

“WHO DO YOU THINK YOU ARE KIDDING?” SOME IMPLICATIONS OF *DREAMVAR*?



1. INTRODUCTION - WHO DO YOU THINK YOU ARE KIDDING?

1.1 When I was first asked to give a paper on the implications of the decision of the Court of Appeal in the combined appeals in *P&P Property Ltd. v. Owen White and Catlin LLP* and *Dreamvar (UK) Ltd. v. Mishcon de Reya LLP* (collectively, “*Dreamvar*”),¹ there were a number of possible implications which I might have looked at.

1.2 However, the five months since the decision has been published has made it obvious to me what there is one particular post-*Dreamvar* phenomena which should be examined. That is the tendency for conveyancers acting for intending buyers to seek ways of cajoling conveyancers acting for sellers to give some sort of representation, warranty or undertaking that they have undertaken the required Anti-Money Laundering (“AML”) and/or the “Know Your Client” (“KYC”) checks.

1.3 One example I have seen is this:

Please confirm:

- (a) that you have taken appropriate steps to verify and have verified your client’s identity against the acceptable forms of ID contained in the Law Society’s Anti-Money Laundering Practice Note and you are satisfied with the same; and
- (b) that you have taken appropriate steps to verify and have verified your client’s association with the property which is being sold and their entitlement to sell the same. If you proceed with this transaction, you are indicating that your client is legally entitled to sell the property.
- (c) That in the event that any information comes to light before completion causing you concern or to question the information you have received in respect of your client’s identity or the transaction, you will immediately share this with us

Another version, a little more subtle, is this:

We will be proceeding on the assumption that you have carried out all the necessary AML and KYC checks to establish that you act for the true owner of the Property. If this is not correct please let

¹ [2018] EWCA Civ 1082; [2018] PNLR 29 (CA).

us know as soon as possible. In the event that you sign the sale contract on behalf of your client we will be relying on your warranty that you have appropriate authority from the true owner of the Property.

I have also seen a number of rather brutal demands for formal warranties and even undertakings, all of which seem to be predicated on the basis that:

1.3.1 the seller is only kidding when he says he is entitled to sell the property, because every sale is a genuine fraud risk; and/or

1.3.2 somehow, routinely asking questions of this nature will create some kind of protection against fraud for the benefit of the buyer or, if a little cynicism may be forgiven, protection for the buyer's conveyancers against any claims in negligence or breach of trust.

1.4 The focus of this paper will be deciding whether the asking of questions such as these is making the buyer and the buyer's solicitors any safer, or whether it is just making the situation worse?

1.5 When I was preparing this paper, I heard on the radio that this year marks the fiftieth anniversary of the first episode of the great "Dad's Army", which made me think to myself, when buyers' conveyancers ask these sorts of questions, who the do they think they are kidding? Shall we ask the boys of the Warmington-on-Sea Home Guard?

2. "I'LL TELL MUM!"² - THE DUTIES OF CARE BETWEEN CONVEYANCERS:

2.1 Under this heading, I am going to address the general common law duties between conveyancers acting for purported sellers and real buyers.³ This issue forms the bedrock as to why asking for a warranty or the like in respect of AML/KYC checks is pointless, because it is not a request that it is sensible to answer in the affirmative.

² Per Private Frank Pike.

³ The duties imposed in equity, arising from the imposition of a trust of the purchase monies, will be considered in paragraph 6.8 *et seq.* below.

2.2 It is, of course, a fundamental truism that the conveyancing process is built on trust as between the professional conveyancers. That need for trust is underlined by the basic position that there is **no** legal duty of care between those acting for the seller and the buyer.

2.3 The root authority is *Gran Gelato Ltd. v. Richcliff (Group) Ltd.*, where replies to preliminary enquiries before the grant of an underlease were provided, in the ordinary way and without any disclaimer of liability, failed to disclose the existence of a break clause in the superior lease.⁴ Sir Donald Nicholls V-C refused to hold that the solicitor for the seller owed a duty of care to the buyer, based on negligent misrepresentation:

... it does seem to me that in the field of negligent misrepresentation caution should be exercised before the law takes the step of concluding, in any particular context, that an agent acting within the scope of his authority on behalf of a known principal, himself owes to third parties a duty of care independent of the duty of care he owes to his principal. There will be cases where it is fair, just and reasonable that there should be such a duty. But, in general, in a case where the principal himself owes a duty of care to the third party, the existence of a further duty of care, owed by the agent to the third party, is not necessary for the reasonable protection of the latter. Good reason, therefore, should exist before the law imposes a duty when the agent already owes to his principal a duty which covers the same ground and the principal is responsible to the third party for his agent's shortcomings. I do not think there is good reason for such a duty in normal conveyancing transactions.

By parity of reasoning, if the seller's solicitor owes no duty of care to the buyer, he cannot owe a duty of care to the buyer's agent, such as the buyer's solicitor, unless there are "special circumstances", "where it is fair, just and reasonable that there should be such a duty".

2.4 *Gran Gelato* was considered by the Court of Appeal in *Dreamvar*. The Court confirmed that the general rule was that a solicitor acting for a seller owed no duties of care in negligence to the buyer or the buyer's solicitor. The underlying policy reason for that absence of a duty of care is that the conveyancer is always acting on behalf of a client and will, generally, be dependent on that client for the information the conveyancer passes on to the other side. The Court held that there were no "special circumstances" which would create such a duty in the cases before it.⁵

⁴ [1992] Ch 560, 571-2, 575 (Nicholls V-C). See also *Francis v. Knapper* [2016] EWHC 3093 (Andrew Baker J), a case on the CPSEs, in which the need for -and efficacy of- a formal disclaimer is considered.

⁵ See Patten LJ at paragraphs [65]-[72].

2.5 The correctness of *Gran Gelato* has been recently confirmed by the Supreme Court in *Steel v. NRAM Ltd.*, a case which helps identify those “special circumstances”.⁶ Ms. Steel, a solicitor, negligently told Northern Rock that her client’s remortgage would pay off all its charge on the client’s property. By the time NR found out the loan was to be reduced, not redeemed, the security had been released and the borrower was bust. This is a Scottish case, so *not* a statement of the law south of the border. However, the Supreme Court applied *Gran Gelato* and a number of other English cases to hold that Ms. Steel did not owe Northern Rock a duty of care.

2.6 Lord Wilson said:

[32] Perhaps it helps only slightly for us to have been reminded in the authorities cited above that Ms. Steel and the firm are liable to Northern Rock only if it was a special case. Probably of greater assistance is the analysis in the *Al-Kandari* case that the solicitors owed a duty of care to the opposite party because they had stepped outside their normal role. But the six authorities cited above demonstrate in particular that the solicitor will not assume responsibility towards the opposite party unless it was reasonable for the latter to have relied on what the solicitor said and unless the solicitor should reasonably have foreseen that he would do so. These are, as I have shown, two ingredients of the general liability in tort for negligent misrepresentation; but they are particularly relevant to a claim against a solicitor by the opposite party because the latter’s reliance in that situation is presumptively inappropriate.

Interestingly, there was an English case with very similar facts in which a duty was owed: *Dean v. Allin & Watts (a firm)*.⁷ The Court of Appeal held that Mr. Dean, the lender, was owed a duty of care by the borrower’s solicitors, essentially because he was unrepresented and the borrowers had made it clear to their solicitors that he was, for that reason, relying on them.

2.7 Lord Wilson’s reference to the *Al-Kandari* case is interesting, because it shows what he meant by the duty of care being assumed when the solicitor steps out of his normal role: on Lord Wilson’s speech, this appears to be what constitutes “special circumstances”, at least in conveyancing transactions.⁸ In a custody case, the court had made an order obliging the father’s solicitors, to retain possession of his passport, on which the children were registered.

⁶ [2018] 1 WLR 1190 (UKSC).

⁷ [2001] 2 Lloyd’s Rep 249 (CA).

⁸ *Al-Kandari v. JR Brown & Co.* [1988] QB 665 (CA).

