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The Pelican Brief

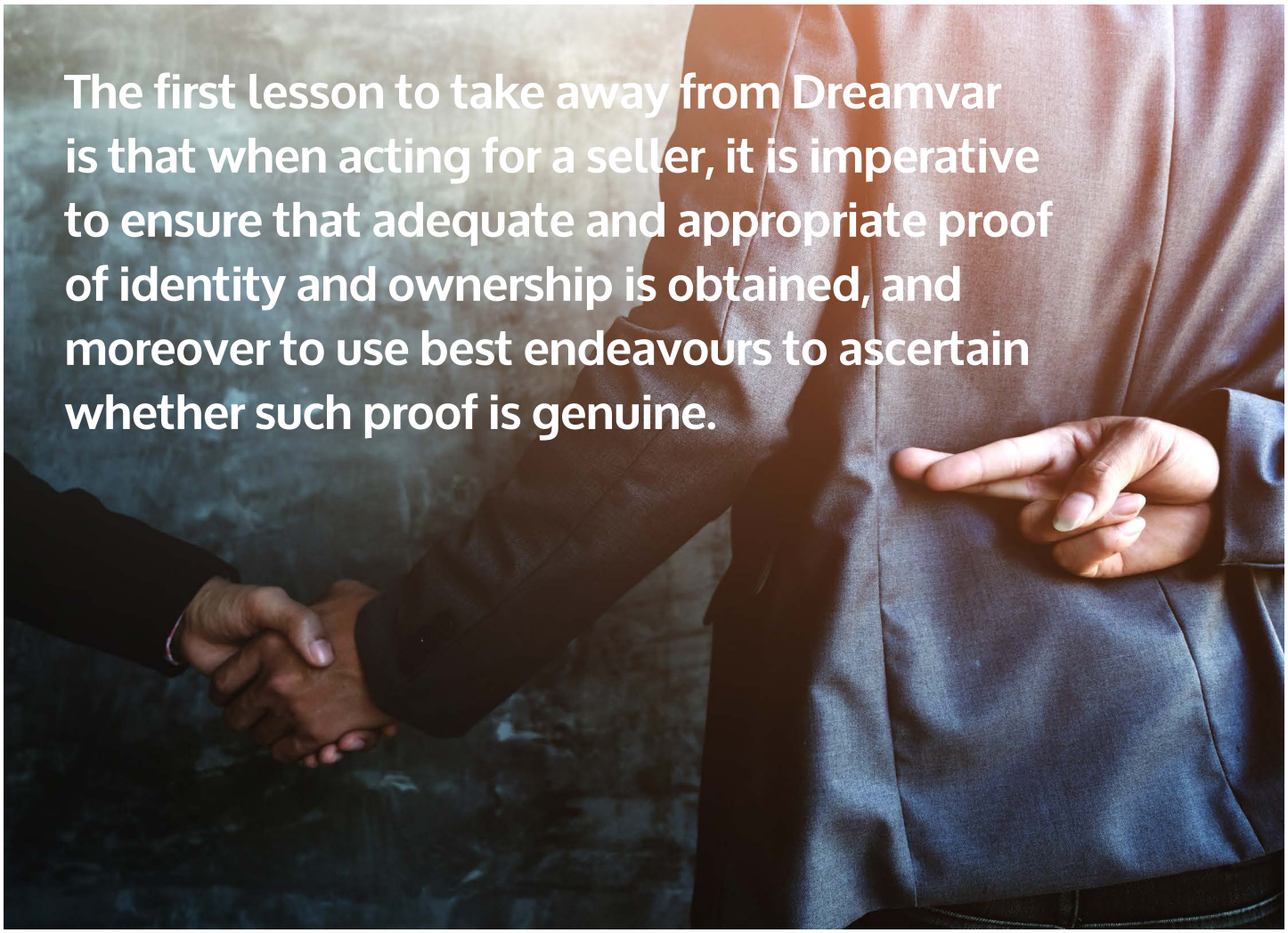
Risk insights and intelligence

Issue 005 | August 2018

Trends and Claims Update

In this latest issue of the Pelican Brief we look at two key developments: First, we consider the May 2018 Court of Appeal case of Dreamvar v Mishcon de Reya, and provide suggestions for conveyancers to protect themselves from fraud and potential liability.

