



Breach of warranty of authority – what does a solicitor warrant in the course of a conveyancing transaction?

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Breach of warranty of authority is an action available against an agent who misrepresents his or her authority to a third party and as a result of that misrepresentation, the third party enters into a contract and suffers loss. The rationale for the action lies in the fact that a third party who is induced to act and has given consideration in reliance on the agent's implied promise (that he or she has authority), has no cause of action against the principal if they did in fact not give authority to the agent.

Breach of warranty of authority claims can arise against solicitors in mortgage fraud cases.

Consider the following scenario.

The law firm, **XYZ Law** is instructed by a purported seller in a property sale, **Mr S**. The property sale is however a fraudulent enterprise and Mr S is not the property's owner, but a fraudster assuming the true owner's identity. The true owner is unaware that the property is to be sold.

Mr S also creates a sham company, which acts as the purchaser of the property. The company engages separate lawyers who act on its behalf and arranges for a mortgagee to advance a loan of \$1,000,000 to the company. The loan is secured by a mortgage over the property.

XYZ Law conveys the property and the mortgagee advances the loan to the sham company. The

company then defaults on the mortgage repayments and the mortgagee seeks to enforce its mortgage, leading to the fraudulent transaction being uncovered.

Following this, the former registered proprietor commences proceedings to recover unencumbered title to the property. The mortgagee, looking to recover the loan amount, commences proceedings against its own solicitors, but also joins XYZ Law to the proceedings. The mortgagee's claim against XYZ Law is that it gave a warranty to the parties to the transaction (including the mortgagee) that it had the authority to act for the true owner of the property in the conveyance and that warranty was breached in circumstances where XYZ Law did not.

Is XYZ Law potentially liable to the mortgagee for breach of warranty of authority?

Breach of warranty of authority

In Australia, there is an absence of authority as to what a solicitor represents to the other parties to a transaction simply by acting on behalf of a participant to that transaction. It is however clear that under normal circumstances, the warranty of authority provided by a solicitor is not a warranty that the principal will perform any obligations, is solvent, or holds any other attributes. Instead, it is that the solicitor has authority from the principal.

Case law from the United Kingdom suggests that a solicitor acting for a client warrants only that he or she has authority to act on behalf of the principal, and does not warrant the identity or any specific qualities or attributes of the client (e.g. that they own a particular property).

The case law

*P&P Property Ltd v Owen White*¹ (**P&P**) for example involved a claim against a solicitor (among others) by a property developer who purchased a property for £1,030,000 from a person purporting to be the true owner of the property, represented by the defendant solicitors. The property developer claimed that the solicitors were in breach of warranty of authority as they represented they had authority to act for the owner of the property, and specifically that they were instructed by the true owner (when they were not and were instead instructed by a fraudster purporting to be the true owner of the property).

The English High Court of Justice found that the solicitor's implied warranty of authority only extended to a representation that the solicitor had authority to act on behalf of their client. The court found that an agent does not, simply by acting as agent, promise it has the authority of the true owner of the property.

On appeal,² the court ultimately determined that the trial judge's decision to dismiss the breach of warranty of authority claim against the solicitor was correct. However, this finding was made on the basis that the purchaser did not rely on the solicitor's representation of authority. The court found the solicitor **did** provide a warranty of authority that she acted for the *true* owner of the property.

In reaching that conclusion, Lord Justice Patten found that because the solicitor executed the contract of sale on behalf of the vendor, she adopted the terms of the contract and expressly warranted that she had authority to act for the true vendor of the property. Patten LJ contemplated that there could be circumstances which might point to the solicitor '*doing no more than to warrant that he had the authority of the client who gave him his instructions*'.³ However, in this instance, by taking the step of signing and exchanging the contract of sale, the solicitor was found to have expressly warranted that she had the necessary authority to do so.