With the mother's consent, the solicitors allowed their agents to take the passport to the Kuwaiti embassy for alteration on condition that it would never be out of their sight. The solicitors did not inform the mother that the embassy had retained the passport nor that (as they knew) the father was due to attend there on the following day. The embassy released the passport to the father, who abducted the children to Kuwait. The solicitors were held liable to the mother.

2.8 This is consistent with the decision in *Dean v. Allin & Watts*, as the solicitors for the borrower "stepped outside their normal role by (apparently) accepting a duty to the *unrepresented* lender, who was a private individual, not a professional lending institution. The solicitors could (and perhaps should) have made it clear that there was an inherent divergence of interest between their borrower clients and the lender. It can also be analysed as a case where the solicitors voluntarily accepted a duty to the lender by not making it clear he could not rely on them to protect his interests. Proof that "no good deed goes unpunished".⁹

2.9 The sad case of *Al-Kandari* is a long way from the conveyancer's daily grind, but what it shows is that merely failing to properly and adequately check that a seller-client is who he says he is will *not* in and of itself make the seller's conveyancer liable to the conveyancer acting for the soon-to-be disappointed buyer. In the general run of cases, where there is no "stepping out of the normal role", there *must* be a voluntary acceptance of a duty to create liability. As we will see, that duty might arise through giving an undertaking or becoming a trustee, but just acting as the seller's conveyancer is not enough.

3. "IT WON'T COST YOU MUCH"¹⁰ - WHAT IS "COMPLETION"?

3.1 The second preliminary point I want to consider is what is meant by "completion". This is the fulcrum of the courts' analysis of identity frauds, as occurred in *Dreamvar*. Even within the sphere of conveyancing, the word has different shades of meaning, which it takes from its context. Note that the focus of this discussion is "what" is completion, not "when" does it occur.

⁹ *Wikipedia* states that this phrase has been attributed to several people, including writers Oscar Wilde and Clare Booth Luce and US bankers John P. Grier and Andrew W. Mellon, but that its actual origin has never been established.

¹⁰ *Per Private Joe Walker.*

Starting simple - unregistered land:

- 3.2 At its most simple, and in the context of unregistered land, “the completion of the purchase” usually means “the complete conveyance of the estate and final settlement of the business”.¹¹
- 3.3 I say “usually”, because the parties are free to agree by their contract that “completion” has a bespoke meaning.¹² *Redwell Investments Ltd. v. 1-3 Cuba Street Ltd.* is a striking example: the parties agreed that completion should take place, even though 25% of the purchase price (£162,000.00) was left outstanding.¹³
- 3.4 In the simple, unregistered land situation, the “final settlement of the business”, will usually be the exchange of the title documents and the purchase price. If the conveyance is with vacant possession, then the giving up of possession and the title documents in exchange for possession constitutes “completion”.¹⁴ In respect of leasehold conveyancing, there is a conflict of authority as to whether completion requires the acceptance of the lease by the lessee: the better view is that completion does require the lessee to execute a counterpart lease (or countersign the lease itself).¹⁵

Registered land is such sweet sorrow:

- 3.5 In unregistered land, completion in the usual sense caused the legal title to be conveyed from seller to buyer. This, of course, does *not* happen in registered conveyancing, as the legal title remains vested in the seller until the buyer becomes the registered proprietor.¹⁶ How does this change “completion”?

¹¹ *Lewis v. The South Wales Railway Company* (1852) 10 Hare 113, 119; (1852) 68 ER 861, 864 per Sir George Turner V-C, adopted in *Killner v. France* [1946] 2 All ER 83 (Stable J) and *Maktoum v. South Lodge Flats Ltd.*, *The Times* 22nd April 1980 (Mervyn Davies J).

¹² As actually happened in *Lewis*.

¹³ [2005] EWCA Civ 1799. The issue was whether interest was payable on account of late completion.

¹⁴ It follows that giving up possession without more is not “completion”: *Maktoum v. South Lodge Flats Ltd.*; *Dogma Properties Ltd. v. Gale* (1984) 134 NLJ 453, 454 per Kilner Brown J. Handing over the documents without giving up vacant possession, if that is required by the contract, also counts as a failure to complete: *Cumberland Consolidated Holdings Ltd. v. Ireland* [1946] KB 264, 270-1 (CA), per Lord Greene MR.

¹⁵ *Maktoum v. South Lodge Flats Ltd.* is to be preferred over *D’Silva v. Lister House Development Ltd.* [1971] Ch 17 (Buckley). Buckley J held that completion of a lease was effected by the lessor unilaterally executing the lease, without need of acceptance or execution by the lessee. The case has been doubted on another point, on the execution of deeds, in *Longman v. Viscount Chelsea* (1989) 58 P&CR 189 (CA).

¹⁶ This is now the combined effect of the Land Registration Act 2002, sections 19(1), 23(1) and 27(1).

- 3.6 Under the Land Registration Act 1925, section 110(6), there was an obligation, “on completion” to deliver the Land Certificate to the buyer or to deposit it at HM Land Registry.¹⁷ Following the “de-materialisation” of registered land, this provision has not been replicated: presumably, the magic of e-conveyancing and simultaneous completion and registration was intended to make an equivalent provision redundant. Meanwhile, back in the real world ...
- 3.7 In registered land under the 2002 Act, the moment of completion occurs *not* upon the new registered proprietor being registered at HM Land Registry, but:

by way of an exchange of real money in payment of the balance of the purchase price for real documents that will give the purchaser the means of registering the transfer of title to the property that he has agreed to buy...

Thus said Rimer LJ in *Lloyds TSB Bank plc v. Markandan & Uddin (a firm)*.¹⁸

- 3.8 That analysis does mean that the buyer parts with his money before he gets his *legal* title, which does seem a little odd. In *Markandan*, it was argued that completion only occurred on registration because, in a “open conveyance”, the buyer was not obliged to part with his money until he had his title. Rimer LJ had he did not have to deal with this issue, as the contract before him incorporated the *Standard Conditions of Sale (4th)*, which obliged the buyer to pay the purchase monies long before registration of his title.¹⁹ It may be that, should pigs ever fly and the point ever arise, the answer is that the protection afforded by taking out a priority search under the *Land Registration Rules 2003*, Rule 147, is sufficient to cause the purchase to “complete” before the buyer has legal title.²⁰

¹⁷ See the discussion of this provision in *R. v. Edwards ex parte Joseph* [1947] KB 392 (Lord Goddard LCJ), a case relating to a prosecution under the Building Materials and Housing Act 1945, section 7, for selling a house at price in excess of that authorised by the local authority. Who knew? [2012] 2 All ER 884; [2012] PNL R 20 at [50] (CA).

¹⁸ Rimer LJ relied on Condition 6.7, “The buyer is to pay the money due on completion by direct credit and, if appropriate, an unconditional release of the deposit held by a stakeholder”.

²⁰ (SI 2003/2114). *Emmet & Farrand on Title*, at paragraph 8.090 and *Ruoff and Roper’s Registered Conveyancing*, at paragraph 20.024, both take this view.

Money for nothing - completion with a fraudster:

- 3.9 It is implicit in the definitions of “completion” I have discussed above that it requires an element of genuine exchange: the buyer parts with the cash and, in exchange, receives either the title itself in unregistered land or the means to have the registered title vested in him. This, of course, is not what happens when you attempt to complete a conveyance with a fraudster: he gets money and you get nothing, because the very contract itself is a nullity.²¹
- 3.10 Speaking in the context of registered land, Rimer LJ explained in the *Markandan* case why it is impossible to “complete” a transaction with a fraudster:²²

[50] ... The purported contract was a nullity, since the [*real registered proprietors*] had not agreed to sell their property to [*the purported buyer*], nor had [*real registered proprietors*] authorised anyone to sell it to [*the purported buyer*] in their name; and the purported completion of that nullity by way of the exchange of purchase money for forged documents could not in my view have amounted to completion. “Nothing”, said Lear, “will come of nothing”, and so it was here. Completion in the present context must mean the completion of a genuine contract by way of an exchange of real money in payment of the balance of the purchase price for real documents that will give the purchaser the means of registering the transfer of title to the property that he has agreed to buy and to charge. An exchange of real money for worthless forgeries in purported performance of a purported contract that was a nullity is not completion at all.