Secondly, the General Data Protection Regulations 2016 (GDPR) have taken the world by storm since they came into force at the end of May. Individuals have newfound control over their data and its use. Transparency and honesty are at the heart of the new regulations, as firms are under an increased obligation to keep individuals both informed and in charge of their data. Individuals no longer have to suffer a measurable loss if their data is lost or misused – the breach needs only to occur. We have set out below a summary of the key changes and recommendations to avoid falling foul of the GDPR.



Dreamvar: Conveyancers – trust no-one!

The facts behind the Dreamvar case are sadly all too familiar for today's conveyancers:

A fraudster offered to sell a property which did not in fact belong to them. They instructed Mary Monson Solicitors (MMS) to act for them on the sale and MMS believed they were acting for the legitimate seller. Dreamvar agreed to purchase the property for over £1million and instructed Mishcon de Reya (Mishcon) to represent them. After purported completion, Land Registry enquiries revealed that the seller was an imposter. Dreamvar was left with no title to the property and lost its purchase monies which, having been transferred to the fraudster, had been dissipated to foreign bank accounts.

Dreamvar brought a claim against MMS and Mishcon. MMS admitted that they were negligent and had failed to carry out adequate due diligence on their purported clients, but the claim against them failed because it was established case law that, as solicitors for the seller, they did not owe a duty of care to the buyer. Mishcon were however found to have been in breach of trust because they held Dreamvar's money on trust pending completion and it was an implied term of their retainer that they would only release money for a genuine completion.

S.61 Trustee Act 1925 provides that if a trustee is or may be personally liable for any breach of trust but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, then the court may relieve him from personal liability.

The court at first instance acknowledged that Mishcon had acted reasonably and honestly but refused to grant relief under s.61. The rationale was that Mishcon (in reality their insurers) could bear the loss more easily than Dreamvar, and that they had been better placed than Dreamvar to consider the risks of the transaction.

In a decision which has caused consternation among conveyancers, the Court of Appeal upheld the refusal to grant Mishcon relief under s.61, finding that the judge at first instance was entitled to take account of Mishcon's ability to meet the "disastrous" financial loss suffered by Dreamvar. However, whilst rejecting any finding of negligence on the part of MMS, because they did not assume a duty of care to the buyer, the Court of Appeal also found that MMS had acted in breach of trust when they released the purchase monies to the fraudster, in circumstances where there was no true completion of the transaction because of the fraud.

Acting for Sellers

The first lesson to take away from Dreamvar is that when acting for a seller, it is imperative to ensure that adequate and appropriate proof of identity and ownership is obtained, and moreover to use best endeavours to ascertain whether such proof is genuine. If a client provides a copy of documents which have been verified by another law firm (as in Dreamvar), ask the client to confirm who certified the documents. Locate that law firm on the SRA website (rather than using details provided by the client) to verify their credentials, and if necessary, call them.

Further, remember that the duty to verify the veracity of your client is an ongoing one throughout the transaction, not just at the outset. Be aware of any inconsistencies, no matter how small, which might suggest that your client is not genuine. Such examples may include:

- Inconsistent contact addresses;
- Continuous difficulty in making contact with your client;
- Hearing a foreign ring tone when you call the supposed UK based client; and/or
- The client's inability to answer basic questions about the property, or answering them incorrectly. One such claim we have seen could have been prevented had the seller's solicitors spotted that the fraudster had indicated that the property had a garden, when it did not.

When your client gives you details of their bank account for completion, ask yourself if the information provided makes sense. If the seller lives in the UK but wants the completion funds transferred to a bank in China (as in Dreamvar) or indeed any other jurisdiction outside the UK, this should ring alarm bells. Ask for explanations. Test if they are credible.

Given the Court of Appeal's endorsement that there is no automatic assumption of a duty by the seller's solicitors to the buyer, beware of attempts by buyers/their solicitors to trap you into assuming a duty, for example by asking questions about your AML policies and indicators of fraud. Consider whether you have policies in place to provide guidance on how to respond to such queries and if not, put policies in place and make clear that no assumption of any duty to the buyer should be construed from your response to any such queries.

Acting for Buyers

The Dreamvar decision puts buyers' solicitors in an invidious position. Although the Court of Appeal has paved the way for Mishcon to seek a contribution from MMS, the case has limited the potential for buyers' solicitors to rely on s.61 to relieve them from liability.

