

PURRUNSING v A'COURT & CO & ANR**HIGH COURT**

HH Judge Pelling QC: 14 April 2016

[2016] EWHC 789 (Ch); [2016] 1 P. & C.R. DG14

☞ Breach of trust; Conveyancing; Due diligence; Fraud; Licensed conveyancers; Money laundering; Professional negligence; Solicitors; Trustees' powers and duties

This was a claim arising out of the purported sale to Mr Purrusing of a property in Wimbledon by a fraudster who claimed to be, but was not, the registered proprietor of the property. By the time the fraud was discovered, the whole of the purchase price (some £470,000) had been paid by Mr Purrusing to the second defendant (House Owners Conveyancers Ltd). This company acted as Mr Purrusing's registered conveyancer. The money was then transferred to the fraudster's solicitors (A'Court & Co) and by them to an account at a bank in Dubai. None of the money paid over by the claimant was recovered and it was common ground that there was never a genuine completion of the transaction. Mr Purrusing was never registered as proprietor of the property and claimed that both defendants were liable to him for breach of trust. As regards House Owners Conveyancers Ltd, he sued also for breach of contract and duty. Both defendants applied for discretionary relief under s.61 of the Trustee Act 1925.

In 2012, the fraudster had retained A'Court & Co to act on his behalf in relation to the sale of the property. The instructions to the firm were that he was not living at the property and that the property was vacant. It was claimed that the property had been a gift from his father and that a speedy exchange and completion would be required. The fraudster produced a bank statement and utility bills purportedly sent to "Mr Dawson" (the name of the registered proprietor) at a Maidenhead address and what appeared to be a British Passport for Mr Dawson. It was common ground that the passport was a forgery. An earlier sale had fallen through because the fraudster refused to provide information as to his employment to A'Court & Co. Unfortunately, his solicitors did not press the matter as such information could have been readily checked. The Office Copy Entries for the property, moreover, contained an alternative address for service in Cambridge. Instructions had not been sought that would permit the firm to write to the Cambridge address nor did it seek any explanation from their client as to why the address he had supplied was not the Cambridge address. In addition, the fraudster had not supplied any documentation that showed a link between him and the property nor had he been asked for such material. There was also an unexplained inconsistency between the information supplied by the fraudster in the Home Use Form in relation to building works at the property and the information that had come to light as a result of a local authority search.

Acting on behalf of Mr Purrunsing in the purchase transaction, House Owners Conveyancers Ltd admitted a breach of the duty of confidence as it had blind copied correspondence for the vendor's solicitors without the claimant's consent. It was accepted by the second defendant that this conduct was unreasonable for the purposes of considering its application for relief under s.61 of the Trustee Act 1925. The Requisitions as submitted by the second defendant required A'Court & Co to state whether or not it was familiar with the seller and to verify the identity of the seller with reference to documents of identification. The first defendant responded that its client was aboard and not expected to return until after completion. The firm did, however, confirm that it had met him in person and had seen his passport (retaining a copy of the photo page) together with utility bills showing his UK address. The reference to the address was ambiguous as it did not clearly state that the address given was either that of the property or the Cambridge address that appeared on the Register. The purchaser's solicitor had relied on A'Court & Co to have carried out the customer due diligence exercise adequately. The Judge concluded that the purchaser's solicitor "could not reasonably have been satisfied with the answer that had been given without at least asking further clarificatory questions and obtaining satisfactory answers." The solicitor ought reasonably to have concluded that it was at least highly probable that there was nothing in A'Court & Co's possession to link the fraudster to the property.

It was common ground that both defendants were subject to the Money Laundering Regulations 2007 because they were independent legal professionals participating in a transaction concerning the buying and selling of real property. Accordingly, each of them was under an obligation to apply 'customer due diligence' when carrying out the transaction. This required the identification of the customer and the verification of that identity on the basis of documents, data or information obtained from a reliable and independent source. A'Court and Co should have been put on enquiry as to why the address the fraudster supplied with was not the registered address. This was all the more so as the firm had neither received from the fraudster, nor had been given sight of any documents relating to the property. In addition to the address issue, the Judge felt that the need to undertake a due diligence was heightened as the property was a vulnerable property because it was unoccupied, unencumbered and of high value. A'Court & Co, moreover, knew that the fraudster was overseas and would not be returning to the UK before completion.

Section 61 Trustee Act 1925 provides that the court may relieve a trustee in whole or in part from personal liability if it find that the trustee 'has acted honestly and reasonably and ought fairly to be excused for the breach of the trust'. As there was no question of dishonesty arising in these proceedings, the Judge observed that, "the threshold question in relation to each defendant in this case is whether they acted not only honestly but also reasonably. If they did not then in the circumstances of this case each is under an immediate obligation to re-constitute the trust" The Judge rejected an argument that a more favourable reasonableness test should be applied to a vendor's solicitor seeking to rely on s.61. The vendor's solicitor was as much a trustee of the purchase money while it was in his possession pending completion as was the purchaser's solicitor. The Judge added, "Whether the vendor's solicitor owes a duty of care in tort to a purchaser has nothing to do with whether he becomes a trustee of purchase money held by him pending completion."

A number of principles relevant to the application of s.61 in a conveyancing context were identified by the court. First, the reasonableness test to be applied to a solicitor who parts with completion moneys without obtaining completion is necessarily a high one because of the need to interpret s.61 consistently with equity's high expectation of a trustee discharging fiduciary obligations. It is, therefore, necessary for the solicitor to act with exemplary professional care and efficiency and to be careful, conscientious and thorough. The Judge did, however, emphasise that, "the test remains one of reasonableness not perfection" Secondly, the onus rests on the trustees concerned to prove that they acted reasonably. Thirdly, conduct that is completely irrelevant or immaterial to the loss (or which played absolutely no part in the occasioning of the loss) will usually be disregarded by the court in its assessment. A departure from best or reasonable practice that increased the risk of loss by fraud, however, will not be disregarded and that is so, as the Judge put it, "even if the court concludes that the fraudster would have achieved his goal even if the solicitor had acted reasonably" Hence, if the trustee cannot prove that his unreasonable conduct played no material part in occasioning the loss then the trustee fails at the threshold stage. Fourthly, in determining whether a trustee has acted reasonably it is necessary for the court to consider the trustee's conduct as a whole. Fifthly, the court must have regard to the effect of the grant of relief not only on the trustee, but also on the beneficiary. Accordingly, considerations such as the financial strength of the loser and the availability of insurance to meet the loss were relevant considerations.

The obligation in relation to purchase money is an absolute obligation not to release the money before completion. The liability that arises from a breach of that obligation is strict and there is no obvious justification for interpreting s.61 more leniently in respect of a breach of trust by a vendor's solicitor than would be the case in relation to such a breach by a purchaser's solicitor. The Judge added that, "what each has to do in order to fulfil that standard may be different because of the different roles that each has in relation to the transaction." Neither defendant had acted like reasonable solicitors in the conveyancing process and neither could successfully invoke the s.61 discretion. Pursuant to s.1 of the Civil Liability (Contribution) Act 1978, and having regard to relative causal potency as well as comparative blameworthiness of both defendants by reference to the facts, it was just and equitable that each should bear equal liability for the loss.