That could not be clearer.

- 3.11 There is no direct authority in respect of unregistered conveyancing, but there ought to be no difference. In *1st Property Finance Ltd. v. Martin & Haigh (a firm)*, a fraudster purported to grant a lease of property he did not own.²³ The lease was long enough to need registration, but the Judge applied the unregistered land definition of completion, “the complete conveyance of the estate and final settlement of the business”, before saying “in my view the delivery of a lease signed by an impostor does not satisfy this definition of ‘completion’. Only the delivery of a lease duly executed by the [*real*] landlord would constitute completion.”

²¹ This is the position in the general law: see *Shogun Finance Ltd. v. Hudson* [2004] 1 AC 919 (HL).

²² See footnote 18, 63 for the reference. William Shakespeare, *King Lear*, act 1, scene 4, line 09, Lear: “Nothing will come of nothing. Speak again.”

²³ [2006] PNLR 29 at [19] *per* HH Judge Pelling QC, sitting as a High Court Judge. For the meaning of “completion” in unregistered land, see my paragraph 1.

3.12 This must be right, as it is a fundamental building block of the common law that no-one can bestow on another a right that they themselves do not have.²⁴ As Willes J said, in *Whistler v. Forster*.²⁵

The general rule of law is undoubted, that no one can transfer a better title than he himself possesses: *Nemo dat quod non habet*.

That analysis works when looking at fraudulent transactions which only get as far as “completion”, or concern leases too short to require registration. HM Land Registry can, of course, create “something out of nothing”.²⁶

3.13 HM Land Registry *can* create something out of nothing by practising the dark art of “statutory magic”.²⁷ The Land Registration Act 2002, section 58, states that:

If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration.

This means that, if a fraudulent conveyance causes the purported buyer to become registered proprietor, the buyer gets good title, unless the Register is rectified under Schedule 1 to that Act. Perhaps surprisingly, *generally* the “real” registered proprietor will *not* get an order for rectification against a *bona fide* buyer in possession: see *Patel v. Freddy’s Ltd.*²⁸

3.14 Having established the meanings of completion, and reviewed the general position on solicitors’ general duties of care to each other, we have the framework for investigating why asking for warranties does not provide much protection, with or without *Dreamvar*. Before we go there,

²⁴ The Judge got to the same answer by this route at [17], describing the lease as a “nullity”.
²⁵ (1863) 14 CB (NS) 248, 258.

²⁶ Some quantum physicists, including Professor Stephen Hawking, have theorised that the whole universe has actually come from nothing: see the discussion of the zero-energy universe in Stephen Hawking & Leonard Mlodinow, *The Grand Design* (2010). It is a tragedy that we cannot now ask the late Professor Hawking whether quantum physics provides a rational explanation for the Land Registration Act 2002, section 58.
²⁷ *Per* Slade LJ in *Argyle Building Society v. Hammond* (1984) 49 P&CR148, 153 (CA), a case on the Land Registration Act 1925, section 9. As a concept, statutory magic dates back to the Land Transfer Act 1875, on which see *In re Suarez (Nº.2)* [1924] 2 Ch 19 (Romer J). “Statutory Magic” has always been practised by the adepts of HM Land Registry.

²⁸ [2017] EWHC 73 (Ch) (Tribunal Judge Elizabeth Cooke, sitting as a Deputy High Court Judge).

it is useful to remind ourselves what actually happened in the two cases before the Court of Appeal.

4. “YOU STUPID BOY!”²⁹ - AN OUTLINE OF THE FACTS IN P&P AND DREAMVAR:

4.1 I am sure we all have heard the facts before,³⁰ but it is worth going back over them not only to put the case into context, but to conduct a little experiment. As I go through the facts, make a mark in the margin every time you think something in the facts ought to have made a cautious and careful conveyancer in the position of the *seller’s* solicitor (but in a post-*Dreamvar* world) question whether there might be an identity fraud afoot.

P&P Property Ltd. v. Owen White and Catlin LLP

4.2 The real Mr. Clifford Harper had owned 52, Brackenbury Road, Hammersmith since 1989. He did not live there and the property was let out to tenants on various short lets.

4.3 It was not the real Mr. Harper who rang Owen White and Catlin LLP (“OWC”) on 20th November 2013, wishing to borrow £800,000.00 against the unencumbered title to the property, within 10 days, as bridging finance to facilitate the purchase of another property. The fake Mr. Harper spoke to Ms. Joyce Lim of OWC, who informed him she would need to verify his ID and address.³¹ She was given an e-mail address and sent various documents to him.

4.4 One document was a client questionnaire form, which was returned to Ms. Lim. The phone numbers on it disclosed that “Mr. Harper” lived or worked abroad. On 26th November 2013, the fake Mr. Harper said he would be returning to the UK and would come into OWC’s office.

²⁹ Per Captain George Mainwaring.

³⁰ Remember that these two transactions took place when the *Money Laundering Regulations 2007* were in force. The current regulations are the *Money Laundering Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017*, which came into force on 26th June 2017.

³¹ It is worth emphasising saying that the Trial Judge, Mr. Robin Dicker QC (sitting as a Deputy High Court Judge) heard Ms. Lim give evidence and found her to be “an honest witness” and a “conscientious solicitor”: [2017] PNLR 3, [6].

- 4.5 On 29th November 2013, Ms. Lim met the fake Mr. Harper, who presented her with his passport and gave her one utility bill (with the right name and address), a business card and a partially completed ID verification form. The form gave the property as his current address and stated that he had lived there for 10 years. “Mr. Harper” was evidently now working abroad and the OCEs showed that he purchased the property in 1989: according to the passport he produced, he was only 23 when he bought the property.
- 4.6 By early December 2013, the proposed lender, Funding 365, was pressing the fake Mr. H to produce evidence of his residence in Dubai, including his contract of employment and bank statements. On 2nd December, the fake Mr. H emailed Ms. Lim, informing her he now wanted to sell the property and by 6th December 2013. 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.
- 4.7 Also on 2nd December 2013, the fake Mr. Harper telephoned a firm of agents, Winkworths, where he spoke to Mr. Ben Hunt. Mr. Hunt was told that Mr. Harper needed to complete the purchase of another property by 15th December, so he needed to find quickly a cash buyer for the property. He instructed Winkworths to market the property for £1m, a 25% discount on its current value. The agents were given a mobile number, an email address and an address in Dubai for the seller, but they relied on Ms. Lim to carry out the AML checks.³² This was a breach of the AML Regulations and unfortunate: Ms. Lim never made any further attempts to verify “Mr. Harper”’s identity. Moreover, the *real* Mr. Harper was well-known to Winckworths.³³
- 4.8 On 3rd December, the fake Mr. H provided Ms. Lim with only the first page of a series of bank statements: even those indicated that Mr. Harper was often in the UK. The following day, 4th December, a property investment company called P&P Property Ltd. (“P&P”), made an offer to purchase the property for £1,030,000.00, which was accepted. Winkworths prepared a

³² The Trial Judge described Mr. Hunt’s conduct as “wholly inadequate” at [6].

³³ See the Trial Judge at [63].

memorandum of sale, which gave “Mr. Harper”’s address as in Dubai.³⁴ Ms. Lim was sent the memorandum and did not query the address, even though the partially completed ID verification form she received five days earlier gave his address as the property.