The English case of *Excel Securities PLC v Maswood*⁴ (**Excel**) dealt with similar circumstances of a fraudster impersonating the owner of a property for the purpose of obtaining a loan over it. The court found the solicitor, who stated that he acted on behalf of the owner of the property, only warranted that he had authority to act

on behalf of a person identifying himself as the owner of the property. The court was unpersuaded that the solicitor warranted any attributes of the purported client (either the identity of their client or his title to the property in question).⁵

In *Excel* it was strongly suggested that the court should not readily impose upon a person rendering professional services an absolute, unqualified obligation amounting, in effect, to a guarantee of his client's identity and title.⁶

Breach of warranty of authority in Australia

In Australia there is an established principle that where a person (the first person) falsely represents that he or she has authority to act on behalf of someone, and another person (the second person) is induced to act on the representation, the second person can recover the amount lost from the first person. This is the case even if the first person acted in good faith believing he or she had the authority he or she purported to have.⁷

Such an example is where a husband fraudulently mortgages a property owned jointly by his wife and him. This is the scenario that arose in *Penn v Bristol & West Building Society*⁸ (**Penn**). In cases such as *Penn*, a solicitor who holds themselves out as acting for both the husband and the wife will likely find themselves liable for breach of warranty of authority on the basis that they held themselves out as having the wife's authority when they did not.

There is however a key, but subtle difference between cases like *Penn* and *P&P* and *Excel*. In *P&P* and *Excel* the question was whether the solicitor represented that their client had a certain attribute (namely that they were the owner of the property). In *Penn*, the question was not whether the solicitor represented the client had a certain attribute, but whether the solicitor actually had the authority of the person they held out to be their client.

As we have outlined above, the rationale for the action of breach of warranty of authority lies in the fact that a third party who is induced to act in reliance on an agent's promise that they have authority, has no cause of action against the principal if the principal did not give authority to the agent. In the *Penn* case, the wife did not authorise the solicitor to act on her behalf, meaning that the wife could not be pursued as principal. The breach of warranty of authority cause of action was intended for such circumstances. In *P&P* and *Excel* however, there was a principal (the fraudster) who could be pursued by third parties. The cause of action is therefore arguably unnecessary and not intended for such circumstances.

Application to the hypothetical scenario

The circumstances outlined in our scenario and cases like P&P and Excel appear not to have been tested in the Australian courts. It is the authors' opinion that, in the absence of any other authority, Australian courts would potentially follow the English decisions.

Whether a solicitor has provided a warranty of authority, and the scope of such an authority, will depend on an objective analysis of the solicitor's actions and conduct having regard to any express representations made to the other parties during the course of a transaction. In the absence of any express statements to the contrary by a solicitor, we consider an Australian court would be reluctant to extend the warranty provided by a solicitor further than simply a warranty that the solicitor had authority to act on behalf of a client.

We are of this view because:

1. It is unlikely that a solicitor would implicitly assume an obligation to warrant that its client was who it said it was;
2. The identity checks required by solicitors in conveyancing transactions are designed to reduce the risk of fraud, not eliminate it;
3. It would arguably be inconsistent with public policy to hold solicitors who act in good faith, liable for the actions of fraudsters who have deceived the solicitors as well as the claimant; and
4. A solicitor would effectively be providing a guarantee of title.

However, the decision in the P&P appeal shows the court's preparedness to find a solicitor did provide a warranty of authority in relation to a client's identity by way of particular conduct. This could include express statements in correspondence, the execution of contracts or land title documents, which may amount to an express warranty that a solicitor acts for a client with certain attributes.

Further, the lack of Australian authority on this point presents some uncertainty, and therefore there is a risk that a court may not necessarily follow the

English approach. That uncertainty is amplified by the fact that the doctrine of warranty of authority in England has oscillated between a reluctance and a readiness to hold solicitors strictly accountable, and it would therefore be open for an Australian court to adopt the latter approach.

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¹ [2016] EWHC 2276 (Ch).

² *P&P Property Ltd v Owen White & Catlin LLP* [2018] EWCA Civ 1082 (15 May 2018)

³ *Ibid* at 55.

⁴ [2010] Lloyd's Rep PN 165.

⁵ *Excel Securities PLC v Maswood* [2010] Lloyd's Rep PN 165 at 100.

⁶ *Ibid* at 102.

⁷ *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd* (No 3) [2009] FCA 1087 at [40] in reliance on *Collen v Wright* (1857) E & B 647 and *Penn v Bristol & West Building Society* [1997] 1 WLR 1356.

⁸ [1997] 1 WLR 1356

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