strict approach" to the position of professional trustees with an "obvious counterpart in the need to have regard to the effect on the beneficiaries" should relief be granted. They cited a passage from the Court of Appeal case of SANTANDER UK PLC V RA LEGAL SOLICITORS [2014] EWCA Civ 183 in which Briggs LJ said:

> *"Relief under s 61 is often described as an exercise of mercy by the court. In my judgment the requirement to balance fairness to the trustee with a proper appreciation of the consequences of the exercise of the discretion for the beneficiaries means that this old-fashioned description of the nature of the s 61 jurisdiction should be abandoned. In this context mercy lies not in the free gift of the court. It comes at a price."*

87. The Court held that, in P&P, the vendors solicitors, OWC, could not be said to have acted reasonably. Although "reasonableness does not mean perfection", nevertheless there had been a series of failures by OWC to carry out a number of relatively basic checks on the identity of their client. The Judge had held that:

> *"The fraud was plainly a sophisticated one which appears to have [been] carried out with some expertise. However, in my view, it is plainly possible that, despite the obvious sophistication of the fraud, further questions would have revealed the true position or discouraged Mr Harper from proceeding further and, even if they did not, they would have increased the prospect of that occurring."*

The Court of Appeal held that the Judge would have exercised his discretion in a manner which was not susceptible to challenge on appeal.

88. So far as MdR was concerned, again the Court of Appeal dismissed the challenge to the Judge's refusal to grant relief. The Judge had refused relief essentially because MdR was insured and thus better able to bear the loss that the purchaser who was not. He said:

> *"As for MdR's position, it is common ground that it 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 MdR (with or without insurance) is far better able to meet or absorb it than Dreamvar. While, as I have held, it was not unreasonable for MdR not to have advised Dreamvar about the risk of fraud, or to have sought greater protection for Dreamvar against that risk (such as further undertakings), it is also not irrelevant that MdR was necessarily far better placed to consider, and as far as possible achieve (a matter not in the event tested), greater protection for Dreamvar against the risk which in fact occurred. As I have already found, Dreamvar has no recourse against MMS, and (it appears) no practical likelihood of either tracing or making any recovery from the fraudster. As a result, the only practical remedy it has is against MdR."*

89. The Court held again that the exercise of the Judge's discretion here was not susceptible to challenge on appeal. Indeed they went further and held that the Judge was wrong to have indicated that MdR would have been relieved had MMS been held to be in breach of trust.

90. Gloster LJ dissented on this part of the case. She would have held that MdR ought to have been relieved. She said (at paragraph 125):

> *"iv) I do not consider that the fact that MdR is insured should in the circumstances of this case lead to the conclusion that MdR should bear financial responsibility for Dreamvar's loss. Dreamvar was entering into what was for it a relatively substantial property development as a business transaction. I do not consider that the Court's sympathy should be with one commercial party (in reality with its loan creditors, given its insolvency) rather than another, simply because one, and not the other, has insurance. It is irrelevant, in my view, that*

Dreamvar was a newly formed company or that its beneficial owner was a young man.

v) There was no suggestion that MMS' insurance would not be adequate to cover the loss."

91. However this more sympathetic approach was rejected by the majority.

CONCLUSIONS

92. Thus:

(i) The innocent purchaser's solicitor in Dreamvar, having accepted that it was liable for breach of trust, was refused relief, and is thus still liable to its client, the purchaser (despite having been in breach of no duty whether statutory, contractual or tortious).

(ii) The Court did not need to hear the purchasers appeal against the dismissal of its claim in negligence against MdR

(iii) The fraudulent vendor's solicitors in both cases were held to be liable to the innocent purchaser for both breach of trust (deriving from the common law and paragraph 10 of the Code) and breach of undertaking (as given in paragraph 7(i) of the Code).

(iv) The fraudulent vendor's solicitors in P&P were refused relief under section 61.