- 4.9 The fake Mr. H e-mailed Ms. Lim signed copies of Forms TA6 and TA10.³⁵ In the TA6 form, the fake Mr. H confirmed that he did not live at the property, but Ms. Lim did not ask where he stayed when he was in the UK: from the bank statements she now had, it was obvious “Mr. Harper” was in the UK regularly. Moreover, neither signature on the forms corresponded to the signature on the passport which Ms. Lim had on file.
- 4.10 On 6th December, Ms. Lim e-mailed the fake Mr. H a copy of the transfer and asked him to take it to a local solicitor in order to witness his signature. Later that day, Ms. Lim exchanged contracts using “Formula B”, with completion set for 11th December. The solicitors agreed to use the *Law Society’s Code for Completion by Post* 2011 edition.
- 4.11 A courier arrived on 9th December, bearing a package from a Mr. Clifford *Hannen* whose address was given simply as “Dubai”. It contained a letter signed by a Mr. Lazarus of Winterhill Largo, which stated that he had verified “Mr. Harper”’s identity and address in Dubai. Mr. Lazarus also witnessed the signature on the transfer. Mr. Lazarus really existed, as did Winterhill Largo: he had been suspended from practice as a solicitor in 2010 and Winterhill Largo was a debt recovery agency.³⁶
- 4.12 On the day completion was due, 11th December, the fake Mr. Harper was getting antsy: Ms. Lim served a notice to complete on P&P. On 12th December 2013, the deposit and a further sum of £327,000.00, provided by the mortgagees, was transferred to OWC. At Ms. Lim’s request, P&P’s solicitors agreed that these sums should be held as the seller’s agent, rather than as stakeholders, so the money could be used to complete the purchase of another property in

³⁴ The Dubai address was given inconsistently as either 87 or 89 Frond M, Palm Jumeriah.

³⁵ The Law Society’s Property Information Form and Fittings and Contents Form.

³⁶ Winterhill Largo purported to employ lawyers in Dubai. Ironically for a debt recovery business, it went into administration in 2016.

Dubai. The remaining £600,000.00 was transferred to OWC at 12:49 on 12 December, but Ms. Lim recorded completion as taking place at 15:40. The purchase price was sent to Dubai, less legal costs and disbursements, later that day. The money was never seen again.

- 4.13 On 17th January 2014, the *real* Mr. Harper attended the property and was very surprised to discover P&P's builders busily stripping it out. Whether or not he was alerted by the application by P&P to become registered as proprietors is not recorded, but it appears that his visit was a coincidence.

Dreamvar (UK) Ltd. v. Mishcon de Reya (a firm)

- 4.14 On 1st September 2014 or thereabouts, Mr. Erman Vardar of Dreamvar (UK) Ltd., a property development company, was contacted by a firm of agents, Douglas & Gordon ("D&G"). The agents told him they acted for a Mr. David Haeems, who was looking for a quick sale of a property at 8 Old Manor Yard, Earl's Court for £1.1m. D&G said Mr. Haeems was getting divorced and was seeking to complete the sale in three days. D&G had been asked to contact developer clients who might be interested. The sale price was £1.1m. D&G's client was, of course, a fake.³⁷
- 4.15 Mr Vardar inspected the property on 1st September, finding it unoccupied. He made an offer of £1.1m, which was accepted. Mr. Vardar instructed Ms. Helen Curtis-Goulding of Mishcon de Reya ("MdR") to act for Dreamvar. Mr. Vardar had instructed MdR on nine previous occasions, in relation to investment properties.
- 4.16 On 2nd September 2014, D&G sent to MdR a memorandum of sale, stating that Mr. Haeems's solicitors were Mary Monson Solicitors ("MMS") of Manchester. The following day, 3rd September, Ms. Slater of MMS informed Ms. Curtis-Goulding that she not yet received proof

³⁷ It is worth recording that the Trial Judge, Mr. David Railton QC (sitting as a Deputy High Court Judge) found that D&G, MMS and MdR were all innocent of any knowing participation in the fraud: [2016] EWHC 3316 (Ch), [15].

of the seller's ID or formal instructions on the sale, so she was unable to send Ms. Curtis-Goulding a contract pack.

- 4.17 At some stage prior to 5th September 2014, MMS had asked the purported seller to verify his identity and address. By a letter on the 9th September, the fake Mr. Haeems 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. Farooq Zoi, a solicitor. The driving licence had only been issued on 28th August 2014 and was valid for three years. It gave a flat in Catford as Mr. Haeems address, as did the TV licence.³⁸ The *Law Society's AML Practice Note* does not accept a TV licence as suitable for verification of a name or address in the UK.
- 4.18 No-one from MMS gave evidence at trial. It was accepted through Counsel that no-one from MMS ever met the fake Mr. Haeems, even though MMS had a London office,³⁹ and MMS accepted that its conduct in identifying Mr. Haeems was not "competent".⁴⁰ The Judge was thus unable to say what steps MMS took to comply with its AML obligations. A fair bet might be "none".
- 4.19 It appears that Mr. Zoi, the solicitor who verified the fake Mr. Haeems did not give evidence, either, but the Judge was shown subsequent correspondence with him, from which it appears that he met the fake Mr. Haeems by chance in the waiting room of another firm of solicitors, referred to in the judgment only as "Dennings".⁴¹ It does not appear that MMS knew this at the time.
- 4.20 On 11th September, MdR received from MMS a draft contract, OCEs and Forms TA6 and TA10, each of which appeared to have been signed by Mr. Haeems on 6th September. The OCEs showed that the property was unencumbered and that Mr. Haeems had been the registered

³⁸ Bear in mind "Mr. Haeems" was selling an unencumbered £1.1m house in Earl's Court...

³⁹ Just around the corner: above the jewellers on the junction of Fleet Street and Chancery Lane.

⁴⁰ [2016] EWHC 3316 (Ch), [24]. Barristers are often quite good at understatement.

⁴¹ There are several firms and former firms with "Denning" in the name.

proprietor since 2000. The OCEs gave the property as his address, but the draft contract gave it as that flat in Catford.

- 4.21 Ms. Curtis-Goulding proceeded with the conveyancing process, in the usual way and on 15th September 2014 it was agreed that completion would take place in accordance with the *Law Society's Code for Completion by Post*, 2011 edition. The documents to be provided on completion included a "TR1 executed by the Seller".
- 4.22 On 16th September, MMS asked the fake Mr. Haeems for his bank details for payment of the sale proceeds. He replied by asking them to send the money to the client account of "Dennings Solicitors". MMS evidently queried this, as a Mr. Zeeshan Mian of Dennings confirmed by e-mail and on headed notepaper that he acted for "Mr. Haeems" in respect of the purchase of machinery from China.
- 4.23 On 17th September, MdR sent the full purchase monies, to be held to order. At 14:45 that afternoon, Ms. Curtis-Goulding and Ms. Slater spoke by telephone, exchanged using "Formula B" and agreed completion was achieved simultaneously. MMS sent the purchase monies, less fees and disbursements, on to Dennings, who paid it away to an account in China. The money was never seen again.
- 4.24 Shortly afterwards, Dreamvar took possession and started refurbishment work. On 10th November 2017, HM Land Registry contacted MMS, as part of a "routine check",⁴² and asked what steps MMS had taken to verify Mr. Haeems' identity. MMS sent the documents it had on file, causing the Registry to inform MMS and MdR that it could not link Mr. Haeems to the Catford flat. The Registry managed to contact the real Mr. Haeems within three days and the fraud then unravelled.

⁴² Yeah, right.

5. “DON’T TELL HIM, PIKE!”⁴³ - THE COMMON LAW DUTIES TO IDENTIFY THE PARTIES:

5.1 I am not going to summarise or discuss *The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017*,⁴⁴ as I can assume that you are all familiar with the duties they impose. Nor am I going to go through the *Joint Law Society and HM Land Registry Note on Property and Title Fraud*,⁴⁵ for the same reason.

5.2 Instead, I am going to look at the different duties which the common law and equity imposes on the parties’ conveyancers and whether buyers’ conveyancers can expect to change the way those duties operate by asking for assurances from sellers’ conveyancers about how rigorously they have undertaken their KYC/AML checks

The common law liabilities - negligence between conveyancers:

5.3 As we have seen, the general position as between conveyancers is that there is no common law duty of care, including for negligent misrepresentation, unless one solicitor “steps out of his normal role”.⁴⁶ Does a failure to comply with the statutory AML regime make a solicitor for a fraudulent seller step outside?

