LEGAL RISK LLP
SOLICITORS

Risk Update • May 2018

Issue No: 81

Contents

Royal Courts of Justice

Events

MBL Anti-Money Laundering for Law firms – Key Issues Conference 2018

Sue Mawdsley will be delivering a session on Terrorist Financing and Transfer of Funds.

Contact info@legalrisk.co.uk for further information on any of the above.

Dreamvar: solicitor as guarantor

Conveyancers' worst nightmares have been realised by the Court of Appeal in *P&P Property Ltd v Owen White & Catlin LLP and Dreamvar v Mishcon de Reya* [2018] EWCA Civ 1082 (18 May 2018). A link to the judgment can be found on www.legalrisk.co.uk/news.

Mishcon de Reya acted for a purchaser, buying a property from a fraudster posing as its owner. It was common ground that they were not negligent. But because a purchaser's solicitors hold the purchase money on trust to pay it to the true owner, they inadvertently committed a breach of trust in paying it to the imposter's solicitors. The judge had power to forgive them the breach of trust, but declined to do so, on the grounds that they were the handiest 'deep pocket'. The Court of Appeal declined to overturn the judge's decision.

In effect, the purchaser's solicitors are the guarantors of the identity of the seller. The next stop may be the Supreme Court.

The only positive aspect to the outcome in the Court of Appeal is that the way was opened for a claim for contribution by Mishcon de Reya against the vendor's solicitors (as the Court of Appeal, unlike the judge at first instance, found that they committed a breach of trust).

For advice on ways to protect against liability in this situation, contact info@legalrisk.co.uk.

PII Consultation: how to avoid nightmares like *Dreamvar*

The SRA's consultation on Professional Indemnity insurance (PII) and the Compensation Fund closes on 15 June 2018. https://goo.gl/DreQc3. They may adversely affect the pockets of many solicitors both while they are in private practice and after retirement, so everyone should make time to consider them and respond.

The reality of the proposals for many firms is that for much of their work, compulsory cover will be reduced to nil, in relation to most commercial clients, from the current minimum of £3m per claim/ £2m for partnerships and sole practitioners. For others, the proposed reduction is to £500,000 or £1m for conveyancing. Note that policy limits include claimants' costs, and if a claim exceeds the limit, the firm must bear a share of defence costs.

Our opinion on the proposals (that they are misconceived) is set out in our March Newsletter: www.legalrisk.co.uk/RiskUpdateMarch2018

An observer might argue that the *Dreamvar* nightmare would never have happened if Mishcon de Reya were not so well insured, because their insurance makes them a 'deep pocket', and that the SRA reforms are therefore to be welcomed. There are two answers to this. First, the judge said Mishcons were able to absorb the loss "with or without insurance". Second, the true lesson of *Dreamvar* is not that Mishcons were the handiest 'deep pocket', but that solicitors operate in an environment so hostile – where they can be found liable even when it is common ground that they have done nothing wrong – that it is all the more important to err on the side of caution and breadth of cover when it comes to professional indemnity insurance.

Jumping the gun – SRA's 'Innovate' initiative

It is a mark of how far the SRA has come in its journey, to recall that in 2009, when issuing guidance on the introduction of alternative business structures, they warned firms against jumping the gun.

Now the SRA have used their own 'Innovate' safe space to approve arrangements in advance of changes to the rules which they are seeking to make and which will require the approval of the Legal Services Board. In the proposed rule change, they plan to allow unregulated entities to employ solicitors to provide legal services to the public. This controversial proposal has yet to be approved, let alone written into the SRA Handbook. But in the meantime, the SRA has allowed at least two unregulated entities to take advantage of its 'safe space' to employ solicitors to provide legal services to the public.

Firms seeking to innovate may want to take advantage of the SRA's 'safe space'. We have advised and represented a number of legal services providers, including disruptors, in discussions with the SRA; contact info@legalrisk.co.uk.