(v) Whilst the fraudulent vendor's solicitors in the P&P case were held to have been in breach of warranty of authority to the purchaser, that claim was dismissed because (as in Dreamvar) there was no evidence that the

purchaser (through its solicitor) had actually relied on any such warranty.

(vi) The claim in negligence brought by the purchasers against the vendor's solicitors was dismissed, there being no duty of care.

(vii) The purchaser solicitors in Dreamvar have (at least-see below) a claim for contribution against the vendors solicitors MMS.

(viii) All the claims against the estate agents in P&P were dismissed.

SOME THOUGHTS

93. It is perhaps a little early to come to firm conclusions about how this decision will impact on conveyancing practice. However it can be said that the outcome is a little more satisfactory than the situation after the first instance decisions.

94. Whilst the innocent purchaser's solicitors (here MdR) have been held liable in breach of trust and refused relief despite having conducted themselves irreproachably, at least they now have a contribution claim against the fraudulent vendors solicitors, who did not.

95. One can speculate that, in a case such as Dreamvar, in which there is a disparity of behaviour between the two sets of solicitors, then the fraudulent vendors solicitors (who failed to comply with their AML obligations) will end up picking up most, if not all of the tab. It is, however, difficult to say what conclusion would be arrived at in a case in which neither solicitor has been at fault in that sense. I suppose that the purchaser's solicitors can always make the point that it is the vendor's solicitor who is able, and

indeed obliged, to carry out the relevant AML checks and thus it ought to bear most of the loss.

96. Further, it can be argued that the innocent purchaser's solicitors do not in fact need to rely on a contribution claim under the 1978 Act. As set out above, the Court of Appeal held that the fraudulent vendor's solicitor was liable to the innocent purchaser for breach of the undertaking given in paragraph 7(i) of the Code. It can be argued that this undertaking is given to the innocent purchaser's solicitor as well as to the purchaser personally. The Code is after all intended to do away with the need for face to face completion and, in its introduction, it states that:

> *"It [i.e. the Code] is intended to provide a fair balance of obligation between seller's and buyer's solicitors and to facilitate professional cooperation for the benefit of clients."*

This point was not considered by the Court of Appeal. However, if it is right, then the innocent purchaser's solicitors will have an unanswerable claim against the fraudulent vendor's solicitors without the need to consider any division of liability.

97. Another interesting point is this. In the Dreamvar case, MdR did not appeal the finding that it was in breach of trust in paying away the purchase monies to the fraudulent vendor's solicitors. There is no doubt, as the Court of Appeal emphasised, that the purchase monies are held on trust by the purchaser's solicitors. But it is also the case that the terms of that trust depend on what is agreed between the purchaser and his solicitor. As the Court of Appeal noted, the retainer letter between MdR and Dreamvar said nothing about the terms on which MdR would hold and be authorised to release the purchase money to the vendor or his solicitor. This lead the Judge at first instance

to find that: there was an implied term in the retainer that the purchase monies would only be released for completion; and that completion in this sense meant real completion and not pretended completion. It seems to me that it would be open to solicitors acting for a purchaser to specify that they are entitled to release the purchase monies to a bona fide firm of solicitors which has given an undertaking pursuant to the Code. This may well absolve the purchasers' solicitors from any liability at all.

98. So far as relief under section 61 is concerned, given the Court of Appeal's approval of the Judge's concentration on the relative outcome and the fact that the purchaser's solicitors were insured, it might seem difficult for any solicitors in the position of MdR to obtain relief.

99. One answer might be for purchasers' solicitors to consider with their clients the possibility of taking out fraud insurance (some such products are already available). This will of course add to the time and cost of conveyancing. However, if the client has made an informed choice, then a stronger claim for section 61 relief could be made.

100. It might be that such insurance need only be considered in circumstances in which there is a risk of fraud as identified by the Joint Law Society and HMLR Practice Note. If you look at it, it clearly identifies, as circumstances in which there is an increased risk of fraud, a number of factors which applied in these cases:

(i) Where there is a sole owner, especially of an unmortgaged property;

(ii) Where there is a long established owner who may have built up equity in a property and perhaps have a small mortgage or no mortgage.