5.4 In *Dreamvar*, Patten LJ considered the *2007 Regulations* and held that they did not, and were not intended to, create a statutory liability on the part of solicitors and estate agents towards innocent third parties who become the victims of fraud.⁴⁷ This is so, even though the failure to carry out required checks might have prevented the frauds from taking place. The *2017 Regulations* differ in some material respects, but the legislative intent is clearly the same: these Regulations impose a criminal liability for non-compliance, but there is nothing to create civil duties of care to those the solicitor or agent deals with.⁴⁸

43 Per Captain George Mainwaring.

44 (SI 2017/692).

45 Released in September 2017.

46 See per Lord Wilson in *Steel v. NRAM* in paragraph 2.5 above.

47 Paragraphs [31] and [78] of his judgment. On this issue, Floyd and Gloster LJJ agreed.

48 This is the general position: the mere imposition of a criminal law duty, without more, does not create any corresponding civil law duties. See *X (Minors) v. Bedfordshire County Council* [1995] 2 AC 633 (HL).

5.5 Patten LJ further held that the many and various failures by the fraudulent sellers' solicitors to comply with their duties to "know their clients" did *not* amount to "special circumstances", nor did they say or do anything to voluntarily accept responsibility for the *bona fides* or the true identity of their client. In both cases, the transactions were, so far as the solicitors on both sides were concerned, ordinary arm's length sale and purchase transactions. The sellers' solicitors ought to have been aware that the buyers' solicitors were relying on them to undertake the appropriate checks, but that was *not* enough to trigger a duty of care. Patten LJ said:

[81] The solicitors and agents in the present appeals did not voluntarily assume responsibility to the purchasers for the adequacy of the due diligence which they carried out. They 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. Nor is there anything in the nature of the particular transactions ... which can be treated as having created a relevant assumption of responsibility or to have made it reasonable in itself for the purchaser to have relied on the vendor's solicitors and agents to have acted competently in that regard. More particularly, there is nothing in the way that these transactions were conducted which made it objectively reasonable to assume that the AML checks would be complete and that the defendants should be legally accountable to the purchasers for the consequences.

5.6 It follows from this explanation of the duty that asking the seller's conveyancers to accept liability is not enough in itself to impose a liability. The seller's conveyancers have to agree to accept the liability. Which no-one would advise them to do, precisely because they do not have to accept such liability under the general law.

The common law liabilities - warranties of authority:

5.7 As the passage from Patten LJ I have just quoted makes clear, conveyancers can accept a duty of care to each other by undertaking or by formally warranting that they have verified their client's identity. This is, obviously, a voluntary assumption of a duty of care although, as Patten LJ says, even at this stage, any liability for the consequences of a warranty being incorrect can be excluded.⁴⁹

5.8 However, is there an implied warranty arising by reason of the fraudulent sellers' solicitors simply holding themselves out as acting for the sellers of the respective properties? The basic

⁴⁹ This is the general position: *Hedley Byrne & Co.Ltd. v. Heller & Partners Ltd.* [1964] AC 465 (HL).

position is that an agent who represents to a third party that he has authority to act on behalf of his principal is treated as warranting that he has such authority and is liable for any loss caused to the third party in reliance on the representation.⁵⁰

- 5.9 In both *P&P* and *Dreamvar*, the seller's solicitors wrote on behalf of a person they identified as "our client" and the "seller". This was not in itself enough to create a warranty of authority: in *P&P*, the selling agents did the same thing, but Patten LJ held that the objective observer would consider their letter to be no more than a statement that a person calling himself "Clifford Harper" had instructed them to act on the sale of a property.
- 5.10 What made the difference in the position of the solicitors was that Ms. Lim signed the contract of sale for and on behalf of the "seller": in so doing, she warranted that she had the authority of *the* Clifford Harper who was entitled to sell *that* property, not just some bloke calling himself "Clifford Harper". Thus it is clear that mere correspondence is unlikely to create a warranty of authority, but signing the contract on behalf of the "seller" does.⁵¹
- 5.11 The story does not, however, end there: OWC were not liable on the warranty of authority implicit in signing the contract, as liability is dependant upon the person to whom the warranty is given being *actually* induced to act in a particular way which causes loss in reliance on that warranty.⁵²
- 5.12 As a matter of fact, the trial Judge found that the seller's solicitor had assumed that OWC, as a respectable firm of solicitors, would have carried out their KYC checks, but he placed no weight on the signature on the contract and had not understood them to be warranting that they acted for the real Mr. Harper. In other words, he relied on OWC to have checked Mr. Harper's

⁵⁰ *Collen v. Wright* (1857) 8 El & Bl 647 (CA) is the root authority. In *Dreamvar*, Patten LJ goes through a number of subsequent authorities before confirming the correctness of *Collen*: see [32]-[59]. On this issue, Floyd and Gloster LJJ agreed.

⁵¹ See *per* Patten LJ at [56]-[57]. On this issue, Floyd and Gloster LJJ agreed. The issue was not raised in the separate appeal in *Dreamvar v MdR*.

⁵² See footnote 50 above.

identity, but he did not rely on them as giving a warranty that they acted for the real Mr. Harper. On that fine but clear distinction, there was no claim.

5.13 As we have seen, some seller's conveyancers have started routinely stating in their letters to the seller's conveyancers that they rely on the sellers' lawyers' representation that they act for the "seller" as giving a warranty that they have the authority of the real seller, even without the lawyer signing the contract. I doubt that this has any effect anyway, but it certainly will not if it becomes routine: is there really any *actual* reliance if it is something that goes into a letter as boilerplate and is then never really thought about when the answer arrives? The reliance has to be on the representation made in the reply, and the reliance has to be both real and provable, not just a mechanical assertion in a outgoing letter which the actual buyer may never consider.

5.14 Moreover, what happens if the letter is met with a disclaimer of any such warranty being given? That is when one needs to start thinking about the duties owed by the buyer's solicitor to his client.

The common law liabilities - the buyer's solicitor's liabilities to his client:

5.15 In an ordinary conveyancing transaction, where nothing unusual happens, the buyer's solicitor does *not* warrant to his client that the client will get the property that the client thinks he is buying.⁵³ What the client obtains from the contract of retainer is a contractual duty of care to make such searches and enquiries as are reasonable, having regard to the scope of the retainer and the particular transaction. Crucially, this duty extends to pursuing further any unsatisfactory replies to any questions the buyer's conveyancer has seen fit to ask (sensibly or otherwise).

⁵³ See, *inter alia*, *Lake v. Bushby* [1949] 2 All ER 964 (Pritchard J); *Goody v. Baring* [1956] 1 WLR 448, 456 (Danckwerts J); *Hill v. Harris* [1965] 2 QB 601, 618 *per* Russell LJ (CA); *Computastaff Ltd. v. Ingledew Brown, Bennison & Garrett (a firm)* [1983] 2 EGLR 150 (McNeill J).

5.16 In the recent case of *Orientfield Holdings Ltd. v. Bird & Bird LLP*, HH Judge Pelling QC, summarised the law this way:⁵⁴

[28] ... In general a solicitor is not obliged to undertake investigations that are not expressly or impliedly requested by the client. This proposition was not apparently in dispute between the parties. ...

[29] To the general proposition that I started this section of this judgment with, there is however this qualification: if in fact a solicitor acquires information that may be of importance to a client, then it is the duty of the solicitor to bring that information to the attention of the client. Again, this proposition does not appear to be in dispute between the parties.

The facts of the case are salutary: the PIF disclosed an unsatisfactory response about a potential development in the area (“please make your own inquiries”) so, on instructions, the solicitors obtained a full and wegthy “Plansearch” Report, which disclosed substantial proposals for development of an adjacent site as a large school. On receipt of the Plansearch, the buyer’s solicitor “skim-read” the report in a few minutes and failed to draw his client’s attention to the information it contained about the development. HH Judge Pelling QC found this failing to be negligent.⁵⁵

5.17 Closer to home is *Purrusing v. A’Court & Co. (a firm)*.⁵⁶ This is another identity fraud case, where a fraudster impersonated a Mr. Nicholas Dawson, the owner of 35, Merton Hall Gardens in Wimbledon. A number of warning bells should have been ringing, as there were many hallmarks of a fraud.⁵⁷

⁵⁴ [2015] PNLR 33 (HH Judge Pelling QC, sitting as a High Court Judge).