A surprising feature of the claim was that Mishcon did not seek to appeal the finding that it acted in breach of trust and therefore the Court of Appeal was not invited to consider this question, which may well be the subject of further authority in years to come.

For now, the significant issue for buyers' solicitors is the Court of Appeal's approach to the grant of relief under s.61. In this case, there was no suggestion that Mishcon had acted unreasonably; rather the decision at first instance, which was upheld by the majority (Lady Justice Gloster dissenting), was based on Mishcon's ability (by reason of its financial position) to compensate Dreamvar in circumstances where, at least at first instance, there appeared to be no redress from the seller's solicitors.

In practical terms, when acting for buyers, we suggest that your correspondence with the seller's solicitors should expressly state your reliance on them to carry out reasonable identity checks on their client, and expressly state that you will not undertake your own independent verification.

Future developments

Rule 11 of the new SRA Accounts Rules (currently in draft and expected to come into force this Autumn at the earliest) enables solicitors to enter into an arrangement to use a third party managed account for the purpose of receiving or making payments from or to a client. This could remove the risk for solicitors of a breach of trust claim, such as that faced by Mishcon in Dreamvar and is therefore something a practice should give consideration to in due course.

Technological advancements should also make it increasingly harder for fraudsters to hoodwink solicitors in the future. For example, we are likely to see an increase in the use of cryptocurrency and block chains to effect the transfer of funds – block chain transactions are not only secure, but moreover the funds are traceable.

In summary, suspect everyone and trust no one! Try to be on your guard constantly throughout the transaction whether you are acting for seller, buyer or indeed a lender. The reality of a heavy caseload may make additional checks difficult but it is at least worth pausing for reflection before money changes hands – we understand that there may be a general reluctance to ask lots of questions of your clients, for fear of irritation, or simply due to time constraints, but when you consider the repercussions for getting this vital issue wrong, genuine clients will understand if their transactions are delayed, if the alternative is no title and no money!

GDPR – transparency and honesty are key

Cases such as Dreamvar have made it clear that a lack of (1) attention to detail; (2) awareness of types of personal information; and (3) adherence to the requirements for data processing can lead to devastating consequences. It is therefore essential that firms fully understand their obligations.

Conveyancing practices turn over multiple transactions over a relatively short time span, which involves a large amount of incoming personal data every day. Any new clients need to be made expressly aware of what their data will be used for, which third parties will have access to it, and also the reasons for this. Although this seems onerous and tedious, it is easiest to avoid a breach by keeping clients informed simply through a fair processing notice. A notice of this nature will meet one of the key objectives of the GDPR – to keep individuals informed. It should clearly and comprehensively describe the purpose and legal basis for the use of your clients' data, set out what each individual's rights are in terms of their data, as well as the retention period for their data (having regard to Article 5(e) which states that "personal data shall be kept for no longer than is necessary for the purposes for which it is being processed").

There is no doubt that the GDPR have significantly enhanced the rights of any individual whose data is being processed. Your clients and/or employees should be comfortable that they are in control of their data, and it is key to demonstrate an understanding of exactly what data you hold and what is being done with it. Individuals (both clients and employees) now have a right to be forgotten by requesting that you remove personal data you hold from your systems. Although it is not an entirely new principle or an unconditional right, it has proved to be one of the more difficult regulations to bring into operation, given data portability into the public domain. Nonetheless, data portability cannot be used as an excuse to delay or refuse any requested erasure.

Some practical tips on how to comply with the GDPR are as follows:

1) **Check your firm's consent practices** – you cannot rely on the implied consent of individuals to process their data. Consent needs to be clear and unequivocal, i.e. ensure clients have an option to opt in, rather than having to take steps to opt out.

2) **Train employees** – serious breaches need to be reported within 72 hours. It is therefore of the utmost importance that employees can spot a red flag when it occurs and feel able to report a breach without fear of repercussions. Ensure therefore that your firm has robust procedures for detecting, reporting, and investigating any data breaches. Small firms are unlikely to require the appointment of a Data Protection Officer unless they are processing special categories of personal data (i.e. political beliefs, ethnic origin etc). However, it is still important to have someone in your organisation who has a detailed understanding of the GDPR and is responsible for data protection.

3) **Update privacy and/or security policies** – or put them in place if they are not already! Broad use of encryption is a good way to minimise your firm's risk of a breach. Share the risk between different systems, evaluate what security measures are in place, and approach this analysis with individuals' rights in mind.

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