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Talk by Donald Reid

Fraud in Conveyancing transactions

Introduction: the great conveyancing novel

I read a terrifying novel recently called "Our House" by Louise Candlish. It concerns a family in London who are victims of a scam whereby criminals mastermind a completely bogus conveyancing transaction, duping solicitors for both parties in the process, to sell the family's valuable house to *bona fide* purchasers and then make off with the money. The novel opens with the wife turning into her street to find the last of her furniture disappearing in a removal van and the proud new owners rolling up to commence their own move in. The narrative then goes back to describe the nightmarish unfolding of events and the ingenious plausibility of the criminal fraudsters leading up to this ghastly outcome. I hasten to say that there are features of the events that call for a generous bit of credulity but the sense that something like this could just about happen in the real world is what gives the story its sleep-losing horror.

Is there a "trust"?

And of course it does happen in the real world which is why I have been asked to address this topic today. In the July 2019 edition of the LSS Journal there was an article by Gail Cook of Lockton commenting on the English case of Dreamvar (UK) Ltd v Mishcon de Reya. The fraudster had somehow managed credibly to pose as the seller of a substantial property and instructed solicitors Mary Monson to act for him. The real owner of the property knew nothing about it. Dreamvar instructed Mishcon to act for them. The whole deal went ahead normally. Dreamvar put Mishcons in funds for the price of £1.1m.. Mishcon paid it over to Mary Monson who in turn remitted the free proceeds to their client's nominated bank account. Shortly after completion and purported registration of the title it was discovered that the whole thing was a sham and of course the fraudster had disappeared. Dreamvar sued Mishcon who defended on the basis that they had simply proceeded in accordance with normal practice. It was decided however that they had held the money for Dreamvar in trust and in remitting it in purported implement of a void and null transaction they had, howsoever innocently, breached the trust and thus were liable to refund the money to Dreamvar.

I am oversimplifying the narrative here for brevity but the article in the Journal was asking risk-management type questions as to whether as solicitors we are effectively being put in a position of guaranteeing that the transactions we get involved in are genuine and not fraudulent. The article went on to offer some practical advice which included the possibility of doing due diligence upon the other

party to a transaction, not your client, and/or demanding a warranty from the solicitor on the other side that they have themselves properly carried out due diligence in vetting their own clients.

This sounded a bit like scaremongering and the LSS therefore commissioned Counsel's opinion on whether the Dreamvar decision could emigrate to Scotland and what exactly are the relationships in play in an ordinary conveyancing transaction and what practical steps should prudently be considered to avoid or reduce risks of negligence or delict or breach of trust. The Law Society is properly concerned to head off any demand that normal practice in Scotland needs to change or any inference that solicitors should always be the fall guys when things go wrong. I myself am participating in this exercise by the LSS which at time of this Conference remains ongoing. Counsel engaged has already submitted an interim report and met with the LSS Property Law Committee to discuss the issues.

It has also come to the attention of the Committee that perhaps as a consequence of Dreamvar there is now an emerging trend where solicitors are being asked by parties other than their clients to provide further details and to complete information forms to accompany the request for identification documents. The Committee's view is that the information requested on such forms goes beyond requesting identification documents and solicitors should not be expected to provide the information requested. However, if a solicitor is minded to provide such information they should seek their clients' instructions before doing so.

A key question now coming to the fore is that of an actual or deemed trust. In what we might call email interception fraud there can be two categories. In the first the solicitor already has the money and pays it out (in perfectly good faith) to the fraudulent recipient. In the second the fraudster intercepts money coming from the client intended for the solicitor. In the first such case, even if the solicitor cannot be faulted as negligent, the client still is entitled to call the solicitor to account to the client for the client's money. Here the situation can be described as one where the solicitor was holding the funds in trust for the client and the paying away of the money, howsoever innocently meant, is nevertheless a breach of trust and carries strict liability. In the second case, the client may legitimately attempt to establish negligence on the part of the solicitor eg for not warning the client stridently enough to be suspicious of any purported alteration to banking details. But if the solicitor can "see off" that allegation, then it would normally be my opinion that the loss has to lie where it falls, namely with the client.

Keep reading the Journal as any formal guidance or advice in this area should in due course appear there. I think it was in the Journal, and have since heard elsewhere, that I heard about completely bogus firms of solicitors being set up with websites, letterheads and all the works and passing themselves off as legitimate so as to gain control of conveyancing transactions and milk the payments as they move around. Frightening.

Email Interceptions

Nowadays we should be very clear about warning our clients about disclosure of bank details and routinely verifying by phone or other direct or safe means any such details we receive and to which we

are asked to remit. In the past few years I have had a number of cases referred to me for opinion where money has been intercepted due to internet hacking and fraud. Naturally the solicitors get blamed for the loss and asked to reimburse. In the earlier cases I tended to opine that there had been no negligence as the "climate of awareness", as I put it, had not matured to a point where the solicitors ought inescapably to have been aware of the relevant risk. That climate of awareness has of course been steadily growing in recent years and I might well now be condemnatory in circumstances where I few years ago I might have been supportive. I have one on my desk just now. It is the first that has come to me since the LSS published its Guide to Cybersecurity in 2017 and a second edition came out last year This Guide inter alia advises solicitors to "consider adopting a cybercrime disclaimer warning on…engagement letters and as a footer on all correspondence." This has met with a flurry of such disclaimers appearing on emails, regardless of actual content along lines like:

> *We do not accept any liability or responsibility for any damage caused by any virus transmitted by this email or for changes made to this e-mail after it was sent.*
>
> *Please note that during this transaction we have no plan to change our bank details. Our client account is [ ]*
>
> *You may be aware of an increase in cybercrime. For this reason, we will only ever ask you to make payment into the above account. In the event that you receive any communication appearing to be from us advising that our bank details have changed, do not transfer any payment into the account or reply to the communication unless you have first telephoned us on [ ] and spoken to the partner in charge of your file or to [ ] to confirm the correct account details.*

I have to say I am not sure how effective these steps might be actually to prevent fraud. What at least they should do is help you to fight off the charge that you should go into your own pocket to recompense the loser. These disclaimers very quickly become "invisible" to the reader. We are all used to screeds of boring text appearing in every screen based thing we do. We can spot it from 20 paces and screen it out without conscious effort. What interests me when people suffer a loss is the way they are quick to blame their solicitors for not warning them enough when all the while as lay people they read the tabloid horror stories and screaming print, both large and small, warning them to be careful. There must surely be room at least for contributory negligence.