⁵⁵ Ar [34]-[35].

⁵⁶ [2016] 4 WLR 81 (HH Judge Pelling QC, sitting as a High Court Judge).

⁵⁷ The property was unoccupied, unencumbered; and of comparatively high value. Completion was being pressed for on an expedited basis by “Mr. Dawson”. The OCEs for the property contained an alternative address for service in Cambridge, but this was not the address “Mr. Dawson” had given. “Mr. Dawson” had not supplied any documentation that showed a link between him and the property. “Mr. Dawson” was apparently employed in Abu Dhabi and a sale to a previous proposed buyer was terminated by him solely because he had been requested to supply information as to his employer in circumstances where there were at least five days to go before completion and the information could have been provided with ease and without delay. There was an unexplained inconsistency between the information supplied by “Mr. Dawson” in the home use and the local authority search.

5.18 Mr. Beach of House Owners Conveyancers, the buyer's licenced conveyancer, evidently heard them ringing, perhaps faintly, as he sent an e-mail to the seller's solicitor, Mr. A'Court of A'Court & Co.:

Please confirm you are familiar with the vendors and will verify they are the vendors and check ID to support same

The reply - magnificently sent with the subject line, "Re Mickey Mouse" - was

We refer to your recent e-mails, all of which have been forwarded to our client who is currently abroad and we believe will not be returning here until after completion. We have also spoken to you and also to our client and to the selling agents by telephone, all today.

For the avoidance of doubt, we have no documents whatsoever relating to this property, save for the ones we have already sent to you ...

We have our client's authority to sign the contract on his behalf.

As explained to you over the telephone, prior to being approached to act on the sale we have no personal knowledge of Mr. Dawson, but we confirm that we have met him in person and have seen his passport (and retain a copy of the photo page) together with utility bills etc showing his UK address as notified to us.

Mr. Beach did not conclude, as HH Judge Pelling held he ought to have, that this meant that Mr. A'Court had nothing to link Mr. Dawson to the Wimbledon property itself. Of course, the sale went through, the £470,000.00 purchase money went to a Dubai bank account and then disappeared, as did "Mr. Dawson".

5.19 Judge Pelling found that Mr. Beach's cardinal sin was asking the questions and then not dealing properly with the answers:

[48] ... it is I think common ground or should be that in general a solicitor or licensed conveyancer is not obliged to undertake investigations that are not expressly or impliedly requested by the client but that if in fact a solicitor or licenced conveyancer acquires information that may be of importance to a client, then it is the duty of the solicitor to bring that information to the attention of the client. This point is only significant in this case because Mr. Beach said repeatedly in the course of his cross-examination that the question [*he asked*] was not one that was usually asked, that it was not standard conveyancing practice to ask such questions and that [*he*] no longer asked it. In my judgment that is not to the point because the question was asked, and because the answer received was clearly unsatisfactory for the reasons that I have set out earlier in this judgment. Mr. Beach ought to have known that the answers were unsatisfactory, and ought to have told his client of the unsatisfactory responses received and advised his client the claimant not to proceed with the transaction until satisfactory responses had been received. After all, that is precisely what Mr Beach

had said to Mr A'Court would be the consequence if an unsatisfactory response was received when raising the Additional Inquiries. In the letter of 16 October 2012, the preamble to the section containing the Additional Inquiries said "Please note we cannot advise client to proceed without full replies".

[49] In my judgment *Mr. Beach*] was in breach of contract and/or duty to the claimant in failing to inform him that

- (a) additional inquiry (2) had been raised,
- (b) that the purpose of that additional inquiry was to attempt to establish a link between the property and the apparent vendor, and
- (c) the answers received showed that
 - (i) *[Mr. A'Court]* had no documents whatsoever relating to this property, save for those already received ...
 - (ii) *[Mr. A'Court]* had no personal knowledge of Mr Dawson, and
 - (iii) *[Mr. A'Court]* had not verified, and could not confirm from the information available to them, or at least had not confirmed from the information available to them, a link between the vendor and the property, and
- (d) in consequence, there was a risk in proceeding with the purchase.

5.20 Herein lies an important moral in my story: indeed, probably the central point:

5.20.1 If you are acting for a seller, and you are asked to warrant or undertake that your client is the person they claim to be and are entitled to sell the property they claim to sell, you should be *extremely* reluctant to do so. By doing so, you step outside the general protection provided to you by *Gran Gelato* and accept a liability to the buyer and his solicitors that you do not otherwise have.

5.20.2 But, if you are acting for a buyer and ask for an undertaking or warranty, then what?

5.20.2.1 If you get an answer (other than "get lost"), it becomes your duty to your client to be sure that it is an answer that it fit to be relied on - the first error Mr. Beach made in *Purrunsing* and the error made by the conveyancer in *Orientfield* who only skimmed the Plansearch and did not advise the client about the contents.

5.20.2.2 What do you do if the answer is subject to a disclaimer?

5.20.2.3 What do you say to your client if the answer is "we are aware of our duties"? What do you say to a client who asks for advice

about what to do in light of such an answer: shrug and say “it’s up to you”?

- 5.21 This goes back to the crucial point in *P&P* about reliance. There was no breach of warranty in that case, because no-one relied on the representation as being a warranty that the seller was the real Mr. Harper. If the response makes it plain that no warranty is being given, the buyer’s solicitors would very probably be negligent in advising a client to rely on something that was not an unequivocal warranty. There needs to be an unequivocal representation before there can be reasonably any reliance upon it.
- 5.22 Moreover, even if the answer might be a warranty, in most cases the buyer’s conveyancer will do his job properly by advising his client whether the reply constitutes a warranty the buyer can rely on. Once that happens, one gets into rather difficult questions about whether the client is really relying on the warranty or the advice given about it.⁵⁸ In a situation like this, I suspect that the court will be predisposed to think that the lay client probably relies not on the correspondence from the seller’s conveyancers, but on the advice his retained conveyancer gives him about that correspondence.
- 5.23 As I said in my introduction, anecdotal and unscientific evidence suggests that a number of buyers’ conveyancers are asking questions along the lines of those asked by Mr. Beach, and most sellers’ conveyancers are refusing to answer (politely or at all) or to go further than “we know our job”. The anecdotal evidence is that such non-answers are *not* making any difference to the number of sales completing. The buyer clients appear to be taking the risk: knowingly or unknowingly...
- 5.24 Before we develop that any further, we need to next consider the duties in equity and the effect of the undertakings contained in the *Law Society’s Code for Completion*.

⁵⁸ A similar problem arises with allegations of estoppel arising in transactions where the party alleging estoppel was fully “lawyered-up” when the representation was made. For a characteristically searing but insightful consideration of reliance in an estoppel case, see *PCE Investors Ltd. v. Cancer Research UK* [2012] 2 P & CR 5 (Peter Smith J).

6. “DO YOU REALLY THINK THAT’S WISE, SIR?”⁵⁹ - GIVING UNDERTAKINGS:

Undertakings:

6.1 The current trend amongst buyers’ conveyancers for asking sellers’ conveyancers to give warranties or undertakings in respect of the true identity of the seller is, for the reasons I have just explored, not really going to add much by way of protection. The answer is hardly ever going to be what the buyer wants to hear.

6.2 Perhaps more importantly, the request for an undertaking or a warranty in respect of the seller’s identity, or the sellers’ solicitors rigour in applying KYC/AML checks **really does not matter very much** in any case where the parties agree to use the *Law Society’s Code for Completion 2011*.

6.3 The crucial provisions are paragraphs 3, 7 and 10. Paragraph 3 states:

In complying with the terms of the code, the seller’s solicitor acts on completion as the buyer’s solicitor’ agent without fee or disbursement...

Paragraph 7 provides:

The seller’s solicitor undertakes:

- (i) to have the seller’s authority to receive the purchase money on completion; ...
- 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 ...

