LEGAL RISK LLP
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Risk Update

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Conveyancing: the need to keep a clean sheet

Santander v RA Legal [2014] EWCA Civ 183 arose from a conveyancing fraud in which the solicitors who purported to act for the seller, Sovereign, did not in fact do so. The lender sued the solicitors who acted for it and the buyer relying on a breach of trust for paying away the mortgage advance without receiving genuine documents in return. The judge had exercised his power under section 61 of the Trustee Act 1925 to relieve the solicitors from liability as trustees. Section 61 requires that the trustee has acted 'honestly and reasonably'.

The Court of Appeal reversed the exercise of that power, holding that the solicitors had not acted reasonably because of numerous departures from best practice. These included making inadequate requisitions, accepting inadequate replies, failing to adopt the Code for Completion by Post and proceeding to the (purported) completion without a written (or any other) undertaking from Sovereign to obtain a discharge of a Mortgage Express charge, nor written evidence of any obligation on Sovereign to return the completion money on demand. They then failed to take adequate steps after completion to protect their clients' position. The solicitors were also criticised for signing a report on title when there was an outstanding point to be checked. Their intention was to expedite release of the advance on the basis that it would not be used if the title issue turned out to be a problem. There was no finding of dishonesty in this case, but a warning shot was fired for solicitors who adopt this practice in other cases.

The solicitors were liable to Santander, even though taking all proper precautions would probably have meant that their clients would still have suffered their loss. In passing, history relates that it is likely that Solicitors Indemnity Fund (SIF) would have considered an appeal as it would be of benefit to the profession as a whole. When SIF went into run off in 2000, it had four appeals to the House of Lords (now the Supreme Court) pending. The writer cannot recall a single such appeal by open market insurers, a point which those in other jurisdictions with statutory schemes under constant review might bear in mind. We have advised other schemes under challenge, as well as reviewing claims handling arrangements, and partner Frank Maher recently provided expert evidence which formed the basis of a decision in which a Law Society successfully resisted a judicial challenge to its compulsory scheme.

The Santander case emphasises the need to follow best practice at all times. There is little evidence of it on many files we see which have been conducted by largely unsupervised paralegals, albeit there is doubtless an element of adverse selection taking place in those we see.

European Risk Management Conference: Amsterdam, 7 May 2014

Legal Risk partners Frank Maher and Sue Mawdsley will be respectively chairing and addressing this conference with representatives of leading European law firms.
Further details can be found here.

Conflicts

Georgian American Alloys v White & Case [2014] EWHC 94 (Comm) is a useful reminder to City and international firms of the importance of following procedures: managing conflicts is as much about keeping work as turning it away. While other firms could equally have been caught, great care needs to be taken when handling an unusually large instruction, in this case $2billion. We have advised City, US and regional firms on conflicts, as well as advising on procedures and implementing workshop training for partners and senior fee earners.

Events

Frank Maher will be speaking at the Association of Professional Responsibility Lawyers' conference in Las Vegas, 27 -29 March 2013.

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Francis Dingwall will be chairing the Ark Group's 7th Compliance for Law Firms conference on 2-3 April 2013.

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Sue Mawdsley will be delivering numerous anti money laundering workshops throughout the UK. Organised by the Law Society .

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Frank Maher and Sue Mawdsley will be respectively chairing and addressing the European Risk and Compliance Conference in Amsterdam on 7 May —see page 1.

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For further details for all events see here.

For further information on any of the above, please contact info@legalrisk.co.uk

News from the USA

Once again, Legal Risk partners attended a packed risk management conference for US lawyers in Chicago.

Conflicts always loom large as an issue for US firms, due to differences in rules, and this year was no exception, with a particular focus on 'playbook' conflicts – where knowledge of the clients' business and strategies, rather than a specific legal conflict, may disqualify a lawyer from acting.

Procedures for deciding whether the firm will act were discussed, identifying the need for the final decision to rest with the general counsel or another person not involved in the fee earning.

Lawyers holding client money where there was no underlying transaction was identified as an issue, just as it is in the UK.

A broker commented that midsize firms taking global clients may lack the in-house infrastructure to manage client intake risk. This is an area of weakness we have identified in UK firms, though we are assisting a number of firms in addressing it.

Management liability policies are subject to claims from law firm failures and departing partner issues. We are aware of adverse claims experience in the UK. Employment practices policies have not seen significant claims exposure in the US, despite an increase in sexual harassment allegations and social media related issues.

Disaggregation is an emerging issue as it is in the UK, with clients seeking to cut costs by doing part of the work in-house or retaining separate firms, including unregulated practices providing e-disclosure services.

IT risks continue to raise a variety of concerns. Cloud computing gives rise to document retention issues when litigation looms, and the need to ensure consistency with client-imposed terms, to identify but two among many risk issues.

Preservation of legal professional privilege where lawyers consult the firm's general counsel or risk management partner about a potential problem on a matter for a current client is still a live issue for debate, and a number of measures were discussed which may assist in establishing such privilege.

As an aside, we have recently had cause to address a related issue in the UK on preservation of privilege when corresponding with insurers who dispute coverage, where the conventional reliance on common interest privilege may be susceptible to challenge.

Pricing of legal services is at least as much under challenge as it is in the UK, and a new venture is providing companies with benchmarking data enabling them to compare their law firms against other firms in similar industries— be warned!

Anti-money laundering

Sanctions are top of the agenda, and will become even more significant with action over Ukraine, particularly in view of the level of Russian investment in the UK. We have advised a number of firms on these issues. Firms need to ensure that the issue is not only addressed at client engagement but also as part of ongoing monitoring, where we find many firms are lacking when we undertake audits.

An appeal by a criminal lawyer convicted of entering an arrangement in connection with money paid on account of costs was allowed by the Privy Council in **Holt v HM Attorney General on behalf of the Queen** [2014] UKPC 4, an appeal from the Isle of Man. We have recently advised a firm wishing to take money for costs from tax scheme providers, for whom it was acting on civil proceedings and in relation to a tax prosecution.

The case is a salutary reminder, notwithstanding the successful appeal. That is not somewhere most lawyers want to be.

Terms of business – in need updating

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 replace the current Distance Selling Regulations and the Cancellation of Contracts made in a Consumer's Home or Place of Work, etc. Regulations from 13 June 2014. We have advised numerous firms of all sizes on terms of business (including limitation of liability).

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