The question of trust comes up again in a slightly different way in email interception or internet fraud cases. In what we might call email interception fraud there can be two categories. In the first the solicitor already has the money and pays it out (in perfectly good faith) to the fraudulent recipient. In the second the fraudster intercepts money coming from the client intended for the solicitor. In the first such case, even if the solicitor cannot be faulted as negligent, the client still is entitled to call the solicitor to account to the client for the client's money. Here the situation could be described as one where the solicitor was holding the funds in trust for the client and the paying away of the money, howsoever innocently meant, is nevertheless a breach of trust and carries strict liability. In the second case, the client may legitimately attempt to establish negligence on the part of the solicitor eg for not

warning the client stridently enough to be suspicious of any purported alteration to banking details. But if the solicitor can "see off" that allegation, then it would normally be my opinion that the loss has to lie where it falls, namely with the client.

Mortgage Fraud

Again I think we are all alert for this sort of thing now but don't get complacent. The warning sign is often the fact or promise of volume transactions from the same source. Buzz word is "revolving deposit" where the non-loan part of the purchase is provided by a third party and the seller then pays a large finder's fee to another party at the end of the transaction, that party in reality being no different to the deposit provider in the first place. The whole arrangement can be dressed around by plausibility and professional tone and it can also be harder than it sounds to spot that money is just going round and round. A variant of this which came along a bit later was the distressed seller version, where the seller was genuinely in financial difficulty and apparently willing to accept a price much lower than valuation for a quick sale. I have been advising in one of these which came as a one off rather than volume and the solicitor concerned did not smell the rat everyone with the privilege of hindsight said he should have done. Her case is going to the SSDT to her immense anxiety and stress. In my opinion there's enough to entitle her to the benefit of the doubt but there's still a long and miserable way to go for this hitherto exemplary practitioner to endure. There but for the grace of God…

The best way to gain God's grace of course in a conveyancing transaction is not to rely on Him at all but to back your own instinct to turn down something that comes from a strange source or has a strange or abnormal ring to it even if from a familiar source.

Identity Theft

Here I mention a recent case my firm has been advising upon. It has similarities to Dreamvar although a much lower value. It involves a downmarket flat in a central belt town which an absentee landlord living in Canada had purchased some years ago for a low price to let out. He has a string of such sub-prime investments. A fraudster learned that the flat was "between tenants" and persuaded an innocent solicitor, producing credible ID, that he was the owner home from Canada and seeking to sell the flat. A buyer of a similar business habit learned of the flat's availability and instructed his usual solicitor, whom he knew well, to put in an offer which was accepted. The buyer paid cash on a short entry date and the transaction settled. The selling solicitor paid the proceeds out to the bogus client. The price was under £30,000 – hardly seems worth risking a lengthy jail sentence for.

Title was registered to the buyer without exclusion of warranty. Then the real owner, still in Canada, somehow learned of the thing and cried foul. The fraudster had of course gone to ground though the police are following up leads. An interesting issue has emerged involving the Keeper. The true owner wants his title back. The defrauded purchaser wants his money back. They approached the Keeper jointly to invite the Keeper to rectify and to pay compensation to the defrauded buyer. The Keeper however is declining to rectify just on the say so of these two parties even though they are adducing very clear signature and other evidence of the fraud.. The Keeper is insisting on a court order being produced which means a court action has had to be raised and carried through. The defrauded buyer is

being advised that some sort of defence needs to be offered in case the Keeper complains that the buyer has not mitigated his loss and declines to compensate. What's more the Keeper will not at this stage be drawn on whether she might, even if a court order is produced, aver carelessness on the part of the buyer or his solicitor under S111 of the 2012 Act. The saga continues. Remember – it could happen to you

Risk management

Wise people who don't actually have much experience of what a fraught business even a normal bona fide conveyancing transaction can become, have lots of advice to offer on risk management. Sometimes I think if we took then time to comply with all the suggestions they make we might find ourselves so busy eliminating the risks that we have no time left to do the actual work which creates the risk in the first place. And so impoverished by the spending we have to incur to protect ourselves that the fees don't pay us. In a recent case I have advised upon the solicitors' It system was hacked by a fraudster who then doctored an email attachment to provide substitute bank details. The client whose money disappeared accused the solicitors of not having state of the art anti-hacking software and pursued that into a negligence claim.

Nevertheless I will mention some of the advice. It's all good of course and the problem is that if someone says you should do a thing and you don't you might then, indeed you will, have to face the accusation that you failed to protect your clients as well as you should. It happens, believe me.

Include a suitable disclaimer in your engagement letter

Consider including standard warnings in your email footer

Make sure that bank details are sent to a client or other remitter in hard print snail mail

If email is or has to be used double check details by at least a phone call if you know your client's voice

Try to accept instructions only from clients you already know or from warm introductions.

Be doubly vigilant of off-the-street clients or fee quote chasers

Get advice on the adequacy of your IT security

Go back to cheques (cows might fly!)