(iii) Where the owner is absent and the property is tenanted or empty;

(iv) Where the only contact details provided for a party are a telephone number, mobile number and/or an email address:

(v) Where the solicitor is instructed on the sale of the property which has been owned by the registered proprietor for a long time, but the client appears to be younger than would be expected.

(vi) Where a client is reluctant to answer questions from the solicitor or from the purchaser.

(vii) If the sale is by a supposed owner-occupier but the client wants the solicitor to write to a different address.

(viii) Where the client requires the transaction to be completed with great urgency without a feasible explanation.

(ix) Where there are inconsistencies between what the seller states in the seller's property information form (SPIF), and what a local search reveals.

(x) A transactions in which the property is being sold at what appears to be a low price, which may or may not be linked to a desire for a quick sale.

(xi) Statements or explanations are provided such as:

- 'I've already put my furniture into store and am living with a friend'
- 'I've moved in with my boy/girl-friend'
- 'We have trouble with our post being stolen'

- ‘It will be quicker if you write to my office address’
- ‘Don’t send me letters - use email for speed and I’ll call in to sign any paperwork’…

101. It might turn out to be the case that purchasers’ solicitors’ insurers will insist that they compel their clients to take out such insurance. Most people would probably consider that undesirable as simply adding the cost of the conveyancing process.

102. As I have stated, HMLR spotted both of these frauds prior to registration. The one clear message appears to me to be that solicitors are going to have to be much more vigilant in carrying out their AML obligations. It is after all a criminal offence to fail to do so.

103. It might also be interesting to see how the ruling on breach of warranty of authority plays out. These claims failed on the evidence. However it might always be open to purchasers’ solicitors to state expressly to the vendors’ solicitors that they are relying on them either to verify their client’s identity or to warrant that their client is who he says he is. If such an undertaking or warranty is disputed, then purchaser’s solicitors might have to consider with their clients the taking out of insurance (see above)

104. So far as vendors’ solicitors are concerned, they have been held to be liable to the purchasers on two and potentially three different grounds. This liability will arise even if they fully comply with their AML obligations. To avoid such liability, they might try to state expressly to purchasers’ solicitors that they give no warranty as to the identity of their client. This might, on the other hand, not be acceptable to purchasers

or their solicitors. The only other option is to seek bespoke amendments to the terms of the Code in order to exclude liability. Again this might prove to be unacceptable.

105. Finally, I have no idea whether the Law Society will amend the Code as a result of these cases. We will have to "watch this space".

ANNEX

THE RELEVANT TERMS OF THE CODE

"3. In complying with the terms of the code, the seller's solicitor acts on completion as the buyer's solicitor's agent without fee or disbursement but this obligation does not require the seller's solicitor to investigate or take responsibility for any breach of the seller's contractual obligations and is expressly limited to completion pursuant to paragraphs 10 to 12.

Before completion

…

7. 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.

8. The buyer's solicitor may send the seller's solicitor instructions as to any other matters required by the buyer's solicitor which may include:

(i) documents to be examined and marked;

(ii) memoranda to be endorsed;

(iii) undertakings to be given;

(iv) deeds or other documents including transfers and any relevant undertakings and authorities relating to rents, deposits, keys, to be sent to the buyer's solicitor following completion;

(v) consents, certificates or other authorities that may be required to deal with any restrictions on any Land Registry title to the property;

(vi) executed Stock Transfer Forms relating to shares in any companies directly related to the conveyancing transaction.

9. The buyer's solicitor will remit to the seller's solicitor the sum required to complete, as notified in writing on the seller's solicitor's completion statement or otherwise in accordance with the contract, including any compensation payable for late completion by reference to the 'contract rate' if the Standard Conditions of Sale are utilised, or in default of notification as shown by the contract. If the funds are remitted by transfer between banks, immediately upon becoming aware of their receipt, the seller's solicitor will report to the buyer's solicitor that the funds have been received.

