

RECENT DEVELOPMENTS IN THE AREA OF SOLICITORS' PROFESSIONAL INDEMNITY



As the dust settles on the 2017 Solicitors' PI renewal, we look at recent case law and emerging trends which may affect that market over the coming months.

Conveyancing-related claims continue to be the largest source of notifications to insurers and this trend is unlikely to change given the growth in cyber related claims and the prospect of ground rent claims on the near horizon.

Solicitors' involvement in so called "Investment schemes" is also likely to become an increasing headache for their insurers.

Further, solicitors and their insurers comprise the Courts' preferred compensatory route in cases involving fraud extending to circumstances where the solicitors' conduct cannot be criticised. Judicial instinct and public policy considerations, rather than rigorous application of authority and principle, appear to underpin a number of high profile decisions.

In **Dreamvar v Mishcon de Reya [2016] EWHC 3316 (Ch)**, the Court held solicitors liable for the consequences of a fraudster impersonating the vendor of a property and stealing the purchase monies notwithstanding finding that the solicitors had not acted negligently. The solicitors held the completion monies on terms they would only be released for a genuine completion. As there had been no genuine completion, the sale contract was a nullity and accordingly the money had been paid away in breach of trust.

Further, although the Judge had found that the solicitors acted reasonably, the Court declined to grant relief under Section 61 Trustee Act 1925 on the basis the solicitors were insured to cover such losses and therefore in a better position to absorb the losses as compared to the buyer. A clear application of public policy.

The decision appears to elevate the duty owed by solicitors to a guarantee or warranty that the transaction is genuine and to penalise those who had acted prudently when buying insurance cover. It is unclear what the finding would have been had the solicitors imprudently taken out inadequate cover for the size of the transactions they acted on?

It is understood permission to appeal has been granted on both the issue of “genuine completion” and the application of section 61.

Some relief for insurers and the profession came with the decision in **Hughes-Holland v BPE Solicitors [2017] UKSC 21** when the Supreme Court reviewed the circumstances where professionals will be responsible for all or part only of a Claimant’s losses and provided welcome guidance on the distinction between “advice” and “information” cases.

An “advice” case is where the professional essentially “*guides the whole decision making process*” and takes responsibility for “*what matters should be taken into account in deciding whether to enter into the transaction*”. In such a case the professional will be liable for all the losses incurred by the client as a result of entering into the transaction.

An “information” case is where a professional provides one part of the material on which the client relies when deciding what steps to take. The professional is accordingly liable for only the consequence of that information being wrong. Furthermore it matters not whether the information is critical to the client’s decision; that does not elevate it to an “advice” case.

The solicitors were not found liable for the Claimant’s losses incurred as a result of making a loan where the solicitors drafted the loan agreement and mis-stated the purpose of the loan. This was an information case; the information provided by the solicitors was one of a number of factors taken into account when making the loan.

Unsurprisingly, the Defendant solicitors relied heavily on the Supreme Court’s decision in **Main & others v Giambrone [2017] EWCA Civ 1193**.

Giambrone was a firm of Italian lawyers practising in London and Italy. It acted for UK investors who were buying holiday homes “off plan” in Calabria, Italy. Giambrone was to carry out due diligence, with clients’ deposits to be released only on receipt of compliant bank loan guarantees.

Notwithstanding the guarantees were non-compliant, Giambrone released the deposits to the developers. The Italian authorities seized the development, prior to its completion, following allegations the project was a Mafia and IRA money laundering operation. The buyers could not recover their deposits and brought proceedings against Giambrone for recovery.

The Court held that Giambrone was in breach of duty in releasing the deposits without compliant guarantees and for failing to advise the buyers of factors said to be central to the decision to buy the plots, for example that a large percentage of the deposits was being paid to the agent promoting the project; that Calabria was a “crime-ridden part of Italy” and that the Mafia had infiltrated into Calabrian life.

Two issues considered by the Court of Appeal are of interest (1) was the loss of the deposits within the scope of the lawyer's duties and (2) is there a duty to warn of the risks of organised crime?

If this was an "information" case then following the BPE judgment a finding of no liability appeared the likely outcome.

However, Jackson LJ held that this was an "advice" case, noting that this was not a "*conventional conveyancing situation*". Whilst the Claimants had decided to buy property in Italy, after that they were reliant on Giambrone. The purchasers were buying properties abroad and had no knowledge of the local law or conveyancing procedures. Giambrone had decided what information the claimants required and provided this to them.

This application of BPE is difficult to understand; many property purchasers in England would not understand conveyancing procedures and would be equally reliant on their conveyancers to conduct the necessary searches.

As to the duty to warn of the risk of organised crime, the Court of Appeal rejected the argument that this would substantially extend the duties of conveyancers and held on the facts of this case there *was* such a duty.

Jackson LJ held that whilst the solicitors knew of the risk of Mafia activities affecting the construction sector in Calabria, the clients knew nothing beyond what was in the glossy brochure and "inspection visits".

Again, this might appear a surprising finding. A simple Google search of "Calabria" brings up "mafia" on its first page. One may expect a prudent prospective buyer to carry out their own, even rudimentary, due diligence before deciding to buy property.

These cases appear to illustrate that decisions are emanating from judicial instinct; *Dreamvar* involved a wealthy and insured firm of solicitors; *BPE* an undeserving Claimant with a whiff of fraud in the background and *Giambrone* deserving and sympathetic Claimants, unhealthy background facts and an international and wealthy law firm.

Looking ahead

Cyber theft and fraud is here to stay. The SRA reported in July that there had been a record number of reports of cyber theft in the 1st quarter of 2017; in the year to March 2017 losses of £11m have been reported, with conveyancing representing 50% of notifications.

The majority of thefts involve some form of e-mail hacking with fraudsters modifying emails and altering bank details to divert funds to their own accounts. We have seen in *Dreamvar* the Courts' approach where funds are stolen at completion.

However, it is unclear what the outcome would be where funds are stolen before they reach the solicitors' account and whether solicitors would be liable in negligence if they do not have adequate protection in their IT systems to prevent hacking.

Claims relating to investments schemes and ground rent clauses are on the increase.

Claims arising out of investment schemes are thankfully rare but when they do occur they give rise to significant losses (£50m in the calendar year to the end of July). Investment schemes are promoted as investments in property promising high returns when in fact the return on the investment depends on the success of a business. Fraudsters use solicitors to give the schemes a badge of authenticity and probity. As interest rates remain low such schemes are superficially attractive.

The increase in claims relating to advice on ground rent provisions of long leaseholds has been well publicised. It is said that 400 claims have been issued in less than a year; the number is only likely to increase as long leaseholders discover that their liability for ground will double periodically.

Such clauses will have a detrimental impact on value such as to render the lease unmortgageable, and claims for diminution in value or cost of rectification will inevitably follow from both buyers and lenders.

Whilst the government has promised to step in to resolve the issue and which may well see an end to long leaseholds, this will take time and will not protect conveyancers who have advised on such leases historically.



Mark Aizlewood

Partner

T: 0203 697 1908

M: 07469 852355

E: mark.aizlewood@cpblaw.com

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