Limits on 'acting in the client's best interests'

SRA Principle 4 requires solicitors to act in the best interests of each client. But taking a myopic view of that obligation, and failing to balance it against other professional obligations, may lead lawyers into trouble. The American Bar Association's formulation of the duty is more nuanced.

In *Bernard Sports Surfaces Ltd v Astrosoccer4u Ltd* [2017] EWHC 2425 (TCC) the judge was highly critical of the Defendant's solicitors, who he said made a threat to their opponent which was on its face unlawful, and exhibited breath-taking rudeness. The firm self-reported to the SRA, who ultimately took no action. The threats in *Ferster v Ferster [2016] EWCA Civ 717* led to a finding of 'unambiguous impropriety' and allegations (not taken up by the Court) of potential blackmail.

In *R (ex p Gopinath Sathivel) v Secretary of State for the Home Dept and other cases* [2018] EWHC 913, the High Court gave guidance on situations where solicitors are alleged to have gone too far in trying to help their clients avoid removal from the UK. And in *Vai Sui Ip v. SRA* [2018] EWHC 957, the Court upheld the striking off of a solicitor for exploiting a 'weak spot' in the Immigration Rules by making last minute applications which were spurious or hopeless, again to avoid removal of clients from the UK.

Solicitors need to ensure that a client's desperation or aggression does not lead them to cross the line into professional misconduct. We provide advice on where the line should be drawn, what should and should not be reported to the SRA, and how it should be presented, as well as representation in the event of an investigation.

GDPR is now fully in force, but with deference to Sir Winston Churchill, now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.

Anti-Money Laundering – Westminster's new mood

It may be the poisoning of the Skripals (coming on top of the Litvinenko case and other suspicious deaths), or it may be the dramatisation of *McMafia* on the TV, but there has been a definite hardening of attitudes towards the risk of money laundering in Westminster. Parliament has pushed through laws requiring overseas territories to provide transparency on beneficial ownership. There seems to be a sense in political circles that the UK may have been overrun by commercial activities linked to Russia, perceived as a state which wants to do us harm. See *Moscow's Gold: Russian Corruption in the UK.* A link can be found on www.legalrisk.co.uk/news.

There is a risk that law firms handling transactions connected with Russian money may be targeted by the non-financial Press. And there is a risk that professional services firms may be picked on as easy targets "*pour encourager les autres*" if their AML systems are shown to be weak. Legislation continues to come through. The Sanctions and Anti-Money Laundering Act 2018 has recently received Royal Assent. A link can be found on www.legalrisk.co.uk/news.

Almost a year on from the introduction of the Money Laundering Regulations 2017, firms need to be sure that they have brought themselves up to date, with a written Risk Assessment, compliant policies, controls and procedures, and training. The first annual review may already be falling due. We have advised leading firms on their risk assessments and independent audit of their systems.

Sanctions – USA's new drumbeat

The re-introduction of stiff sanctions by the USA against Iran requires firms to ensure that the appropriate checks are being made; otherwise a summer holiday in the USA may turn out to be longer and less luxurious than planned. OFSI has recently published reporting forms. A link can be found on www.legalrisk.co.uk/news.

General Data Protection Regulation (GDPR)

GDPR is now fully in force as of 25 May 2018, but with deference to Sir Winston Churchill, now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning. What is regarded as constituting compliance will change and firms will need to maintain their efforts to keep their processes under review.

The Data Protection Act 2018 received Royal Assent on 23 May 2018 and contained an important change in relation to lawyers' duties of confidentiality.

We have advised many firms, including a large number of US law firms, on compliance. Resources can be found on www.legalrisk.co.uk/GDPR and, for US law firms, www.legalrisk.co.uk/GDPRUSA. New guidance is being released constantly and key documents relevant to law firms are posted on www.legalrisk.co.uk/news.

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Note

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Subjects covered change constantly and develop.

No responsibility can be accepted by the firm or the author for any loss occasioned by any person acting or refraining from acting on the basis of this.