

Dispute Resolution
Case Law Update
Rosling King LLP



The High Court recently addressed a novel point of law and found that solicitors who acted for a fraudulent seller were equally liable with a buyer's conveyancer for the loss caused to the buyer.

Background to the Law

Trustees are subject to a duty of care under common law, as well as a statutory duty of care when performing particular functions. It is possible for a trustee to be in breach of trust if they fail to comply with the terms of the trust or their fiduciary duties. When a trustee is found to be in breach of their duties, that trustee has personal liability to pay equitable compensation for all losses that would not have occurred "but for" the breach, or to reconstitute the trust fund. Under section 61 of the Trustee Act 1925 ("section 61") the Court has an absolute discretion to discharge a trustee from making good a loss, even if they have acted in breach of trust. This discretion applies when the Court finds that the trustee has acted honestly and reasonably, and ought fairly to be excused for the breach.

Solicitors are required to apply customer due diligence measures and constantly monitor client activities according to a risk based approach, applying strict requirements for high risk situations and less strict requirements for low risk situations.

Facts of the Case

House Owners Conveyancers Limited ("HOC") acted for the Claimant in respect of a £470,000 property purchase from a fraudster ("F"). F claimed to be the registered proprietor of the property, and told his solicitors A'Court & Co ("AC") that his father had gifted the property to him in 2008. He informed AC that the property was vacant and that he required a quick sale (within 14 days). F claimed to be living in Maidenhead and had provided two utility bills and a bank statement to support this. He also produced to AC what appeared to be a British passport in the name of the registered proprietor. However, the passport transpired to be a forgery. AC obtained office copies of the registered title from HM Land Registry. These confirmed that the property was not subject to a charge and gave the proprietor's address as the property itself and an alternative address for service, however, AC made no further enquiries. F had previously aborted an earlier sale of the property when a prospective buyer had requested details of his employment in Abu Dhabi.

Terms of sale were agreed for the sale of the property to Mr Purrusing ("P"). P then instructed HOC to act for him. HOC required AC to confirm that they were familiar with F and that they would verify that F was the seller and check the relevant identification to support this. AC confirmed to HOC that it had no personal knowledge of F, but had met him in person and had seen his passport and utility bills confirming his UK address. HOC, however, did not make P aware of the ambiguous response that AC had provided.

Contracts were exchanged and a purported completion occurred with F signing the TR1. Completion funds were transferred from HOC to AC, and then by AC to an account in Dubai. The fraud then came to light and P was not registered as the proprietor of the property. It was common ground that there was never a genuine completion of the transaction due to F's lack of title, and as such, the payments made by HOC to AC, and then from AC to F, were

payments made in breach of trust with both HOC and AC being liable to P for the breach. AC had held the purchase monies on trust for P as beneficiary, until completion. In paying the money to F, AC had also committed a breach of trust. The monies were never recovered and P sought damages for breach of trust against HOC and AC. However, both parties sought relief under section 61, as well as contribution from each other. There was no suggestion that HOC and AC were dishonest or complicit in the fraud. The main issue before the Court was whether both parties had acted reasonably, so as to be entitled to relief under section 61.

Judgment

The Court held that AC and HOC were equally liable for P's loss, as they had both failed to discharge the burden of proof that they had acted reasonably. As such, neither was entitled to relief under section 61.

The Court found that a reasonable solicitor in the position of AC ought to have considered if F was the owner of the property and whether the transaction was lawful. The Court held that AC should have considered a number of factors including: why the property was vacant, why completion was sought on an expedited basis, the inconsistency between the proof of address provided by F and the service address, why the HMLR documents provided a different address for service and the transaction being unencumbered and was of relatively high value. The Judge also found that a reasonable solicitor in the position of AC should have adopted the appropriate risk-based approach and clearly considered whether F was the owner of the property in order to assess whether the transaction was indeed lawful.

The Court rejected AC's argument that a lesser standard of reasonableness applied to a seller's solicitor than a buyer's solicitor. The obligation not to release the purchase monies before actual completion was an absolute obligation and the fact that AC had no contractual relationship with P and owed no duty of care to P did not affect this.

In relation to HOC, the Court found that HOC was in breach of contract and negligent, in failing to inform their client of the established link between the property and F. HOC had raised enquiries with AC in relation to this but had failed confirm this link. HOC was aware of the risks in proceeding with the transaction but failed to inform P. Had P been made aware of this, he would not have proceeded with the transaction.

The Judge held that the parties must each bear equal responsibility for the loss caused to P.

Commentary

This decision highlights the duties that flow from the status of a trustee. It indicates that a seller's solicitor can be liable to a buyer, even though there is no contractual relationship between them. It also confirms that, when considering the reasonableness test for the purposes of section 61, the threshold is the same for both the seller's solicitor and the buyer's solicitor in relation to purchase monies.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.