Lastly, paragraph 10 states:

The seller’s solicitor will complete upon becoming aware of the receipt of the sum specified [*as required to complete*], or a lesser sum should the buyer’s and seller’s solicitors so agree,

6.4 This is where the meaning and effect of “completion” becomes paramount.⁶⁰ Because “completion” means a real completion, in which real money is exchanged for the real title to the

⁵⁹ Per Sergeant Arthur Wilson.

⁶⁰ See paragraphs 3.2 to 3.13 above.

land (or the means to become registered proprietor), a “completion” with a fraudster is no completion at all. By using the *Code*, the seller’s conveyancer gives an undertaking in paragraph 7 that he has the authority of the *real* owner of the property to really complete the transaction and an undertaking to tell the buyer’s solicitor if he does not have the authority of the *real* owner. When he acts for a fraudster, these undertakings are broken, as are the duties imposed by paragraphs 3 and 10.

6.5 In *Dreamvar*, the Court of Appeal had no difficulty in concluding that the conveyancer who gives these undertakings breaches them when they purport to complete on behalf of a fraudster. Having regard to the meaning of “completion”, Patten LJ held that the references to the “seller” in the *Code* were to be construed as a reference to the person *actually* entitled to sell the relevant title:

[119] ... Both OWC and MMS agreed with their opposite numbers to adopt the *Code* for the purposes of completion. They therefore agreed to give the undertakings set out in paragraph 7 and to be bound by the other terms of the *Code* which stipulate the obligations of the seller’s solicitor. But the content of those undertakings and other obligations falls to be determined by the true construction of the *Code*, not by whether OWC and MMS were in fact instructed by the named seller. ... In my view both OWC and MMS gave undertakings that they had the authority of the real Clifford Harper and David Haeems to receive the purchase monies on completion.

6.6 The trial Judge in the case of *Dreamvar UK v. MdR*, Mr. Railton QC, expressed a concern that:

[151] ... the general understanding within the profession is that solicitors acting for sellers 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.

If that understanding has survived the decision in the *Dreamvar* appeals, then the professions need to snap out of it. By using the *Code*, the seller’s solicitor does not warrant that his client is the real seller: he gives an *undertaking* to that effect.

6.7 To my mind, that conclusion may be unpalatable, but it must be right, because the long-established meaning of “completion”, as used in the *Code* and generally, requires an exchange of real money for a real legal title. It would be wayward to impute to the draftsman of the *Code* an intention to give “seller” a meaning which meant no more than “the person purporting to sell”,

when the focus of the obligations in the Code is the machinery needed to effect a genuine completion.

- 6.8 Asking the seller's solicitors for undertakings or warranties about AML/KYC compliance is not going to make the faintest difference to any breach of trust in an identity fraud case. None. None at all.

Breach of trust:

- 6.9 There is another consequence of the general meaning of the word "completion": a purported completion with a fraudster will usually put *both* the buyer's and seller's solicitors in breach of trust. The mechanics of why that is so are not seriously open to doubt:

6.9.1 In the hands of the buyer's conveyancer, the purchase monies are held on a bare trust for the buyer, or the buyer's lender, as the case may be pending completion.⁶¹

6.9.2 The entitlement of the conveyancer to part with the purchase monies is governed by the instructions he receives from his client or clients. There will be few, if any, cases where the conveyancer's instructions will permit him to release the monies other than to effect a *genuine* completion.⁶²

6.9.3 The seller's conveyancer usually receives and agrees to hold the purchase money as agent for the buyer's conveyancer, pending completion. Where the *Code for Completion* is employed, this agency is made explicit by paragraph 3 and the terms on which the monies can be released is set out in paragraphs 10 and 11. In accordance with the general law, as an agent for a trustee, the seller's solicitor is under a fiduciary duty to observe and give effect to those terms.⁶³

⁶¹ *Target Holdings Ltd. v. Redferns (a firm)* [1996] AC 421, 436 *per* Lord Browne-Wilkinson (HL) and *Twinsectra Ltd. v. Yardley* [2002] 2 AC 164 at [100] *per* Lord Millett (HL).

⁶² *Lloyds TSB Bank plc v. Markandan & Uddin (a firm)* [2012] 2 All ER 884; [2012] PNLR 20 (CA).

⁶³ *Gibert v. Gonard* (1884) 54 LJ Ch 439, 440 (North J); *Twinsectra* at [76] *per* Lord Millett (HL).

6.9.4 If the purchase monies are released by the seller's solicitor on the instructions of the buyer's solicitors other than to effect a genuine completion, they *both* breach their fiduciary duties because there is no completion at all. Therefore, they both release the funds for a purpose other than one for which they were entitled to release it to effect.⁶⁴

6.10 Although some arguments were put to the Court of Appeal which might be described as "ingenious (and as bad as that)"⁶⁵, the Court held that all four firms of solicitors acted in breach of trust.⁶⁶ This is obviously right in principle, as well as consistent with the previous decisions.

7. "MIGHT I BE EXCUSED, SIR?"⁶⁷ - THE TRUSTEE ACT 1925, SECTION 61:

7.1 That leads me to a brief consideration of the Trustee Act 1925, section 61 and the Court's jurisdiction to relieve a trustee from the consequences of a breach of trust. Section 61 provides:

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.

7.2 This section confers on the court a power to relieve a trustee, in whole or in part, from personal liability for a breach of trust, where:⁶⁸

7.2.1 the trustee has paid trust money to the wrong person; and

7.2.2 the trustee has acted honestly in making the payment; and

⁶⁴ *Markandan* at [54] per Rimer LJ (CA); *Santander UK v. RA Legal Solicitors* [2014] PNLR 20 at [12]-[16] per Briggs LJ (CA) and *Dreamvar* at [94] and [98] per Patten LJ (CA).

⁶⁵ Per Blackburne J: one of my favourite judicial insults, but only because it was not said of an argument I was putting forward.

⁶⁶ In the specific *Dreamvar v MdR* case, Mishcon de Reya accepted they were in breach of trust. Having regard to the House of Lords decision in *Target Holdings*, and (for that matter) *Barclay's Bank Ltd. v. Quistclose Investments Ltd.* [1970] AC 567 (HL), this was obviously the right thing to do.

⁶⁷ Per Private Charles Godfrey.

⁶⁸ *Re Windsor Steam Coal Co. (1901) Ltd.* [1929] 1 Ch 151, 164 per Lawrence LJ (CA).

7.2.3 the trustee has acted reasonably in making the payment; and

7.2.4 the trustee convinces the court that he “ought fairly” to be excused for making the payment in breach of trust.

7.3 In a passage approved by Patten LJ in *Dreamvar*, Lawrence LJ said this of an application by a liquidator for relief in *Re Windsor Steam Coal Co. (1901) Ltd.*:⁶⁹

... even if the [*liquidator*] had taken the best possible advice and had made the payment acting on such advice, I am of opinion that that would not have been sufficient to excuse him, regard being had to the fact that he was a trustee employed because of his professional skill and paid for his services in performing his duties.

Lawrence LJ went on to refer to Lord Redesdale’s judgment in *Doyle v. Blake* of a case involving an executor:⁷⁰

If, under the best advice he could procure, he acts wrongly, it is his misfortune; but public policy requires that he should be the person to suffer.

Lawrence LJ agreed, contrasting the position of a trustee who acts as such in the course of his business or profession and a private person acting as gratuitous trustee, perhaps as a “lay” executor of a will trust.

7.4 Patten LJ also referred to, and followed, this observation from Briggs LJ in *Santander UK v. RA Legal Solicitors*:⁷¹

[33] The second main stage of the section 61 analysis, usually described as discretionary, consists of deciding whether the trustee ought fairly to be excused for the breach of trust. This requires that regard be had to the effect of the grant of relief not only upon the trustee, but also upon the beneficiaries: ... Furthermore, section 61 makes it clear that even if the trustee ought fairly to be excused, the court still retains the discretionary power to grant relief from liability, in whole or in part, or to refuse it. In the context of relief sought by solicitor trustees from liability for breach of trust in connection with mortgage fraud, much may depend at this discretionary stage upon the consequences for the beneficiary. An institutional lender may well be insured (or effectively self-insured) for the consequences of third party fraud. But an innocent purchaser may have

⁶⁹ *Ibid.*; Patten LJ at [106]. On this, Floyd and Gloster LJJ agreed.
⁷⁰ (1804) 2 Sch & Lef 231, 243 (CA Ireland). The case concerned a prototype of the jurisdiction now in section 61.
⁷¹ [2014] PNLR 20 (CA).

contributed his life's savings to the purchase and have no recourse at all other than against his insured solicitor, where for example the fraudster is a pure interloper, rather than a dishonest solicitor in respect of whose fraud the losers may have recourse against the Solicitors' Compensation Fund.

