

Property

Safe as houses?

Amanda Eilledge assesses the threats posed by mortgage identity fraud



IN BRIEF

- There is a misconception among conveyancers that provided they have taken reasonable steps to verify the identity of their client, they will not be liable to the victims of mortgage fraud if their client turns out to be an imposter.

The classic example of identity mortgage fraud concerns the husband in financial difficulty who remortgages or sells the matrimonial home without his wife's knowledge. He forges his wife's signature on the transfer and/or the charge. In most cases, these deeds will be held by the solicitor who believes he is acting for both the husband and wife and will be delivered by him on completion. The purchaser and/or the lender consents to the purchase monies being released on delivery of the deeds. The husband uses the money to pay off his debts.

A more recent and far more sophisticated variation on this fraud involves a fraudster who adopts the identity of a residential homeowner with a high credit rating and no mortgage. He obtains a mortgage in the homeowner's name and absconds with the money. In a recent case I was involved in, the fraudster managed to redirect the victim's post to a PO box number so that the real owner was unaware of the correspondence regarding the mortgage, and even posed as the owner of the property when the valuer came to inspect the property on behalf of the lender.

The consequences of the fraud

The forged contract of sale, the transfer and the charge are null and void. The wronged wife or innocent homeowner retain their interest in the property and the purchaser or lender has parted with their money with little prospect of recovery from the fraudster. It is in these circumstances that they may turn to the fraudster's solicitor to recover their losses.

The claim

The basis of the claim by the victim against the fraudster's solicitor is breach of the warranty of authority. A solicitor who purports to act on behalf of a vendor client may impliedly warrant to third parties with whom he has dealings, including the purchaser and lender, that he has that client's authority to act. The solicitor may give the warranty by signing the contract of sale or the transfer on behalf of his client or simply by acting in the course of negotiations between the parties and in the exchange of documents prior to completion. The key moment in the transaction will be the delivery of the transfer and/or charge by the conveyancer on behalf of his client at the point of completion. The purchaser or lender can establish reliance upon the warranty by the advance of the purchase price or mortgage monies at that point.

The law

The principle that a solicitor (indeed any agent) warrants that he has the authority of his client to act in a particular way is well-established and goes back to the nineteenth century and the decision of *Collen v Wright* (1857) 7 E & B 647 (the most familiar example involving solicitors is *Yonge v Toynbee* [1910] 1 KB 215).

The operation of the principle in favour of lenders is of more recent origin. Two cases, both involving the Bristol and West Building Society, are of particular significance: *Penn v Bristol and West Building Society* [1997] 3 All ER 470, [1997] 1 WLR 1356 CA and *Bristol and West Building Society v Fany & Jackson (a firm) and other actions*

[1997] 4 All ER 582 ChD. Both cases concerned a husband in financial difficulties raising money on the matrimonial home without his wife's knowledge.

Mr Penn purported to sell the property to a co-conspirator, who obtained mortgage finance from the Bristol and West which was used to pay off the existing mortgage on the property and the husband's business debts. Mrs Penn obtained a declaration that neither the transfer nor the charge were binding on her. HHJ Kolbert also found the solicitors acting for Mr Penn and purporting to act for his wife liable to the lender for breach of warranty of authority. A unanimous Court of Appeal upheld his decision.

Waller LJ, who gave the judgment of the court, expressly rejected the submission that in order to found liability the warranty, express or implied, must have been given to the claimant or that the transaction into which the claimant was induced to enter must have been some form of dealing with the supposed principal. At [1363] he said: "The question whether a warranty of authority has been given rests on a proper analysis of the facts in any given situation, and not on any preconceived notions as what is essential as part of the factual analysis. Of course there is no issue that to establish a warranty of authority as with any other collateral warranty there must be proved a contract under which a promise is made either expressly or by implication to the promisee, for which promise the promisee provides consideration.

But consideration can be supplied by the promisee entering into some transaction with a third party in a warranty of authority case just as it can in any other collateral warranty case. Furthermore, the promise can be made to a wide number of people or simply to one person, again all depending on the facts. It follows, as Mr Jackson has submitted, that the plaintiff, whether as one of the wide number of people to whom the offer is made or by virtue of being the only person to whom the offer is made, has to establish that the promise was made to him. There is also no doubt that what he has to establish is that a promise was made to him by the agent, to the effect that the agent had the authority of the principal, and that he provided consideration by acting in reliance on that promise.”

In *Penn*, different solicitors were acting for borrower and lender. Chadwick J had no difficulty in *Fancy & Jackson* in finding that the principle established in *Penn* applied equally in circumstances where the same solicitor was acting for both lender and borrower.

Strict liability

Once the implied contract has been established, liability is strict. Since the

claim is for breach of warranty, the defence of contributory negligence is not available. Such a claim, therefore, has enormous potential to affect solicitors, particularly with the advent of long distance conveyancing, where the conveyancer never meets the client and accepts photocopies of proof of identity, which may have been stolen or can be doctored easily. It does not matter how careful a solicitor might be in checking the identity of his client, he will still be liable for breach.

Avoidance of liability

The question whether a warranty of authority has been given rests on a proper analysis of the facts in any given situation. Since the warranty principle is based on an implied contract, in principle it should be straightforward to exclude any such implication by an express disclaimer. In practice it remains to be seen whether lenders will be prepared to lend on this basis.

The best course of action is still avoidance and there is no substitute for the tried and tested “know your client” approach. If it is not possible to meet the client then the client’s identity documents should be certified by

a local solicitor. At least that way it may be possible to claim an indemnity from the certifying solicitor if the client turns out to be an imposter.

The following is a suggested check list of the steps that should be taken if you do not know your client(s) or you only know one of them:

- Obtain written instructions from all clients and speak to all of them on the telephone.
- Ensure the proceeds of sale/mortgage advance are paid into a joint account
- Obtain verification of the identity documents of the client(s) from a local solicitor.
- Unless known to you, check that the solicitor is who he says he is: contact the Law Society.
- Do not accept certified copies unless you have contacted the certifying solicitor personally to check that they have seen the client(s).



Amanda Eilledge, is a barrister practising at 11 Stone Buildings, Lincoln’s Inn, in the area of chancery/commercial work with a particular emphasis on property related disputes