Completion

10. The seller's solicitor will complete upon becoming aware of the receipt of the sum specified in paragraph 9, or a lesser sum should the buyer's and seller's solicitors so agree, unless –

(i) the buyer's solicitor has notified the seller's solicitor that the funds are to be held to the buyer's solicitor's order; or

(ii) it has previously been agreed that completion takes place at a later time.

Any agreement or notification under this paragraph should if possible be made or confirmed in writing.

11. When completing, the seller's solicitor **undertakes**:

(i) to comply with any agreed completion arrangements and any reasonable instructions given under paragraph 8;

(ii) to redeem or obtain discharges for every mortgage, charge or other financial incumbrance specified under paragraph 6 so far as it relates to the property which has not already been redeemed or discharged;

that the proprietor of each mortgage, charge or other financial incumbrance specified under paragraph 6 has been identified by the seller's solicitor to the extent necessary for the purpose of the buyer's solicitor's application to HM Land Registry.

After completion

12. The seller's solicitor **undertakes**:

(i) immediately completion has taken place to hold to the buyer's solicitor's order every document specified under paragraph 8 and not to exercise a lien over any of them;

(ii) as soon as possible after completion, and in any event on the same day:

(a) to confirm to the buyer's solicitor by telephone, fax or email that completion has taken place;

(b) to notify the seller's estate agent or other keyholder that completion has taken place and authorise them to make keys available to the buyer immediately;

(iii) as soon as possible after completion and in any event by the end of the working day following completion to send written confirmation and, at the risk of the buyer's solicitor, the items specified under paragraph 8 to the buyer's solicitor by first class post or document exchange;

(iv) if the discharge of any mortgage, charge or other financial incumbrance specified under paragraph 6 takes place by electronic means, to notify the buyer's solicitor as soon as confirmation is received from the proprietor of the mortgage, charge or other financial encumbrance that the discharge has taken or is taking place."

THE LAW SOCIETY GUIDANCE

The Law Society's Anti-Money Laundering Practice Note of October 2013.

At paragraph 4.3.3 it states the following:

4.3.3 Methods of verification
Verification can be completed on the basis of documents, data and information which come from a reliable and independent source. This means that there are a number of ways you can verify a client's identity including:
• obtaining or viewing original documents
• conducting electronic verification
• obtaining information from other regulated persons
Independent source
You need an independent and reliable verification of your client's identity. This can include materials provided by the client, such as a passport.

Consider the cumulative weight of information you have on the client and the risk levels associated with both the client and the retainer.
You are permitted to use a wider range of sources when verifying the identity of the beneficial owner and understanding the ownership and control structure of the client. Often only the client or their representatives can provide you with such information. Apply the requirements in a risk-based manner to a level at which you are satisfied that you know who the beneficial owner is.
Documents
You should not ignore obvious forgeries, but you are not required to be an expert in forged documents.

Paragraph 4.6.1 provides:

4.6.1 Natural persons

A natural person's identity comprises a number of aspects, including their name, current and past addresses, date of birth, place of birth, physical appearance, employment and financial history, and family circumstances.

Evidence of identity can include:

• identity documents such as passports and photocard driving licences

• other forms of confirmation, including assurances from persons within the regulated sector or those in your firm who have dealt with the person for some time.

In most cases of face to face verification, producing a valid passport or photocard identification should enable most clients to meet the AML/CTF identification requirements.

It is considered good practice to have either:

• one government document which verifies either name and address or name and date of birth

• a government document which verifies the client's full name and another supporting document which verifies their name and either their address or date of birth…

Where you do not meet the client, the Regulations state that you must undertake

enhanced due diligence measures."