[34] Relief under section 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 section 61 jurisdiction should be abandoned. In this context mercy lies not in the free gift of the court. It comes at a price.

7.5 The Trial Judge in *P&P Property Ltd. v. OWC* held that Ms. Lim had not acted “reasonably” because of the multiple failures to verify “Mr. Harper’s” identity and declined to relieve the firm of liability as, although Ms. Lim had acted honestly, she had “fallen short of the high standard equity expects of a trustee”. Patten LJ agreed.⁷²

7.6 The Trial Judge in the case of *Dreamvar UK v. MdR* held that MdR should not be excused, even though it had acted both honestly and reasonably. The Judge had regard to the consequences of MdR’s breach of trust on Dreamvar, which the Judge described as “disastrous”. That company was small, had lost the purchase price, was not insured against fraud and was left with creditors of more than £1.2m. By comparison, MdR was insured for and had sufficient cover for the full loss suffered: with or without insurance, MdR was better able to meet or absorb the loss than Dreamvar. Patten and Floyd LJJ agreed with him.⁷³

7.7 Gloster LJ dissented on this issue alone: she would have relieved MdR of liability under section 61. The central point of distinction between her view and that of the minority is this:

[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.

⁷² At [108]-[109].

⁷³ Patten LJ at [110]-[111]. Floyd LJ at [123].

Gloster LJ expressed her view quite shortly, evidently aware of the others took a different view. She should not be criticised for not dealing with the arguments more fully as she was a dissenter.

7.8 I would, however, respectfully agree with the majority's view because the comparison between MdR and *Dreamvar* is *not* the level playing-field Gloster LJ describes. The reasons for that are in the older cases referred to by Patten LJ: equity demands high standards from any trustee, and even higher standards from a professional trustee such as those conveyancers who hold the purchase monies as trustee, whether they act for buyer or seller. That is the real, conceptual difference between MdR and *Dreamvar*, even though they are both businesses which, of necessity, have to take risks: MdR is a professional trustee.

7.9 On the cases, it is also obviously right to take into account the *relative* impact of the loss on the solicitor and the client, which Gloster LJ's test does not. Again, these parties were not in an equal position: MdR was a big enterprise and was insured; *Dreamvar* was a much smaller enterprise and was not insured for this risk.

7.10 As a matter of applying the principles which direct the way in which the section 61 discretion should be exercised, I believe that courts having to decide who should bear the loss in any future cases of identity fraud such as this will very probably follow Patten and Floyd LJ's approach to section 61 and refuse to relieve the solicitor-trustee from liability.

8. **WHAT DOES THE FUTURE HOLD - "WE'RE DOOMED... DOOMED":⁷⁴**

The Law Society's Revised Code for Completion:

8.1 The Law Society's Conveyancing and Land Law Committee has been actively considering the implications of the *Dreamvar* decision and it considering whether the *Code* needs amending, one way or another, in order to respond to Patten LJ's analysis of its present meaning and effect.

⁷⁴

Per Private James Frazer.

8.2 The process is ongoing and is the subject of very careful and anxious consideration: the Committee is very conscious of the potential ramifications of any change it makes and is very, very keen to ensure that it acts for the best.

The Law Commission and HM Land Registry:

8.3 However, whatever The Law Society decides to do, the Law Commission might take the correct response to *Dreamvar* out of all our hands. The Commission has made some recommendations to amend the Land Registration Act 2002 and two of those recommendations are going to make sure that the cost of identity fraud falls on the conveyancers, not the Registry....⁷⁵

8.4 The Commissions' recommendations may be summarised as follows:

8.4.1 The 2002 Act should be amended to impose a statutory duty of care to HM Land Registry to take reasonable care to verify the identity of the parties for whom they act.

8.4.2 This duty is to be imposed on any person who, in the course of a business or profession, makes an application to the Registrar, executes a deed intended to be used in connection with such an application, or assists or advises in respect of those matters.

8.4.3 This statutory duty shall not create rights and liabilities between the parties to a transaction, but only between those persons on whom the duty is imposed and HM Land Registry.

8.4.4 The steps necessary to verify a client's identity will be prescribed by the Registry in Directions and may be made mandatory. These Directions may provide for electronic verification and constrain the right to delegate the verification process.

⁷⁵ *Updating the Land Registration Act 2002* (Law Com N^o. 380), 18th July 2018. The damage gets done in Chapter 14, Recommendations 31 and 32.

8.5 As and when these amendments are made, the buyer's conveyancer can try to stick liability on the seller's conveyancer all he likes, but the primary liability to the Registry will fall equally on both of them. Fact.

9. CONCLUSION - "DON'T PANIC! DON'T PANIC!"⁷⁶

9.1 It might look like the present is a bit grim and the future looks even grimmer. It might seem that there is not much the buyer's conveyancer can do to protect his client - and himself - from liability if the seller's conveyancer does not take the steps necessary to "Know Their Client" and carry out the Anti-Money Laundering checks. As to the future, much will depend on the steps the Registry ends up mandating in its Regulations and how those steps differentiate between the steps to be taken by those acting for the buyer and the seller. Who knows if that will end up actually assisting those acting blamelessly for buyers?

9.2 For the here and now, though, the best advice anyone can give the buyer's conveyancer is that contained in *The Law Society's Conveyancing Handbook*: conveyancers should "take a risk-based approach to client due diligence including the obligation to obtain satisfactory evidence of their client's identity".⁷⁷

9.3 The best-practice approach is not to automatically try to export the risk of identity fraud onto the seller's conveyancer, even though they are infinitely better placed to take steps to "Know Their Client". The reality is that such attempts are unlikely to be effective and may actually make the buyer's conveyancer's position worse when the request for a warranty or a clear representation goes unanswered. It will often be better not to ask than to ask and then get no good answer.

9.4 The right approach requires the buyer's conveyancer to actually *think*. The right approach to seeking comfort as to the identification of the seller needs to be nuanced: what is the right level of caution, given all the circumstances of the particular transaction? What will be appropriate in relation to a sale by the owner-occupier of a modestly priced residential property that is

⁷⁶ Per Corporal Jack Jones.
⁷⁷ 24th edition, section A25.1.

subject to a building society charge may not be appropriate in relation to the apparent sale of a high value unencumbered property being offered for sale by a registered proprietor whose claimed address is not that of the property being sold or any other address for service on the Register.

9.5 Taking this thoughtful and targeted approach is the best way forward. If you are able to put to the seller's conveyancer the specific reasons for your concerns, based on specific factors in the proposed transaction, the seller's conveyancer may or may not be more forthcoming about their efforts to identify their seller client. Their response or lack thereof will probably put the buyer's conveyancer in a better position to give their client balanced and constructive advice as to the levels of risk they are accepted if they proceed.

9.6 There is no magic bullet. There is no guarantee that the fraudster will be stopped every time. There is no foolproof way to ensure that only the fools are left with liability. Like the boys of the Warmington-on-Sea Home Guard, the buyer's conveyancer is the last line of defence against hostile action, so the buyer's conveyancer has to be like them: always vigilant and always ready.



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If anybody cares by now, I am a barrister and a member of Landmark Chambers. I am a co-opted member of The Law Society's Conveyancing and Land Law Committee and an equally co-opted member of the RICS Dilapidations Forum Steering Group. I am a contributing editor of *Hill & Redman's Law of Landlord and Tenant* and a member of the editorial board of *The Conveyancer*. Inexplicably, I have been rated as a top-tier junior for real estate litigation by both *Chambers & Partners* and *Legal 500* for over twelve years.