The Joint Law Society and Land Registry Note states:

2.1 Methods used to carry out title fraud…
***Sellers/borrowers**: a registered proprietor (or an unregistered owner) might be impersonated in order for a fraudster to attempt to sell or mortgage a property using false or stolen ID documentation. Registered proprietors or unregistered owners most at risk are:*

• sole owners, especially of unmortgaged properties; absent owners, particularly landlords; those who are deceased or someone in a care home or hospital or owners living or absent overseas (see Vulnerable registered owners and properties below)
• long established owners who may have built up equity in a property and perhaps have a small mortgage or no mortgage…

2.2.6 Client contact details

Client contact details may suggest an increased risk of fraud. This includes:
• Where the only contact details provided for a party are a telephone number, mobile number and/or an email address:

- *Why is the client unable to provide a contact address? Is the explanation reasonable in all of the circumstances? In P&P Property Limited v Owen White & Catlin [2016] EWHC 2276 (Ch), the court found that the solicitor should have asked further questions to establish the client's current residence, and that, with other factors, relief under S 61 Trustee Act 1925 would not have been granted if a breach of trust claim had been proven (see also Dreamvar (UK) Ltd v Mishcon de Reya and Mary Monson Solicitors Ltd [2016] 3316 (Ch).*
- *Is the client able to provide you with sufficient evidence of his/her connection to the property?*
- *Record all of the information in your customer due diligence file (see further in Record keeping below) together with your reasoning as to whether you accept that the client is who they purport to be. This may include the results from certain electronic verification services…*

2.2.7 Examples of suspicious behaviour

These are examples of behaviour sufficiently suspicious for you to make further investigations:

• If you are instructed on the sale of the property which has been owned by the registered proprietor for a long time, but the client appears to be younger than would be expected.

• Where a client is reluctant to answer questions from you or from the purchaser. In Purrunsing for example, the fraudster withdrew from the sale to a buyer who requested details of the alleged overseas employer of the purported seller, which should have raised suspicions on the part of the seller's solicitor, a factor which contributed to the finding that the firm was not entitled to s. 61 relief for breach of trust (see para 19 of the case report).

• If the sale is by a supposed owner-occupier but the client wants you to write to a different address. Various reasons may be given (which may be genuine).

• A client who requires the transaction to be completed with great urgency without a feasible explanation.

• There are inconsistencies between what the seller states in the seller's property information form (SPIF), and what a local search reveals. In Purrunsing, for example, the local authority search confirmed building

works had been carried out although the seller had indicated in the SPIF that no works had been done on the property.

• Transactions in which the property is being sold at what appears to be a low price, which may or may not be linked to a desire for a quick sale.

• Statements or explanations are provided such as:

- *'I've already put my furniture into store and am living with a friend'*
- *'I've moved in with my boy/girl-friend'*
- *'We have trouble with our post being stolen'*
- *'It will be quicker if you write to my office address'*
- *'Don't send me letters - use email for speed and I'll call in to sign any paperwork'…*

2.2.8 Vulnerable registered owners and properties

HM Land Registry has identified that certain categories of owner may be more susceptible to registered title fraud. These vulnerable registered owners include, for example, clients who rent out their property, overseas owners or elderly owners who are in hospital or have moved into a care

home. These types of owners may own properties without a mortgage which increases the risk of title fraud. Attempts could be made to sell or charge the target property by use of identity fraud.

Factors which may point to a vulnerable client include:

• an address for service (that is, the notification address recorded on the register) which is not the address of the property (especially if it is a care home, or overseas) or

• the presence of a Form RQ restriction or

• a registered proprietor who has been proprietor for a very long time and may therefore be elderly.

Some clients may be particularly at risk from fraudulent activity because, for example:

• they no longer live in the property and there has been an acrimonious break up with a partner

• they let the property or it is empty

• they have already been the victim of identity fraud

• they are a personal representative responsible for a property where the owner has died and the property is to be sold

• they are elderly.

HM Land Registry has identified that certain types of properties may be particularly vulnerable to registered title fraud, such as:

• unoccupied properties, whether residential or commercial

- *tenanted properties*
- *high value properties without a mortgage*
- *high value properties with a mortgage in favour of an individual living overseas*
- *properties undergoing redevelopment…*